the questions, but by limiting the audience. Complainants should routinely give their evidence with the public and the press excluded: something the "fair trial" requirement in Article 6 undoubtedly permits. And what is also wrong, surely, is that the complainant can be asked if she regularly consents to sex without the defendant having to admit—if such be so—that he has previously forced others to have sex with him without it. In this respect, if in no other, we need to change the rules about evidence of previous misconduct.

J.R. SPENCER

HUMAN RIGHTS REVIEW: RAISING THE STANDARD

THE decision of the House of Lords in *R. (Daly)* v. *Secretary of State for the Home Department* [2001] 2 W.L.R. 1622 provides authoritative guidance as to how human rights issues should be treated in judicial review cases. In common with a number of other recent leading cases in this area, *Daly* concerns prisoners' rights. All governors of closed prisons were required by the Home Secretary to operate a cell searching policy under which prisoners were not permitted to remain in their cells during searches, so as to prevent intimidation of those conducting searches and to stop prisoners gaining knowledge of search techniques. Prison officers were permitted to examine, but not read, legal correspondence stored in cells. The claimant, who stored such correspondence in his cell, successfully contended that the policy was unlawful to the extent that it precluded prisoners' presence during examination of legal correspondence. This note highlights four points of general importance which arise from their Lordships' decision.

First, *Daly* was explicitly decided by reference to the principle of proportionality, as the three-stage methodology embraced by Lord Bingham clearly demonstrates. His Lordship began by determining that the policy infringed the claimant's right to legal professional privilege. However, he then observed that the policy was prima facie justified by the competing public interest in prison security, since legal correspondence may constitute a hiding place for illicit material. Finally, rather than asking whether the policy was reasonable in the *Wednesbury* sense, his Lordship found it "necessary to ask whether ... the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline". It was at this third stage that the policy foundered: although it was possible to justify the

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exclusion of prisoners who posed a particular security risk, a policy requiring indiscriminate exclusion constituted a disproportionate infringement of the relevant right. Such reliance on the proportionality test is unsurprising, given its adoption (albeit in rather ambiguous terms) in earlier cases such as *Simms* [2000] 2 A.C. 1115 and the activation of the Human Rights Act. Their Lordships' clear determination in *Daly* that the test is to be applied in human rights cases is nevertheless welcome, given the remarkable reluctance of the lower courts to move beyond sub-*Wednesbury* review in earlier cases which considered the Human Rights Act (most notably *Mahmood* [2001] 1 W.L.R. 840).

Secondly, *Daly* usefully addresses the relationship between the *Wednesbury* and proportionality concepts. In particular, it emphasises that they are *distinct* but *related* principles. Each of these points has, in the past, been disputed. As to the former, Lord Cooke noted that "the view that the standards [of review supplied by the two principles] are substantially the same appears to have received its quietus" in *Smith* v. *UK* (1999) 29 E.H.R.R. 493, in which the European Court of Human Rights held *Wednesbury* review to be an inadequate remedy for the purposes of Article 13 ECHR in a case where Convention rights were at stake. Importantly, however, their Lordships recognised in *Daly* that although proportionality is capable of founding a higher standard of curial scrutiny, it subsists in a public law context which still recognises reasonableness as a principle of judicial review. This characterisation of the relationship between the two concepts is most apparent in Lord Steyn's remarks: he observed that "there is an overlap" between the principles, but that "the intensity of review is somewhat greater under the proportionality approach". The reasoning in *Daly* therefore supports the view commended by, amongst others, Laws L.J. (see, *e.g., Begbie* [2000] 1 W.L.R. 1115), according to which "*Wednesbury*" and "proportionality" merely describe different parts of a single substantive review continuum; it is the courts' task to determine the precise intensity of review which is apposite to individual fact situations. As Lord Steyn correctly concluded in *Daly*, this model applies "even in cases concerning Convention rights. In law context is everything." It is, however, worth noting that while Lord Cooke generally appeared to share this vision of context-sensitive substantive review, he did raise a question as to the breadth of the continuum: in terms of low-intensity review, is it ever constitutionally necessary to embrace a standard as low as *Wednesbury*? Lord Cooke thought not, opining that although "the depth of judicial review and the deference to due administrative discretion vary with the subject matter ... the

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law can never be satisfied ... merely by a finding that the decision under review is not capricious or absurd".

Thirdly, their Lordships were at pains to emphasise that the proportionality doctrine and the appeal-review distinction can co-exist. For instance, Lord Steyn said that applying proportionality in human rights cases "does not mean that there has been a shift to merits review ... [T]he respective roles of judges and administrators are fundamentally distinct and will remain so." This is consistent with Strasbourg case law on the "margin of appreciation" and the flexible conception of proportionality found in EU jurisprudence, as well as with the "discretionary area of judgment" concept endorsed by Lord Hope in *Kebilene* [2000] 2 A.C. 326. Recent cases decided by UK courts (*e.g. R.* v. *A (No. 2)* [2001] 2 W.L.R. 1546; *Brown* v. *Stott* [2001] 2 W.L.R. 817) also reflect a conception of the proportionality principle which constrains but does not destroy decision- and policy-making discretion. The emphasis is therefore on judicial identification of *disproportionate* (and hence unlawful) avenues of administrative action, rather than on judicial dictation of a single *proportionate* response.

Fourthly, the decision in *Daly* illuminates how the courts are likely to determine the proportionality doctrine's sphere of influence. It is noteworthy that Lord Bingham applied the proportionality principle because a common law constitutional right was at stake, without the need to rely on the Human Rights Act. This suggests that the courts are adopting a substantive, rather than a formalistic, approach to the scope of high-intensity review: the proportionality doctrine is thus to be deployed whenever fundamental rights are involved, irrespective of whether their juristic basis is in the common law or the Convention. Indeed, at least for Lord Cooke, it seems that to attempt to distinguish between common law and Convention rights is to set up a false dichotomy: "some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them." On this view, the common law and the Convention coalesce to form a single set of fundamental norms which it is the courts' task to uphold by recourse to appropriately rigorous tools of substantive review.

The decision in *Daly* raises the standard of human rights review in terms of both its acceptance of the proportionality principle, which is now acknowledged to be capable of supplying a higher standard of review than the *Wednesbury* doctrine, and the clarity with which their Lordships have laid the foundations for rights-based review in the post-incorporation era (in contrast to the

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disappointingly opaque judgments of the lower courts on this point). *Daly* reflects a measured approach to human rights review by embracing a flexible and sophisticated conception of proportionality, and by correctly locating the principle within a public law framework which characterises the intensity of review as a function of context.

MARK ELLIOTT

WHAT IS THE COURSE OF EMPLOYMENT?

SIR John Salmond stated in the first edition of his *Law of Torts* (1907) that a wrongful act is deemed to be done by a servant in the course of employment if it is "either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master". This passage, to be found at page 443 of *Salmond & Heuston on the Law of Torts*, 21st ed. (1996), has been cited with approval in many judgments. The first alternative is unproblematic, save that it refers to a situation where the master is primarily rather than merely vicariously liable. But the second can be difficult to apply, particularly where the servant's tort is intentional. How can it be right to describe conversion by a servant of a fur which he has been told to clean (*Morris* v. *C.W. Martin & Sons Ltd.* [1966] 1 Q.B. 716) or deceit of his master's client (*Lloyd* v. *Grace, Smith & Co.* [1912] A.C. 716) as a mode of doing an authorised act, when it is effectively the opposite of what he has been authorised to do? The problem is even more acute when the tort consists of trespass to the person. In *Trotman* v. *North Yorkshire County Council* [1999] L.G.R. 584 the Court of Appeal held the defendant Council not liable for a sexual assault by a teacher on a handicapped teenager committed to his care on a foreign holiday, on the ground that it was an independent act outside the course of employment. *Trotman* has now been overruled by a unanimous House of Lords in *Lister* v. *Hesley Hall Ltd.* [2001] 2 W.L.R. 1311, where it was held that the proprietors of a school for children with emotional and behavioural difficulties were vicariously liable for the systematic sexual abuse of two teenage boys by the warden of a boarding house.

In their Lordships' view, the key to the matter is to be found in a further passage in *Salmond*: "a master ... is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them". They approve

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