negligence lawyers will no doubt welcome the fact that the *Bedfordshire* cases have made it to clear ground beyond Article 6; but negligence is not completely home and dry, and probably never will be. It remains in what some English private lawyers would still consider to be unfamiliar territory. But now, of course, human rights have been brought home.

TOM HICKMAN

NO NEW SCOPE FOR CONTRIBUTORY NEGLIGENCE

CONTRIBUTORY negligence has never been a defence to an action in deceit. Of the dozen or so authorities to this effect, the dictum most often cited is that of Sir George Jessel M.R. in *Redgrave* v. *Hurd* (1881) 20 Ch.D 1 at 13–14:

> Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.

Although these words leave little space for argument, the High Court has been invited to review the decision in *Redgrave* v. *Hurd* on no fewer than three occasions in recent years. Each time the invitation has been declined: *Alliance & Leicester Building Society* v. *Edgestop Ltd.* [1993] 1 W.L.R. 1462, *Corporación Nacional del Cobre de Chile* v. *Sogemin Metals Ltd.* [1997] 1 W.L.R. 1396, and *Nationwide Building Society* v. *Thimbleby & Co.* [1999] Lloyd's Rep. P.N. 359.

In *Standard Chartered Bank* v. *Pakistan National Shipping Corporation (No. 4)* [2001] Q.B. 167, the Court of Appeal has finally given reassurance that *Redgrave* v. *Hurd* remains good law. The dispute arose from false bills of lading issued by PNSC. The bills were passed to SCB, the confirming bank under a letter of credit transaction. SCB confirmed payment, but was later left out of pocket when the issuing bank identified other discrepancies in the shipping documents (unrelated to the fraud) and refused to pay. SCB claimed its losses from PNSC in the tort of deceit. The Court found that SCB's employees had been at fault in failing to identify the discrepancies before forwarding the bills to the issuing bank, and therefore the issue arose whether its damages should be reduced under the Law Reform (Contributory Negligence) Act 1945. By a majority (Aldous and Ward L.JJ., Sir Anthony Evans dissenting), the Court held that contributory negligence is no defence to an action in deceit.

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This proposition is obviously correct. Contributory negligence has never been applied in this context because deceit is an unusual tort with an unusually broad set of remedies: *Smith New Court Securities Ltd.* v. *Citibank NA* [1997] A.C. 254, 279. In particular, the claimant in deceit is not required to prove that the fraud was the sole, or even predominant, cause of loss. It is sufficient if the fraud was a "material inducement" acting on the claimant's mind at the relevant time: *Peek* v. *Derry* (1887) 37 Ch.D 541, 574. So contributory negligence is legally irrelevant to an action in deceit.

Sir Anthony Evans saw the authorities differently, concluding that contributory negligence has always been available as a defence to deceit. At 178B–E, his Lordship said that *Redgrave* v. *Hurd* establishes only that the claimant should not be blamed for failing to detect the fraud; there might be other forms of contributory fault which would give rise to the defence. This reasoning gives rise to two sources of difficulty. First, it does not seem to address the causation point. If, as *Peek* v. *Derry* dictates, the defendant's deceit is in law the sole cause of the claimant's loss, what legal relevance can *any* form of contributory fault possess? Secondly, it is difficult to conceive of any conduct on the claimant's part which might fall within the definition. Other than failing to identify the fraud (for which the claimant is clearly not to be regarded as culpable), what other relevant species of fault can the claimant possibly commit? The only real possibility is that he might discover the fraud and carry on incurring loss regardless. But such loss would be unrecoverable in any event as the deceit would have ceased to be a material cause of loss.

The Court also considered whether the Law Reform (Contributory Negligence) Act 1945 has affected the scope of the contributory negligence defence. Unanimously, the Court found that it had not—the scope of the defence remains as stated by the common law, and the Act operates only where the claimant's conduct would have amounted to contributory negligence prior to 1945.

The Court's decision on this point is to be welcomed. The 1945 Act has always operated in the context of an established common law rule. The Act was passed—further to the Eighth Report of the Law Revision Committee (Cmd. 6032)—to abolish the principle that contributory negligence operated as a total defence to a claim in tort. To this end, section 1(1) does not establish a new defence, but provides that "a claim ... *shall not be defeated* by reason of the fault of the person suffering the damage" (emphasis added).

While the Act may have modified the *consequences* of the defence at common law, there is no reason to believe that the Act

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should have altered its *scope*. On the contrary, the scope of the common law defence is expressly preserved. Section 1(1) states that the defence is to be triggered when damage occurs by reason of the claimant's "fault". "Fault" is not an easy concept under the Act, as section 4 (which sets out to define the concept) is poorly drafted. However, correctly interpreted, section 4 provides that a claimant is only guilty of contributory negligence under the Act if his conduct would have amounted to contributory negligence at common law: *Reeves* v. *Commissioner of Police of the Metropolis* [2000] 1 A.C. 360 at 369G.

This case provides welcome relief on all fronts. It tells us what we always knew, which is that the Law Reform (Contributory Negligence) Act 1945 *reformed* rather than *replaced* the common law defence of contributory negligence. But most importantly, the majority judgments dispose convincingly of the recent challenge to the principle in *Redgrave* v. *Hurd*. Conventional wisdom, if it ever left us, has been firmly restored.

NEIL BERESFORD

INCORPORATING PARTICULARLY ONEROUS OR UNUSUAL TERMS

IN *O'Brien* v. *MGN Ltd.* [2001] EWCA Civ 1279, the Court of Appeal gave a significant decision dealing with the issue of incorporation of onerous or unusual terms.

The claimant thought he had won £50,000 in a scratchcard game played in the *Daily Mirror* on Monday 3 July 1995; the Mirror Group Newspapers (MGN) thought otherwise. The issue was whether the contract between them incorporated the Mirror Group's rules, including rule five. The Court of Appeal decided it did.

The scratchcard game was designed and the cards were printed to produce only one or two £50,000 prizes each week. Someone responsible for determining winning combinations made a mistake, and too many winning cards were produced. The claimant's card revealed two sums of £50,000. As was required, he telephoned the mystery hotline, and a message indicated that he had won that amount. He had trouble in ringing up to register his claim. As it turned out, 1,472 other people made the same claim.

The newspaper apologised for the "mix up" and announced a special draw for one £50,000 prize, for which those with cards showing two sums of £50,000 would be eligible. In addition, a further £50,000 would be shared equally among all those with such

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