girl under 16, contrary to section 6 of the 1956 Act, the presumption of fault must be excluded by section 6(3) which creates the "young man's defence". The more serious offence of a man having sex with a girl under 13, contrary to section 5, is not qualified in this way. According to Lord Bingham, this should be interpreted as a strict liability offence as well. This must be right, but for reasons of policy rather than interpretation of the offence in its statutory context.

Finally, how difficult a task will it be for the prosecution to prove that the defendant did not honestly believe that the victim was 16 or over? In many cases the defendant is unlikely to have considered the victim's age, and is probably unaware of its legal significance anyway. But, if there is some evidence that the defendant may have thought the victim was over-age, or even a bare assertion by the defendant to this effect, then the burden will be on the prosecution to prove that the defendant did not believe this, and this will be very difficult to establish. So the effect of the decision will undoubtedly be to make it more difficult to secure the conviction of those who indecently assault children where the child consents, or is believed to consent, to the assault. Where the defendant is close in age to the victim, this may be appropriate, but where there is a larger age difference, this is a cause of concern.

The law is in a mess. A statutory provision has been interpreted in a way which one of the Law Lords considers to be contrary to the intention of Parliament, but he still justified that interpretation. Although the general acceptance of the presumption of mens rea is appropriate, problems arise in identifying clear principles as to when it will be impliedly rebutted. This is yet another decision of the House of Lords the implications of which make the case for a Criminal Code. But at least in the area of sexual offences, with the publication of the Home Office Consultation Paper *Setting the Boundaries* (July 2000), there is some hope that the offences themselves will be reformed, but it will be vital that all new offences identify explicitly what fault, if any, is required.

GRAHAM VIRGO

NEGLIGENCE AND ARTICLE 6: THE GREAT ESCAPE?

WHEN, the European Court of Human Rights decided in *Osman* v. *UK* [1999] 1 F.L.R. 193 that striking out a claim in negligence (in *Osman* v. *Ferguson* [1993] 4 All E.R. 344) against the police, for failing to prevent a disturbed teacher injuring a pupil and killing

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the pupil's father, amounted to a breach of Article 6 of the European Convention, many domestic lawyers felt that human rights law had gone too far. Article 6 protects the right to a fair and public hearing in the determination of one's civil rights. The ECtHR did not say that the hearing had not been fair, but that it had not really been a hearing at all. By so deciding, the ECtHR subjected the public policy considerations that had been relied on by the Court of Appeal to strike out the claim to the requirements of legitimacy and necessity which have to be satisfied to justify an interference with Article 6.

In two decisions, *Z* v. *UK* [2001] 2 F.L.R. 612 and *TP and KM* v. *United Kingdom* [2001] 2 F.L.R. 549, the ECtHR has taken a marked step back from *Osman*. The same claims were heard as the "abuse cases" in *X* v. *Bedfordshire CC* [1995] 2 A.C. 633. In the first case the ECtHR found a violation of Article 3, in the second a violation of Article 8, but the striking out of these claims in *Bedfordshire*, as disclosing no arguable claims in negligence, escaped condemnation under Article 6.

The implications of *Z* v. *UK* and *TP and KM* v. *UK* cannot be analysed without first looking at the *Osman* judgment itself. There are at least two aspects to the ECtHR's judgment in *Osman*. In the first place it was felt that the public policy considerations, relied on by the Court of Appeal to determine whether it would be fair, just and reasonable to allow the claim, were distinct from the duty of care. The Court of Appeal had applied the House of Lords authority of *Hill* [1989] A.C. 465 which had found that there were cogent policy reasons why the police should not owe a duty of care while carrying out their "investigative" functions. In distinguishing the fairness, justice and reasonableness aspect of the duty of care from its other components, the ECtHR was no doubt misled by the Court of Appeal itself: McCowen L.J. stated that the policy considerations were "a separate point which is not reached at all unless there is a duty of care". This aspect of *Osman* was highlighted in *Palmer* [1999] Lloyd's L.R. Med. 351 in which the Court of Appeal expressed the opinion that *Osman* precluded the striking out of claims by reference to policy considerations, but not for absence of proximity.

This approach may appear to rest on a division between principle and policy, but in fact policy considerations are integral to the negligence determination in hard cases. The requirement of "proximity" is itself not simply a categorisation of facts from which conclusions about responsibility can be straightforwardly drawn. A finding of proximity is underpinned by policy considerations. Moreover, Pill L.J. in *Palmer* noted that in many cases proximity

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and the fairness, justice and reasonableness requirement are "merely facets of the same thing" (cf. *Stovin* v. *Wise* [1996] A.C. 923, 932 and *Hill* v. *Van Erp* (1997) 188 C.L.R. 159). *Osman* threatened what has been a welcome trend in recent years, *viz.* the open articulation of the policy issues which influence courts.

The second central aspect to the *Osman* decision was that the policy considerations had been applied in a blanket fashion without considering competing considerations. In *Osman* v. *Ferguson*, however, the immunity was said only to apply to the "investigative" functions of the police, in a similar way that some political areas are considered unsuitable for a negligence enquiry and non-justiciable. This type of policy "immunity", at least, does seem to be accurately and properly divorceable from the seriousness of the harm or other competing factors. The ECtHR suggested that such "immunities" not only require justification, but should be re-considered in every case. It was even suggested that that the applicants ought to have had the facts of their case investigated at trial.

In *TP and KM* v. *UK* the ECtHR stated that the striking out of the claim had been based on "ordinary principles of negligence law" and thus not on an "exclusionary rule". Lord Browne-Wilkinson in *Bedfordshire* had said that social workers and psychiatrists had not assumed responsibility towards the mother or children in question, but he also said that the public policy considerations applied with equal force to preclude a duty of care. Taken in isolation, *TP and KM* v. *UK* could be taken to confirm the view that the ECtHR is seeking to draw an arbitrary distinction between determining cases by invoking conceptual tools such as "proximity" and "assumption of responsibility", and by relying on policy considerations as to what is fair, just and reasonable.

In both *TP and KM* v. *UK* and *Z* v. *UK* the ECtHR said that in the *Bedfordshire* case the House of Lords had been concerned with the "existence" of civil rights, since they had been faced with wholly novel claims. Once determined against the claimants, however, the ECtHR suggested there would be no arguable civil right at all in comparable cases. It is then difficult to see that there had been any right in negligence after *Hill* with regard to the investigative functions of police activities, yet *Osman* v. *UK* was not explicitly disapproved. Surely the ECtHR is not suggesting that it reserves the right to determine whether precedent has been properly applied, since this would be tantamount to an appellate function (compare *Bellet* v. *France* (1995) A 333B)?

In *Z* v. *UK* the ECtHR went further than in *TP and KM* v. *UK* and acknowledged that it had been mistaken in concluding that the

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public policy factors were not an integral part of the duty of care in English law. It thus implied that Article 6 could not, in fact, bite on such matters at all, since they are inextricably bound up with the substance and content of the civil right in English law. The ECtHR stressed: "Article 6 does not in itself guarantee any particular content for civil rights and obligations in national law ...". In addition, it recognised that, far from having been denied access to a court, the applicants had "litigated with vigour up to the House of Lords...".

Unfortunately the ECtHR did not fully withdraw the jaws of Article 6 from negligence. In particular it stated: "the ruling of law concerning [the policy considerations] *in this case* does not disclose the operation of an *immunity*" (emphasis added). It seems to be suggesting that *some* "immunities" would still have to be justified and that *Osman* v. *Ferguson* was indeed wrong in not sufficiently "weighing in the balance the competing considerations of public policy", in particular the policy that wrongs should be remedied, as was done in *Bedfordshire*. The reservation is probably meant to bite on the "sweeping" or "blanket" use of "immunities" to limit the reach of negligence law, but it could clearly retain the influence of Article 6 on the content of substantive rights.

The effects of the reservation may well, however, be limited. The recent trend of English cases reassert a balancing approach on domestic principles (although influenced by *Osman*: *e.g. Barrett* [2001] 2 A.C. 550). Moreover, the ECtHR has suggested that such "immunities" must not be an element of the "substantive content, properly speaking, of the relevant civil right" (*McElhinney* v. *Ireland* (2002) 34 E.H.R.R.13). This will, however, be determined independently of the domestic characterization of the "immunity" in question.

Finally, it is worth noting that the ECtHR expressly disclaimed the suggestion in *Osman* that all cases should go to trial, noting the value of the striking out procedure. It had more than one eye on the new CPR and the approach taken in *S* v. *Gloucestershire* [2001] Fam. 313. There the Court of Appeal in a preliminary hearing considered all the important evidence and, in one of the cases before it, gave summary judgment against the claimants under CPR r. 24.2 since there was no real prospect of the applicants making out a breach of duty. After *Z* v. *UK* English courts should also be less hesitant to invoke the valuable striking out procedure in r. 3.4(2).

While it is clearly appropriate and highly desirable for the law to be confined by human rights norms, it is not right that Article 6 should interfere with the content of substantive rights. Domestic

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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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