HOUSE OF LORDS SESSION 2002-03

[2003] UKHL 53

on appeal from: [2001] EWCA Civ 2081

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Wainwright and another (Appellants)

v.

Home Office (Respondents)

ON

THURSDAY 16 OCTOBER 2003

The Appellate Committee comprised:

Lord Bingham of Cornhill

Lord Hoffmann

Lord Hope of Craighead

Lord Hutton

Lord Scott of Foscote

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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he gives I would dismiss this appeal.

LORD HOFFMANN

My Lords,

2. On 15 August 1996 Patrick O'Neill was taken into custody on a charge of murder and held at Armley Prison, Leeds. The prison authorities suspected that while awaiting trial he was dealing in drugs. They did not know how he obtained his supplies but people who visit prisoners are a common source of drugs and other contraband. So the governor gave instructions that anyone who wanted an open visit with Patrick O'Neill had first to allow himself (or herself) to be strip searched. Rule 86(1) of the Prison Rules 1964 (consolidated 1998) confers a power in general terms to search any person entering a prison.

3. Strip searching is controversial because having to take off your clothes in front of a couple of prison officers is not to everyone's taste. Leeds Prison has internal rules designed to reduce the embarrassment as far as possible. They are modelled on the code of practice issued to the police. The search must take place in a completely private room in the presence of two officers of the same sex as the visitor. The visitor is required to expose first the upper half of his body and then the lower but not to stand completely naked. His body (apart from hair, ears and mouth) is not to be touched. Before the search begins, the visitor is asked to sign a consent form which outlines the procedure to be followed.

4. On 2 January 1997 Patrick O'Neill's mother Mrs Wainwright, together with her son Alan (Patrick's half-brother) went to visit him. A prison officer told them that they would have to be strip searched. They reluctantly agreed and prison officers took them to separate rooms where they were asked to undress. They did as they were asked but both found the experience upsetting. Some time afterwards (it is unclear when) they went to a solicitor who had them examined by a psychiatrist. He concluded that Alan (who had physical and learning difficulties) had been so severely affected by his experience as to suffer post-traumatic stress disorder. Mrs Wainwright had suffered emotional distress but no recognised psychiatric illness.

5. Mrs Wainwright and Alan commenced an action against the Home Office on 23 December 1999, just before the expiry of the limitation period. By the time the case came to trial in April 2001, none of the prison officers could remember searching the Wainwrights. They, on the other hand, gave evidence, which the judge accepted, that the search had not been conducted in

accordance with the rules. Both had been asked to uncover all or virtually all of their bodies at the same time, both were not given the consent form until after the search had been completed, the room used to search Mrs Wainwright was not private because it had an uncurtained window from which someone across the street could have seen her and one prison officer had touched Alan's penis to lift his foreskin.

6. Judge McGonigall, who heard the action in the Leeds County Court, said that the searches could not be justified as a proper use of the statutory power conferred by rule 86(1). He gave two reasons: The first was that the strip searching of the Wainwrights was an invasion of their privacy which exceeded what was necessary and proportionate to deal with the drug smuggling problem. Although the prison officers honestly believed that they had a right under the rules to search the Wainwrights (paragraph 83), they should not have done so because it would have been sufficient to search Patrick O'Neill after they left. The second reason was that the prison authorities had not adhered to their own rules. The Court of Appeal agreed with the second reason but not the first. Lord Woolf CJ, who has considerable experience of the administration of prisons, said that a search of Patrick O'Neill would have been inadequate. It followed that "on the findings of the judge, searching, if it had been properly conducted, was perfectly appropriate": [2002] QB 1334, 1351, para 54. On the other hand, Lord Woolf CJ agreed that if there were clearly laid down restrictions on how the search was to be conducted, conduct which did not observe those restrictions could not (if otherwise actionable) be justified.

7. The conclusion of both the judge and the Court of Appeal was therefore that the searches were not protected by statutory authority. But that is not enough to give the Wainwrights a claim to compensation. The acts of the prison officers needed statutory authority only if they would otherwise have been wrongful, that is to say, tortious or in breach of a statutory duty. People do all kinds of things without statutory authority. So the question is whether the searches themselves or the manner in which they were conducted gave the Wainwrights a cause of action.

8. The judge found two causes of action, both of which he derived from the action for trespass. As Diplock LJ pointed out in *Letang v Cooper* [1965] 1 QB 232, 243, trespass is strictly speaking not a cause of action but a form of action. It was the form anciently used for a variety of different kinds of claim which had as their common element the fact that the damage was caused directly rather than indirectly; if the damage was indirect, the appropriate form of action was the action on the case. After the abolition of the forms of action trespass is no more than a convenient label for certain causes of action which derive historically from the old action for trespass vi et armis. One group of such causes of action is trespass to the person, which includes the torts of assault, battery and false imprisonment, each with their own conditions of liability.

9. Battery involves a touching of the person with what is sometimes called hostile intent (as opposed to a friendly pat on the back) but which Robert Goff

LJ in *Collins v Wilcock* [1984] 1 WLR 1172, 1178 redefined as meaning any intentional physical contact which was not "generally acceptable in the ordinary conduct of daily life": see also *Wilson v Pringle* [1987] QB 237. Counsel for the Home Office conceded that touching Alan's penis was not acceptable and was therefore a battery.

10. That, however, was the only physical contact which had occurred. The judge nevertheless held that requiring the Wainwrights to take off their clothes was also a form of trespass to the person. He arrived at this conclusion by the use of two strands of reasoning. First, he said that a line of authority starting with *Wilkinson v Downton* [1897] 2 QB 57, which I shall have to examine later in some detail, had extended the conduct which could constitute trespass to the utterance of words which were "calculated" to cause physical (including psychiatric) harm. There was in his view little distinction between words which directly caused such harm and words which induced someone to act in a way which caused himself harm, like taking his own clothes off. So inducing Alan to take off his clothes and thereby suffer post-traumatic stress disorder was actionable.

11. The judge recognised, however, that in the cases upon which he relied the claimant had suffered a recognised psychiatric injury. Mrs Wainwright had not. It seemed to him illogical to deny her a remedy for distress because her constitution was sufficiently robust to protect her from psychiatric injury. So the second strand of his reasoning was that the law of tort should give a remedy for any kind of distress caused by an infringement of the right of privacy protected by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the time of the incident the Human Rights Act 1998 had not yet come into force but the judge considered that he was justified in adapting the common law to the Convention by analogy with the principle by which, even before the 1998 Act, the courts interpreted statutes so as to conform, if possible, to the Convention.

12. The judge therefore found in favour of both Wainwrights. He awarded Mrs Wainwright damages of £2,600, divided into £1,600 "basic" and £1,000 aggravated damages, and Alan £4,500, divided into £3,500 basic and £1,000 aggravated. The award to Alan did not distinguish between the damages for the battery and the injury caused by having to strip.

13. The Court of Appeal did not agree with the judge's extensions of the notion of trespass to the person and did not consider that (apart from the battery, which was unchallenged) the prison officers had committed any other wrongful act. So they set aside the judgments against the Wainwrights with the exception of the damages for battery, to which they attributed £3,750 of the £4,500 awarded by the judge.

14. The Wainwrights appeal to your Lordships' House. Their counsel (Mr Wilby QC and Mr Christie) put the case in two ways. The first was that, in order to enable the United Kingdom to conform to its international obligations under the Convention, the House should declare that there is (and in theory always has been) a tort of invasion of privacy under which the searches of both

Wainwrights were actionable and damages for emotional distress recoverable. This does not give retrospective effect to the Human Rights Act 1998. It accepts that the Convention, at the relevant time, operated only at the level of international law. Indeed, the argument (if valid) would have been equally valid at any time since the United Kingdom acceded to the Convention. Alternatively, counsel proposed that if a general tort of invasion of privacy seemed too bold an undertaking, the House could comply with the Convention in respect of this particular invasion by an extension of the principle in *Wilkinson v Downton* [1897] 2 QB 57.

15. My Lords, let us first consider the proposed tort of invasion of privacy. Since the famous article by Warren and Brandeis (*The Right to Privacy* (1890) 4 Harvard LR 193) the question of whether such a tort exists, or should exist, has been much debated in common law jurisdictions. Warren and Brandeis suggested that one could generalise certain cases on defamation, breach of copyright in unpublished letters, trade secrets and breach of confidence as all based upon the protection of a common value which they called privacy or, following Judge Cooley (*Cooley on Torts*, 2nd ed (1888), p 29) "the right to be let alone". They said that identifying this common element should enable the courts to declare the existence of a general principle which protected a person's appearance, sayings, acts and personal relations from being exposed in public.

16. Courts in the United States were receptive to this proposal and a jurisprudence of privacy began to develop. It became apparent, however, that the developments could not be contained within a single principle; not, at any rate, one with greater explanatory power than the proposition that it was based upon the protection of a value which could be described as privacy. Dean Prosser, in his work on *The Law of Torts*, 4th ed (1971), p 804, said that:

> "What has emerged is no very simple matter … it is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'. "

17. Dean Prosser's taxonomy divided the subject into (1) intrusion upon the plaintiff's physical solitude or seclusion (including unlawful searches, telephone tapping, long-distance photography and telephone harassment) (2) public disclosure of private facts and (3) publicity putting the plaintiff in a false light and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. These, he said, at p 814, had different elements and were subject to different defences.

18. The need in the United States to break down the concept of "invasion of privacy" into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level

principle. There are a number of common law and statutory remedies of which it may be said that one at least of the underlying values they protect is a right of privacy. Sir Brian Neill's well known article "Privacy: a challenge for the next century" in *Protecting Privacy* (ed B Markesinis, 1999) contains a survey. Common law torts include trespass, nuisance, defamation and malicious falsehood; there is the equitable action for breach of confidence and statutory remedies under the Protection from Harassment Act 1997 and the Data Protection Act 1998. There are also extra-legal remedies under Codes of Practice applicable to broadcasters and newspapers. But there are gaps; cases in which the courts have considered that an invasion of privacy deserves a remedy which the existing law does not offer. Sometimes the perceived gap can be filled by judicious development of an existing principle. The law of breach of confidence has in recent years undergone such a process: see in particular the judgment of Lord Phillips of Worth Matravers MR in *Campbell v MGN Ltd* [2003] QB 633. On the other hand, an attempt to create a tort of telephone harassment by a radical change in the basis of the action for private nuisance in *Khorasandjian v Bush* [1993] QB 727 was held by the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655 to be a step too far. The gap was filled by the 1997 Act.

19. What the courts have so far refused to do is to formulate a general principle of "invasion of privacy" (I use the quotation marks to signify doubt about what in such a context the expression would mean) from which the conditions of liability in the particular case can be deduced. The reasons were discussed by Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr* [1979] Ch 344, 372-381. I shall be sparing in citation but the whole of Sir Robert's treatment of the subject deserves careful reading. The question was whether the plaintiff had a cause of action for having his telephone tapped by the police without any trespass upon his land. This was (as the European Court of Justice subsequently held in *Malone v United Kingdom* (1984) 7 EHRR 14) an infringement by a public authority of his right to privacy under article 8 of the Convention, but because there had been no trespass, it gave rise to no identifiable cause of action in English law. Sir Robert was invited to declare that invasion of privacy, at any rate in respect of telephone conversations, was in itself a cause of action. He said, at p 372:

> "I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another."

20. As for the analogy of construing statutes in accordance with the Convention, which appealed to the judge in the present case, Sir Robert said, at p 379:

> "I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the Convention, the court would readily seek to construe the legislation in a way that would effectuate the Convention rather than frustrate it. However, no relevant legislation of that sort is in existence. It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed."

21. Sir Robert pointed out, at p 380, that the problem about telephone tapping was not in formulating the generalisation that the state should not ordinarily listen to one's telephone calls but in specifying the circumstances under which it should be allowed to do so. This required detailed rules and not broad common law principles:

> "Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is those circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision."

22. Once again, Parliament provided a remedy, subject to a detailed code of exceptions, in the Interception of Communications Act 1985. A similar problem arose in *R v Khan (Sultan)* [1997] AC 558, in which the defendant in criminal proceedings complained that the police had invaded his privacy by using a listening device fixed to the outside of a house. There was some discussion of whether the law should recognise a right to privacy which had been prima facie infringed, but no concluded view was expressed because all their Lordships thought that any such right must be subject to exceptions, particularly in connection with the detection of crime, and that the accused's privacy had been sufficiently taken into account by the judge when he exercised his discretion under section 78 of the Police and Criminal Evidence Act to admit the evidence obtain by the device at the criminal trial. The European Court of Human Rights subsequently held (*Khan v United Kingdom* The Times, 23 May 2000) that the invasion of privacy could not be justified under article 8 because, in the absence of any statutory regulation, the actions of the police had not been "in accordance with law". By that time, however, Parliament had intervened in the Police Act 1997 to put the use of surveillance devices on a statutory basis.

23. The absence of any general cause of action for invasion of privacy was again acknowledged by the Court of Appeal in *Kaye v Robertson* [1991] FSR 62, in which a newspaper reporter and photographer invaded the plaintiff's hospital bedroom, purported to interview him and took photographs. The law of trespass provided no remedy because the plaintiff was not owner or occupier of the room and his body had not been touched. Publication of the interview

was restrained by interlocutory injunction on the ground that it was arguably a malicious falsehood to represent that the plaintiff had consented to it. But no other remedy was available. At the time of the judgment (16 March 1990) a Committee under the chairmanship of Sir David Calcutt QC was considering whether individual privacy required statutory protection against intrusion by the press. Glidewell LJ said, at p 66:

> "The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals."

24. Bingham LJ likewise said, at p 70:

> "The problems of defining and limiting a tort of privacy are formidable but the present case strengthens my hope that the review now in progress may prove fruitful."

25. Leggatt LJ, at p 71, referred to Dean Prosser's analysis of the development of the law of privacy in the United States and said that similar rights could be created in England only by statute: "it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed."

26. All three judgments are flat against a judicial power to declare the existence of a high-level right to privacy and I do not think that they suggest that the courts should do so. The members of the Court of Appeal certainly thought that it would be desirable if there was legislation to confer a right to protect the privacy of a person in the position of Mr Kaye against the kind of intrusion which he suffered, but they did not advocate any wider principle. And when the Calcutt Committee reported in June 1990, they did indeed recommend that "entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication" should be made a criminal offence: see *Report of the Committee on Privacy and Related Matters* (1990) Cm 1102, para 6.33 The Committee also recommended that certain other forms of intrusion, like the use of surveillance devices on private property and long-distance photography and sound recording, should be made offences.

27. But the Calcutt Committee did not recommend, even within their terms of reference (which were confined to press intrusion) the creation of a generalised tort of infringement of privacy: paragraph 12.5. This was not because they thought that the definitional problems were insuperable. They said that if one confined the tort to "publication of personal information to the world at large" (paragraph 12.12) it should be possible to produce an adequate definition and they made some suggestions about how such a statutory tort might be defined and what the defences should be. But they considered that the problem could be tackled more effectively by a combination of the more sharply-focused remedies which they recommended: paragraph 12.32. As for a "general wrong of infringement of privacy", they accepted, at paragraph 12.12, that it would, even in statutory form, give rise to "an unacceptable degree of

uncertainty". There is nothing in the opinions of the judges in *Kaye v Robertson* [1991] FSR 62 which suggests that the members of the court would have held any view, one way or the other, about a general tort of privacy.

28. The claimants placed particular reliance upon the judgment of Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967. Sedley LJ drew attention to the way in which the development of the law of confidence had attenuated the need for a relationship of confidence between the recipient of the confidential information and the person from whom it was obtained - a development which enabled the UK Government to persuade the European Human Rights Commission in *Earl Spencer v United Kingdom* (1998) 25 EHRR CD 105 that English law of confidence provided an adequate remedy to restrain the publication of private information about the applicants' marriage and medical condition and photographs taken with a telephoto lens. These developments showed that the basic value protected by the law in such cases was privacy. Sedley LJ said, at p 1001, para 126:

> "What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy."

29. I read these remarks as suggesting that, in relation to the publication of personal information obtained by intrusion, the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary. As the underlying value protected is privacy, the action might as well be renamed invasion of privacy. "To say this" said Sedley LJ, at p 1001, para 125, "is in my belief to say little, save by way of a label, that our courts have not said already over the years."

30. I do not understand Sedley LJ to have been advocating the creation of a high-level principle of invasion of privacy. His observations are in my opinion no more (although certainly no less) than a plea for the extension and possibly renaming of the old action for breach of confidence. As Buxton LJ pointed out in this case in the Court of Appeal, at [2002] QB 1334, 1361-1362, paras 96-99, such an extension would go further than any English court has yet gone and would be contrary to some cases (such as *Kaye v Robertson* [1991] FSR 62) in which it positively declined to do so. The question must wait for another day. But Sedley LJ's dictum does not support a principle of privacy so abstract as to include the circumstances of the present case.

31. There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values - principles only in the broadest sense - which direct its development. A famous example is *Derbyshire County Council v Times Newspapers Ltd* [1993] AC

534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.

32. Nor is there anything in the jurisprudence of the European Court of Human Rights which suggests that the adoption of some high level principle of privacy is necessary to comply with article 8 of the Convention. The European Court is concerned only with whether English law provides an adequate remedy in a specific case in which it considers that there has been an invasion of privacy contrary to article 8(1) and not justifiable under article 8(2). So in *Earl Spencer v United Kingdom* 25 EHRR CD 105 it was satisfied that the action for breach of confidence provided an adequate remedy for the Spencers' complaint and looked no further into the rest of the armoury of remedies available to the victims of other invasions of privacy. Likewise, in *Peck v United Kingdom* (2003) 36 EHRR 41 the court expressed some impatience, at paragraph 103, at being given a tour d'horizon of the remedies provided and to be provided by English law to deal with every imaginable kind of invasion of privacy. It was concerned with whether Mr Peck (who had been filmed in embarrassing circumstances by a CCTV camera) had an adequate remedy when the film was widely published by the media. It came to the conclusion that he did not.

33. Counsel for the Wainwrights relied upon *Peck's* case as demonstrating the need for a general tort of invasion of privacy. But in my opinion it shows no more than the need, in English law, for a system of control of the use of film from CCTV cameras which shows greater sensitivity to the feelings of people who happen to have been caught by the lens. For the reasons so cogently explained by Sir Robert Megarry in *Malone v Metropolitan Police Comr* [1979] Ch 344, this is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle.

34. Furthermore, the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under article 8 have been infringed by a public authority, he will have a statutory remedy. The creation of a general tort will, as Buxton LJ pointed out in the Court of Appeal, at [2002] QB 1334, 1360, para 92, pre-empt the controversial question of the extent, if any, to which the Convention requires the state to provide remedies for invasions of privacy by persons who are not public authorities.

35. For these reasons I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy.

36. I turn next to the alternative argument based upon *Wilkinson v Downton* [1897] 2 QB 57. This is a case which has been far more often discussed than

applied. Thomas Wilkinson, landlord of the Albion public house in Limehouse, went by train to the races at Harlow, leaving his wife Lavinia behind the bar. Downton was a customer who decided to play what he would no doubt have described as a practical joke on Mrs Wilkinson. He went into the Albion and told her that her husband had decided to return in a horse-drawn vehicle which had been involved in an accident in which he had been seriously injured. The story was completely false and Mr Wilkinson returned safely by train later that evening. But the effect on Mrs Wilkinson was dramatic. Her hair turned white and she became so ill that for some time her life was thought in danger. The jury awarded her £100 for nervous shock and the question for the judge on further consideration was whether she had a cause of action.

37. The difficulty in the judge's way was the decision of the Privy Council in *Victorian Railway Comrs v Coultas* (1888) 13 App Cas 222, in which it had been said that nervous shock was too remote a consequence of a negligent act (in that case, putting the plaintiff in imminent fear of being run down by a train) to be a recoverable head of damages. RS Wright J distinguished the case on the ground that Downton was not merely negligent but had intended to cause injury. Quite what the judge meant by this is not altogether clear; Downton obviously did not intend to cause any kind of injury but merely to give Mrs Wilkinson a fright. The judge said, however, at p 59, that as what he said could not fail to produce grave effects "upon any but an exceptionally indifferent person", an intention to cause such effects should be "imputed" to him.

38. The outcome of the case was approved and the reasoning commented upon by the Court of Appeal in *Janvier v Sweeney* [1919] 2 KB 316. During the First World War Mlle Janvier lived as a paid companion in a house in Mayfair and corresponded with her German lover who was interned as an enemy alien on the Isle of Man. Sweeney was a private detective who wanted secretly to obtain some of her employer's documents and sent his assistant to induce her to co-operate by pretending to be from Scotland Yard and saying that the authorities wanted her because she was corresponding with a German spy. Mlle Janvier suffered severe nervous shock from which she took a long time to recover. The jury awarded her £250.

39. By this time, no one was troubled by *Victorian Railway Comrs v Coultas* 13 App Cas 222. In *Dulieu v White & Sons* [1901] 2 KB 669 the Divisional Court had declined to follow it; Phillimore J said, at p 683, that in principle "terror wrongfully induced and inducing physical mischief gives a cause of action". So on that basis Mlle Janvier was entitled to succeed whether the detectives intended to cause her injury or were merely negligent as to the consequences of their threats. Duke LJ observed, at p 326, that the case was stronger than *Wilkinson v Downton* [1897] 2 QB 57 because Downton had intended merely to play a practical joke and not to commit a wrongful act. The detectives, on the other hand, intended to blackmail the plaintiff to attain an unlawful object.

40. By the time of *Janvier v Sweeney* [1919] 2 KB 316, therefore, the law was able comfortably to accommodate the facts of *Wilkinson v Downton* [1897] 2

QB 57 in the law of nervous shock caused by negligence. It was unnecessary to fashion a tort of intention or to discuss what the requisite intention, actual or imputed, should be. Indeed, the remark of Duke LJ to which I have referred suggests that he did not take seriously the idea that Downton had in any sense intended to cause injury.

41. Commentators and counsel have nevertheless been unwilling to allow *Wilkinson v Downton* to disappear beneath the surface of the law of negligence. Although, in cases of actual psychiatric injury, there is no point in arguing about whether the injury was in some sense intentional if negligence will do just as well, it has been suggested (as the claimants submit in this case) that damages for distress falling short of psychiatric injury can be recovered if there was an intention to cause it. This submission was squarely put to the Court of Appeal in *v Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721; The Times, 7 December 2001 and rejected. Hale LJ said that before the passing of the Protection from Harassment Act 1997 there was no tort of intentional harassment which gave a remedy for anything less than physical or psychiatric injury. That leaves *Wilkinson v Downton* with no leading role in the modern law.

42. In *Khorasandjian v Bush* [1993] QB 727 the Court of Appeal, faced with the absence of a tort of causing distress by harassment, tried to press into service the action for private nuisance. In *Hunter v Canary Wharf Ltd* [1997] AC 655, as I have already mentioned, the House of Lords regarded this as illegitimate and, in view of the passing of the 1997 Act, unnecessary. I did however observe, at p 707, that:

> "The law of harassment has now been put on a statutory basis…and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence…The policy considerations are quite different."

43. Mr Wilby said that the Court of Appeal in *Wong's* case should have adopted this remark and awarded Ms Wong damages for distress caused by intentional harassment before the 1997 Act came into force. Likewise, the prison officers in this case did acts calculated to cause distress to the Wainwrights and therefore should be liable on the basis of imputed intention as in *Wilkinson v Downton* [1897] 2 QB 57.

44. I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be very careful about what you mean by intend. In *Wilkinson v Downton* RS Wright J wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in *Janvier v Sweeney* [1919] 2 KB 316, that the plaintiff should succeed whether the

conduct of the defendant was intentional or negligent. But the *Victorian Railway Comrs* case 13 App Cas 222 prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go.

45. If, on the other hand, one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not. Lord Woolf CJ, as I read his judgment, at [2002] QB 1334, 1350, paras 50-51, might have been inclined to accept such a principle. But the facts did not support a claim on this basis. The judge made no finding that the prison officers intended to cause distress or realized that they were acting without justification in asking the Wainwrights to strip. He said, at paragraph 83, that they had acted in good faith and, at paragraph 121, that:

> "The deviations from the procedure laid down for strip-searches were, in my judgment, not intended to increase the humiliation necessarily involved but merely sloppiness."

46. Even on the basis of a genuine intention to cause distress, I would wish, as in *Hunter's* case [1997] AC 655, to reserve my opinion on whether compensation should be recoverable. In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation. The Protection from Harassment Act 1997 defines harassment in section 1(1) as a "course of conduct" amounting to harassment and provides by section 7(3) that a course of conduct must involve conduct on at least two occasions. If these requirements are satisfied, the claimant may pursue a civil remedy for damages for anxiety: section 3(2). The requirement of a course of conduct shows that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident. It may be that any development of the common law should show similar caution.

47. In my opinion, therefore, the claimants can build nothing on *Wilkinson v Downton* [1897] 2 QB 57. It does not provide a remedy for distress which does not amount to recognized psychiatric injury and so far as there may a tort of intention under which such damage is recoverable, the necessary intention was not established. I am also in complete agreement with Buxton LJ, at [2002] QB 1334, 1355-1356, paras 67-72, that *Wilkinson v Downton* has nothing to do with trespass to the person.

48. Counsel for the Wainwrights submit that unless the law is extended to create a tort which covers the facts of the present case, it is inevitable that the European Court of Human Rights will find that the United Kingdom was in breach of its Convention obligation to provide a remedy for infringements of Convention rights. In addition to a breach of article 8, they say that the prison

officers infringed their Convention right under article 3 not to be subjected to degrading treatment.

49. I have no doubt that there was no infringement of article 3. The conduct of the searches came nowhere near the degree of humiliation which has been held by the European Court of Human Rights to be degrading treatment in the cases on prison searches to which we were referred: see *Valasinas v Lithuania* Application No 44558/98 (unreported) 24 July 2001 (applicant made to strip naked and have his sexual organs touched in front of a woman); *Iwanczuk v Poland* Application No 25196/94 (unreported) 15 November 2001 (applicant ordered to strip naked and subjected to humiliating abuse by guards when he tried to exercise his right to vote in facilities provided in prison); *Lorsé v The Netherlands* Application No 52750/99 (unreported) 4 February 2003 (applicant strip searched weekly over 6 years in high security wing without sufficient security justification).

50. In the present case, the judge found that the prison officers acted in good faith and that there had been no more than "sloppiness" in the failures to comply with the rules. The prison officers did not wish to humiliate the claimants; the evidence of Mrs Wainwright was that they carried out the search in a matter-of-fact way and were speaking to each other about unrelated matters. The Wainwrights were upset about having to be searched but made no complaint about the manner of the search; Mrs Wainwright did not ask for the blind to be drawn over the window or to be allowed to take off her clothes in any particular order and both of them afterwards signed the consent form without reading it but also without protest. The only inexplicable act was the search of Alan's penis, which the prison officers were unable to explain because they could not remember having done it. But this has been fully compensated.

51. Article 8 is more difficult. Buxton LJ thought, at [2002] QB 1334, 1352, para 62, that the Wainwrights would have had a strong case for relief under section 7 if the 1998 Act had been in force. Speaking for myself, I am not so sure. Although article 8 guarantees a right of privacy, I do not think that it treats that right as having been invaded and requiring a remedy in damages, irrespective of whether the defendant acted intentionally, negligently or accidentally. It is one thing to wander carelessly into the wrong hotel bedroom and another to hide in the wardrobe to take photographs. Article 8 may justify a monetary remedy for an intentional invasion of privacy by a public authority, even if no damage is suffered other than distress for which damages are not ordinarily recoverable. It does not follow that a merely negligent act should, contrary to general principle, give rise to a claim for damages for distress because it affects privacy rather than some other interest like bodily safety: compare *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65.

52. Be that as it may, a finding that there was a breach of article 8 will only demonstrate that there was a gap in the English remedies for invasion of privacy which has since been filled by sections 6 and 7 of the 1998 Act. It does not require that the courts should provide an alternative remedy which distorts the principles of the common law.

53. I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

54. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he gives I too would dismiss this appeal.

LORD HUTTON

My Lords,

55. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he gives I too would dismiss this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

56. I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Hoffmann and am in full agreement with his analysis and exposition of the principles of law applicable to this case.

57. The essence of the complaint of each claimant is that he or she was subjected to conduct by the prison officers at Armley Prison, Leeds, that was calculated to, and did, cause humiliation and distress. The main issue is whether this conduct was tortious. In the case of each the strip search was carried out in a manner that, in a number of respects, was in breach of the procedures prescribed for strip searches by the internal rules of Armley Prison. And whether or not it was the intention of the prison officers to humiliate and cause distress to Mrs Wainwright and to Alan, it must, in my opinion, be accepted that the manner in which the strip searches were carried out was calculated (in an objective sense) to produce and did in fact, in relation to each of them, produce that result. I need not rehearse the relevant core facts. They are set out in paragraph 5 of Lord Hoffmann's opinion.

58. But there is an important difference between the case of Alan Wainwright and that of Mrs Wainwright. In the course of, and as part of, the strip search of Alan, one of the prison officers poked a finger into Alan's armpits, handled his penis and pulled back his foreskin. It is conceded by the defendant that this touching of Alan constituted battery. The commission of the battery, being part of the conduct of the strip search, was inextricably associated with the overall humiliation and distress caused to Alan by the strip search. No justification for the handling of Alan's penis in the way described, or indeed for any of the touching of him, was offered by the prison officers. They said they had no recollection of the strip searching of Alan but that they would, when carrying out a strip search, have followed the prescribed procedure and

avoided any touching of the person being searched. But the trial judge accepted Alan's evidence to the contrary of what they had done to him. Counsel for the defendant, the Secretary of State, did not suggest that there could ever be circumstances in which a strip search with a view to discovering the presence of drugs on the person being searched would require the foreskin of the penis to be pulled back, or indeed the penis to be touched at all. For my part I am unable to understand how in any circumstances the pulling back of the foreskin could be a necessary part of a search for drugs.

59. The pulling back of Alan Wainwright's foreskin by the prison officers constituted as gross an indignity as can be imagined. It undeniably warranted an award of aggravated damages. The judge awarded Alan £3500 ordinary damages and £1000 aggravated damages. He did so on the footing that even without the touching, ie without the battery, the conduct of the strip search would have been tortious. The Court of Appeal disagreed with that conclusion. They held that if there had been no touching the prison officers' conduct would not have been tortious and they, therefore, reduced Alan's damages by £750.

60. My Lords I am doubtful whether this reduction was justified. I agree with the Court of Appeal, and with your Lordships, that if there had been no touching, as there was not in Mrs Wainwright's case, no tort would have been committed. The unjustified infliction of humiliation and distress does not, without more, suffice at common law to constitute a tort. But the touching of Alan, in his armpits and on his penis, and the humiliation and distress thereby caused to him, cannot in my opinion be separated out from the strip search as a whole and the humiliation and distress caused by the strip search as a whole. The touching was an integral part of the strip search, neither minor nor incidental. Accordingly, I would have been receptive to an argument that, whatever view be taken about the existence at common law of a tort based on the infliction of humiliation and distress, the judge's award to Alan of £4500 should have been left untouched.

61. Moreover, the award to Alan of £1000 aggravated damages was, in my opinion, distinctly on the low side. It was the same amount as that awarded to Mrs Wainwright who did not suffer the humiliation of having her sexual parts handled. And the absence of any possible justification for the handling of Alan's penis allows the inference to be drawn that it was a form of bullying, done with the intention to humiliate. However, no argument on these lines was addressed to your Lordships. The claimants have not sought to distinguish their respective cases. They have concentrated on the issue of principle.

62. The important issue of principle is not, in my opinion, whether English common law recognises a tort of invasion of privacy. As Lord Hoffmann has demonstrated, whatever remedies may have been developed for misuse of confidential information, for certain types of trespass, for certain types of nuisance and for various other situations in which claimants may find themselves aggrieved by an invasion of what they conceive to be their privacy, the common law has not developed an overall remedy for the invasion of privacy. The issue of importance in the present case is whether the infliction of humiliation and distress by conduct calculated to humiliate and cause distress,

is without more, tortious at common law. I am in full agreement with the reasons that have been given by Lord Hoffmann for concluding that it is not. Nor, in my opinion, should it be. Some institutions, schools, university colleges, regiments and the like (often bad ones) have initiation ceremonies and rites which newcomers are expected to undergo. Ritual humiliation is often a part of this. The authorities in charge of these institutions usually object to these practices and seek to put an end to any excesses. But why, absent any of the traditional nominate torts such as assault, battery, negligent causing of harm etc, should the law of tort intrude? If a shop assistant or a bouncer or barman at a club is publicly offensive to a customer, the customer may well be humiliated and distressed. But that is no sufficient reason why the law of tort should be fashioned and developed with a view to providing compensation in money to the victim.

63. Whether today, the Human Rights Act 1998 having come into effect, conduct similar to that inflicted on Mrs Wainwright and Alan Wainwright, but without any element of battery and without crossing the line into the territory of misfeasance in public office, should be categorised as tortious must be left to be decided when such a case arises. It is not necessary to decide now whether such conduct would constitute a breach of article 8 or of article 3 of the Convention.

64. I, too, would dismiss these appeals.