NOTTINGHAM LAW JOURNAL

VOLUME 7

1998

NOTTINGHAM LAW JOURNAL

VOL 7 **1998**

CONTENTS

NOTTINGHAM LAW JOURNAL

EDITORIAL

THE PAST YEAR has been busy and productive for Nottingham Law School with important developments in a number of areas. The professoriate has been strengthened by the recruitment of Professor Mary Seneviratne and the promotion of Professor Ralph Henham. The School's newly created Centre for Legal Research has carried out several significant research contracts: Two were carried out for Directorate General XI (Environment) of the European Commission and these examined the transposition of certain water quality and air pollution directives; two contracts, investigating aspects of dispute management and management of legal services, were carried out for British Nuclear Fuels plc; and a further contract, examining the relevance of *champerty* in the context of event-triggered legal expenses insurance, was undertaken for the Association of British Insurers. The Centre has also carried out work for the Environment Agency on aspects of environmental enforcement. In addition, the School has just completed an important research project (under the leadership of John Peysner) for the Lord Chancellor's Department on "Piloting the Fast-track". This work, combining the School's expertise in designing and running simulations with its knowledge of civil justice, is intended to trial the new rules, forms and procedures expected to apply in fast-tack litigation as part of the current civil justice reforms.

The importance of those reforms, and their role in *"Modernising Civil Justice"*, was spelt out by Geoffrey Hoon M.P., Minister of State at the Lord Chancellor's Department, when he delivered the 1998 *Nottingham Law Journal Lecture* at the Law School in the early summer. The lecture itself, the text of which appears in this issue of the *Journal*, was the focus of a very enjoyable and stimulating evening and the generosity of the speaker in taking questions, and his frankness in responding to them, were much appreciated. Other distinguished visitors to the School in the past year have included Lord Woolf M.R., whose report on *"Access to Justice"* so clearly informs the process of reform which Mr Hoon's lecture described. Lord Woolf kindly opened the Law School's new Taylor Building, which he named in memory of Lord Taylor C.J., and which houses the Bar Vocational Course within the School. Other highlights of the year included Mark Mildred's inaugural lecture as Sweet & Maxwell Professor of Advanced Litigation. The text of the lecture, which concerned the nature of the "development risks" defence under the Product Liability Directive, is also published in this issue.

Finally, it is again my pleasure to thank all contributors to the *Journal*, and all Members of the Board and external referees, for their support. We hope that our readers will find the new format appealing and its content interesting. The "product liability – conflicts of law" bias of the issue is balanced by contributions dealing with other subjects and, in particular, by Michael Gunn and Anne Lyon's consideration of an aspect of the law of treason – an interesting subject but one which we hope, unlike the others, will have no practical relevance! We continue to welcome scholarly contributions from academics and practitioners in the law from this country or abroad.

PETER KUNZLIK, Editor.

NOTTINGHAM LAW JOURNAL

VOL 7, Pages 1 to 60 1998

ARTICLES

The address for submission of articles is given at the beginning of this issue

THE DECLINE AND FALL OF STRICT LIABILITY

Inaugural Lecture

*MARK MILDRED**

INTRODUCTION

THALIDOMIDE WAS DEVELOPED AS A SLEEPING REMEDY by a small West German manufacturer and was sold between 1959 and 1962 in various countries under licence. No tests were carried out on pregnant animals in the laboratory. Whilst some companies did undertake such tests, it was not mandatory or universal practice so to do. Notwithstanding this, thalidomide was expressly claimed to be safe in pregnancy and was widely used by pregnant women. As is well known, about 6000 children were born world-wide suffering profound disabilities including a characteristic phocomelia, the absence or gross underdevelopment of limbs. This devastating episode provoked a number of responses. The Medicines Act 1968, following the recommendations of the Dunlop Committee, provided for formal regulation of medicines for the first time in the UK. Doctors and scientists increased their attention to pre-marketing testing of drugs and post-marketing surveillance of the effects of those drugs. Claims for damages dragged on in courts around the world. Unusually there was no doubt about the question of cause and effect; the manufacturers, however, took advantage of the burden placed by existing law on the claimants to prove that they had been at fault, in other words, had been guilty of negligence. The UK proceedings were settled only in 1973, eleven years after thalidomide had been withdrawn from the market and only then in part due to a publicity campaign instituted by *The Sunday Times* which influenced public opinion and, more importantly, affected the Distillers Company's share price. All agreed that a system which permitted so conspicuous a disaster to be dealt with so inefficiently was in need of radical overhaul.

This lecture sets out to chart the progress of the attempts to make such difficult litigation quicker and cheaper by the incorporation of a strict liability standard for claims for damages for death and personal injury caused by defective products - the area known by the shorthand of "product liability". A strict liability system is one where the claimant is not required to prove fault on the part of the defendant.

* Sweet & Maxwell Professor of Advanced Litigation, The Nottingham Law School. This is the text of Professor Mildred's professorial inaugural lecture, given at the Law Society, Chancery Lane, London, on 29 January 1998. Professor Mildred acted as co-agent for the E.C. Commission in *Commission* v. *The United Kingdom (Re the Product Liability Directive)*, Case C-300/95, [1997] 3 C.M.L.R. 923.

In this context I intend to examine the rationale for and the consequences of introducing a "development risks" defence. This involves absolving producers from liability for damage caused by unforeseeable defects. To put the problem into context, the scientists examining the effects of thalidomide after the event quite quickly found that the effect on the human foetus could readily be replicated, but only in the New Zealand white rabbit. That was not, however, a species commonly used for laboratory animal testing of new medicines. Thus the effect was discoverable but not discovered and failure to discover it may well not have involved any fault on the part of the manufacturer. Should the risk of injury from a defect that was discoverable but undiscovered fall on the injured consumer or the non-negligent manufacturer?

My conclusion will be that the opportunity to achieve simpler, fairer and wider access to justice has largely been missed and efforts to reduce unconscionable delay and exorbitant cost largely in vain.

HISTORY

The heavy obligation on the plaintiff to prove fault on the part of the defendant produced pressure to establish less demanding criteria for the recovery of damages. This pressure came after the thalidomide settlements not predominantly from consumer interest groups but rather from the statutory Law Commissions of England and Wales and of Scotland and from the Pearson Royal Commission on Civil Liability and Compensation for Personal Injury.

The Commission recommended that producers should be strictly liable for products circulated in the course of a business; and that a product should be characterised as defective, if it does not comply with the reasonable standard of safety which a person is entitled to expect of it determined objectively in the light of all circumstances. These should include instructions for use or warnings relating to use which could reasonably be given with the product. In particular the Commission recommended that there should be strict liability for pharmaceutical products. All recommended that there should be no defence founded on development risks or on the approval of regulatory bodies, that it should be impossible to contract out of civil liability, and that there should be no limit on the damages recoverable.

Notwithstanding this plethora of activity none of these recommendations were implemented. This may have been partly as the result of the wider initiative of the EC.

THE DIRECTIVE

The first draft of the EC Directive on liability for defective products was circulated as long ago as August 1974 (just before the Law Commission reports) and the delay of eleven years before agreement and notification can probably be attributed to the vigorous lobbying (in opposite directions) of industry and consumers, the differing law in the Member States relating to the need to prove fault and perhaps a general reluctance to surrender national autonomy in the legislative process.

The strict liability regime which was ultimately introduced by the Product Liability Directive (Directive 85/374) is subject to a powerful qualification. The producer is liable not for damage caused by the product but only for that caused by a defect in the product and the consumer has the burden of proving the defect and the damage and then the causal connection between the two.

"Defect" itself is not defined but a product is defective when it does not provide the safety which a person is entitled to expect. To what person does this refer? Is it a reasonable person or an "average" person? Is the person to be presumed to have the characteristics of age, gender,

location and wealth of the majority of the population, or those of the particular population group to which the plaintiff belongs or those of the actual plaintiff? The Directive contains no guidance and there is as yet no case-law to assist. The problem is clear. If the intention is to impose the standard of the reasonable person, this is no more than the reintroduction of the negligence, that is to say, the fault standard. For what material difference exists between proof that a producer failed to satisfy the expectation of a reasonable person and proof that the producer has acted unreasonably in the manufacture or marketing of a product?

The burden of my argument is that the requirement for the claimant to prove the existence of a defect mitigates the burden on the producer in such a generous manner that any exceptions to the liability principle by way of defences available to the producer should be kept within the narrowest ambit.

Each Member State, when it came to implement the Directive into national law had the option to exclude the development risks defence. The passage through Parliament of the Consumer Protection Bill in 1987 was dominated by the question whether to incorporate or exclude the development risks defence and, if it was to be included, how it should be formulated. A ping-pong process took place between the two Houses of Parliament. The House of Lords favoured the words of the Directive itself whereas the House of Commons insisted on the use of the DTI wording which was finally enacted. Intense lobbying was carried out on both sides. On the return of the Bill to the House of Lords, Lord Allen of Abbeydale (a retired career civil servant) summarised his widely shared concerns thus:

> The CBI briefing argues in effect that the amendment now before us will make it easier for a company to mount a defence of development risks. But as the form of words approved of here ... follows the words of the Directive, what the CBI must be saying is that the clause with the amendment before us will be more favourable to industry than will the Directive itself - the Directive which the Bill purports to implement. If that is so, that seems to be a pretty serious state of affairs.

In the horse trading which saw completion of the Bill on the last day of Parliament before the 1987 General Election, the Government version was incorporated, no doubt as the price of enactment. The initial response to this form of words was generally divided down the producer/consumer divide. Most commentators (apart from the more analytical academic writers) committed themselves to the view that the Act went further than the Directive in exonerating producers from liability for damage caused by unforeseen risks.

There have in practice been few cases in which the defence has been relied upon and none of these has reached the stage of judgment so that there is no available authority on the meaning of the defence. One such was a case in the North of England where nearly 30 people suffered botulism after eating hazelnut yoghurt. Laboratory tests concluded that canned hazelnut puree was the most likely source of the toxin *clostridium botulinum*. The purée manufacturer relied on the development risks defence and gave particulars that, although there were tests which could have revealed the presence of the toxin, facilities for those tests were not available to it; and such tests were outside the scope of routine testing available to manufacturers of the product in question. They pleaded that the tests which they would themselves have been equipped to carry out would not have detected the presence of the toxin. Although the cases were settled after the manufacturer pleaded guilty to a criminal charge, the employment of the defence in these circumstances caused a *frisson* of excitement amongst those who feared that the wording of the Act would allow producers to escape liability by saying, in effect "firms like ours cannot be expected to use techniques which we do not have".

THE INFRINGEMENT PROCEEDINGS[1]

After more than six years of unproductive negotiation and the formal preliminaries, infringement proceedings were commenced by the Commission in September 1995 under Article 169 of the Treaty of Rome. The Commission sought a declaration that, by failing to take all the measures necessary to implement the Directive, and in particular Article 7(e) thereof, the United Kingdom had failed to fulfil its obligations under the Directive and under the Treaty. In Article 169 proceedings the burden of proving the infringement rests upon the Commission. In this case, in the absence of any decisions by the Court of Justice or any court in any of the Member States on the meaning of Article 7(e), the Commission had to demonstrate that section 4(1)(e) of the Act (the provision which contains the development risks defence) was incapable of bearing the same legal meaning as that of Article 7(e). It is to the question of the true legal meaning of the two provisions that we must now turn.

THE LEGAL MEANING OF THE PROVISIONS

An attempt to elucidate the legal meaning of Article 7(e) involves a number of considerations. The starting point must be the Recitals which begin the Directive. The first Recital calls for approximation of the laws of the Member States. This is to eliminate distortion of competition and the fettering of free movement of goods within the market and to avoid different degrees of consumer protection arising in different Member States. From this it is clear that economic interests have a part to play in the process.

The second Recital asserts the proposition that liability without fault is the only adequate means of achieving a fair apportionment of the risks inherent in modern technological production. It would not be unreasonable to treat this as establishing the over-riding principle to govern the construction of the Directive. This is the more so since that fair apportionment is the basis for the availability (in the seventh Recital) of a number of exceptions to the rule of liability without fault. There is nothing here to be found to suggest any other constraint on liability or any reference to the personal or generic characteristics of the producer as a determinant of the liability standard. It is noteworthy that none of the other defences available to the producer refers to or involves personal responsibility or fault: they rather protect those who could be categorised as outwith the regime created by the Directive, for example those who made no supply, or no supply in the course of a business, or whose product was not defective. Whilst these considerations fall short of providing the legal meaning of the provision, they may be seen as providing a context for its elucidation.

THE ARGUMENTS OF THE PARTIES

Since pleadings in infringement proceedings are not open to the public gaze, discussion of the arguments on both sides must be restricted to what emerges from the Advocate General's Opinion and the judgment of the Court together with the arguments at the oral hearing which lasted, in the best tradition of the Court, comfortably less than an hour.

The Commission argued that the test in Article 7(e) is objective in the sense that it refers to a state of knowledge and not to the knowledge or the ability or capacity to acquire knowledge of a particular person or class of persons. The Act, on the other hand, implies an assessment referable to what may be expected of a reasonable producer, if not the actual producer, of the

[1] *Commission* v. *The United Kingdom (Re the Product Liability Directive), supra.*

type of products in question. The Directive requires the producer to show the impossibility of discovering the defect rather than the fact, or likelihood, that a person in the same or a similar situation as or to his own would not have discovered it. Under the Act, on the other hand, proof that the producer took standard or reasonable steps to discover the defect will exonerate him. The incorporation into the defence of a reasonableness test is, in effect, reintroducing fault-based liability by the back door, albeit with the burden of proof reversed.

There is already ample safeguard for the producer in the concept of "defect". A product is only defective if it is not as safe as persons generally are entitled to expect. The burden of showing that is on the claimant. The only stage at which reasonable standards could possibly be relevant is when the claimant must prove that the product is defective, not when the producer must prove that the defect was undiscoverable.

The Commission submitted that, since the defence created an exception to the fundamental principle of strict liability, it should be narrowly construed in accordance with the normal approach of the Court. The Commission gave as an example the case of a chemical manufacturer who, in common with the rest of the industry and excusably, did not read an article in a certain basic science journal published in German which clearly established the risk of cell damage in humans exposed to a chemical manufactured by the company. It is clear to see that there would in these circumstances be a viable defence under the Act (because a producer of products of the type in question could not be expected to have discovered the defect) but not under the Directive (because the defect was clearly discoverable).

The United Kingdom replied that the tests administered by the two provisions were the same, both being objective. The examination of the state of scientific and technical knowledge is not directed to what the producer in question actually knows, but to the knowledge which producers of the "class of producer in question, understood in a generic sense" may objectively be expected to have. One might wonder, in passing, both what the word "general" means; and, if it is true that the meanings of the Act and Directive are in fact the same, why such extraordinary efforts were made in 1987 to impose the one and exclude the other.

The more substantive point made by the United Kingdom (and referred to only in the Advocate General's Opinion) was that, if the relevant state of knowledge does not correspond in some way to the ability of the producer in question to discover the defect, the defence could never succeed unless the producer could show that no-one in the world could have discovered it. A defence, the argument runs, which is unattainable in practice cannot provide the required fair apportionment of risk and thus cannot have the meaning contended for by the Commission. A more appropriate approach is to provide an objectively verifiable standard - that of the capacity of persons in the same generic position as the actual producer to discover the defect. One could object, however, that a defence which was only to be available in the rarest circumstances was what many commentators imagined was intended.

THE OPINION OF ADVOCATE GENERAL TESAURO

The Advocate General's Opinion confirmed that the true question for the Court was whether the national provision was capable of only one interpretation which was manifestly different from the Community provision and hence incompatible with it. The Advocate General reflected that one of the reasons for the introduction of the draft Directive was that injured consumers frequently went uncompensated as a result of the difficulty in proving negligence on the part of the manufacturer whereas the latter could pass his liability costs on to consumers generally in the overall price of the product. He began his elucidation of Article 7(e) itself by saying that the test was not the custom and practice of the industry in question, but rather whether available knowledge would have permitted eradication of the defect.

Neither expense nor practicability nor failure to keep abreast of changes in the state of knowledge will absolve the producer from failure to discover the defect.

The Advocate General went on to reflect on the meaning of "state of knowledge" which does not develop in a linear manner and to which theories once thought erroneous or speculative may in time be admitted. He advised that the word 'state' does not connote simply a majority or establishment view but rather the most advanced opinion and that this reinforces the obligation to deal with all foreseeable risks either by increasing research and experimentation or by instead insuring against liability for any damage caused. How the word "foreseeable" entered the equation is not explained - it certainly has no place in the text of the Directive.

One isolated opinion as to the potentially defective or hazardous nature of the product is sufficient to take the defect out of the realm of unforeseeability although the speed and scale of dissemination of a discovery would affect its discoverability for the purpose of article 7(e). The Advocate General then concluded that "state of knowledge" must be construed to include all data in the information circuit of the scientific community as a whole, bearing in mind, however, on the basis of a reasonableness test, the actual opportunities for the information to circulate. As a result of this breathtakingly sudden gloss on the words of both the Directive and the Act, the Advocate General had no difficulty in rejecting an irremediable conflict between the two provisions. This was despite finding an undeniable ambiguity in the Act which, he said, "insofar as it refers to what might be expected of the producer, could be interpreted more broadly than it should".

The rationalisation of the conflict rested on three arguments. First, consideration of the producer was central to both the Directive as a whole and to Article 7(e) which "although it does not mention him, is aimed at the producer himself as the person having to discharge the burden of proof in order to avoid incurring liability". This was surely the same as saying that, because the producer is the defendant, the standard by which he should be judged is that of producers, notwithstanding the language and purpose of the provision.

The second asserted the objectively verifiable knowledge of producers as a whole as the key criterion, but again arbitrarily limited this to such most advanced knowledge as was "objectively and reasonably obtainable and available".

Thirdly, and bizarrely, the contention that the Act in effect introduces a quasi-negligence test was rejected on the basis that the burden of establishing the defence rests on the defendant.

THE JUDGMENT OF THE COURT OF JUSTICE

In giving judgment on 29 May 1997 the Court confirmed that Article 7(e) is not specifically directed at the practices and safety standards in use in the industrial sector in question but concerned, "unreservedly, ... the state of scientific and technical knowledge, including the most advanced level of such knowledge". The state of knowledge is, the Court said, not that of which the actual producer "actually or subjectively was or could have been apprised, but the objective state of scientific and technical knowledge of which the producer is presumed to have been informed".

The only basis which the Court offered for the making of that presumption was that the relevant knowledge must have been accessible at the time at which the product was put into circulation but no explanation of what was meant by this was offered. Does it follow that anything recorded on a searchable database is presumed to be within the producer's knowledge? Or only that in the same language as that spoken by the producer? Or only that contained in the databases which a producer of products of the type in question is in the habit of searching? No guidance was given although it was accepted on all sides that knowledge

must be published to be discoverable. The Court ended by giving five reasons for rejecting the Commission's view that there was a clear conflict between the two provisions and, therefore, for dismissing the application.

The first entirely uncontroversially pointed out that, under both provisions, the burden of establishing the defence rests on the producer. The second referred to the fact that the definition of state and degree of knowledge in the Act is not tied to that of the producer. Even so, however, that knowledge is related by the language of the Act to the expectation (a word and concept to be found nowhere in the Directive) that a producer of the type of goods in question would or might have discovered the defect.

The third reason was that the wording of the Act does not suggest that the test will be whether the producer has taken reasonable care by the standards of the industrial sector in question. Whilst that principle is to be welcomed, it is at least questionable how it is derived from the criterion of the expectation that a producer of similar products might have discovered the defect, if present in products under his control.

Finally the Court referred to the failure of the Commission to refer to any decision of the domestic courts inconsistent with the Directive and stated that there was nothing to suggest that English courts would not interpret section 4(1)(e) in the light of the wording and purpose of the Directive.

DISCUSSION

The decision of the Court is unhelpful in a number of respects: the basis for the presumption of what information the producer had, the meaning of the words 'accessible' and 'knowledge', the difficulties of interpretation of Article 7(e) raised but not articulated, let alone resolved; the introduction of the concepts of reasonableness and foreseeability, the failure to translate the principles contained in the Recitals into a teleological construction of the defence and the question whether the lack of case-law does or does not matter.

This is not, however, to ignore arguments in favour of the United Kingdom's position made more powerfully outside the proceedings than within them. Stapleton argues that, to achieve a fair apportionment of risk, the defence must be given substance and therefore, since virtually everything is literally discoverable, that must extend its ambit to matters which were only discoverable by extraordinary means. The capacity of exposure to thalidomide in the first trimester of pregnancy to cause phocomelia in the foetus, the argument runs, was discoverable since animal testing was an available technique and the New Zealand white rabbit was known by the researchers to exist. Thus the defect in the drug was discoverable, but undiscovered. Once the criterion for discoverability involves leaps of curiosity or creativity, a succession of value questions are introduced the inevitable consequence of which is that liability should exist only in respect of defects discoverable by reasonable means, for there is no logical halfway house between absolute undiscoverability (rendering the defence nugatory) and undiscoverability by reasonable means (aping the negligence standard). This is a powerful argument to which one can only respond that, unless the availability of the defence was intended to overwhelm the principle of strict liability (and the text of the Directive strongly suggests that it was not), such leaps of creativity are both necessary and proper.

From the field of legal practice Hodges has fired a powerful salvo in defence of the Act. He characterises the wording of Article 7(e) as setting an impossibly high standard on the producer in relation to inaccessible information and imposing the insupportable burden of proving a world-wide negative. If the producer fails to discover information which the plaintiff uses in rebuttal of the defence, he will either be negligent (in which case the Directive will be redundant) or unlucky (in which case it would be unjust to impose liability upon him). This is, to

say the least, an odd argument against a regime explicitly put in place to establish strict liability and ignores the fact that the defence is a derogation from the strict liability principle of the Directive rather than a free-standing principle itself. Indeed the nuance that the defence can only be defeated if the defendant is at fault surely runs counter to the rationale of liability without fault upon which the Directive is founded.

After considering the familiar problems about the status of knowledge Hodges concludes that discoverability must be regulated by the concept of reasonableness both in relation to the ambit of necessary research and the length of the inferential process to be carried out from the item or seed of information available. Would the defence, he asks, ever succeed if the true obligation were to be to investigate all information and belief, however inaccessible, worldwide? Or should the law encourage reasonable efforts to act in accordance with reasonable theories?

The sense of this approach is said best to be illustrated in the crucial area of development of new medicines - an activity clearly important in relation to both economic growth and the good of human kind. This sector is extensively regulated in relation to the licensing of new products and, moreover, the extent and nature of animal experimentation and human trial is tightly circumscribed. Why should a radically different approach be taken to the determination of liability for undiscoverable defects? One answer to this might be that there is no necessary logic in relating the requirements to be fulfilled as the price of licensing approval to the determinants of liability in the post-licensing period of use.

Is this an unworldly approach to the risk business where there is no social purpose in denying humankind the weapons with which to fight disease and poverty? Can the risk of driving manufacturers out of innovative industries, particularly in the healthcare field, be responsibly run? These are essentially pragmatic questions rather than questions of principle and can thus only receive pragmatic answers.

There are good reasons to resist alarmist attitudes. First, regulation of industry does not, and cannot, seek to eradicate all damage caused by the products of that industry. In these circumstances tort claims may serve as a source of deterrence (as the economic theorists would explain it) as well as providing adequate compensation. The lot of the claimant has recently been made more difficult by dicta in the ill-fated tranquilliser litigation to the effect that product liability claims are merely cash relationships in which the public interest plays no part. A modest corrective justice role for these claims would tend to compensate for the effects of deregulation and the trend against collective solutions to social problems.

Second, injury caused to a small minority of those exposed to a product has, for example in the vaccination field, for a number of years been thought to be justified by the benefit to the majority. In those circumstances, provision has been made to insure the liability to pay damages to the affected minority. The report on which the Five Year Review of the Directive by the Commission was based expressly recorded no perceptible increase in insurance premia and no contraction in the availability of cover. There is no cogent evidence that the position has changed in this regard since December 1995.

Clearly, however, insurance may become unavailable or prohibitively expensive and this would certainly be a social ill either as suppressing development of useful products or leaving claimants uncompensated. What would be likely to bring this about? Self-evidently either a steep rise in the level of damages or an explosion of litigation such that, irrespective of the merits of the claims, the resources which manufacturers would have to devote to contesting them would lead to the discontinuance of the products in question. There is a respectable view that this is a real effect in the United States. If the Restatement Third of the Law of Torts by the American Law Institute is followed in the courts, this trend will be reversed. Strict liability will apply only in cases of manufacturing defects. In cases of design and warnings defects there will be liability only where foreseeable risks could have been avoided or reduced by a

reasonable alternative design or warning the absence of which renders the product not reasonably safe. The wheel will have come almost full circle. It is no part of the brief of those concerned that the Directive be applied rigorously to promote excess in litigation in the European Union. How can it be avoided?

The modest levels of damage in the United Kingdom, the absence of juries in civil trials, the unavailability of punitive damages in personal injury claims, the unlawfulness of contingency (as opposed to conditional) fee agreements, the "loser pays" costs rule and the likely disappearance of Legal Aid are all good reasons to believe that such an explosion will not occur.

And what of the product liability litigation which does take place? Despite the uncertainty about the true meaning of the word 'defect' referred to above, there can be no doubt that the burden on the plaintiff to prove the existence of the defect and its causative link to the damage is a potent inhibitor of claims. For once a product has been licensed for use in the confidence of the licensing authority that its benefits outweigh its risks, the burden of proving that it is not as safe as persons generally are entitled to expect will usually be heavy indeed. The cases which could give rise to viable claims might then be confined to those involving either frank manufacturing faults or adverse effects not fairly warned against. This would formalise in the context of civil litigation the obligation to conduct post-marketing surveillance and accurately reflect it in the product information.

The criterion to be used for deciding whether the development risks defence should succeed would now, following the judgment of the Court of Justice, appear to be whether the producer could, according to the most advanced level of scientific and technical knowledge, be presumed to have been aware of the defect. That presumption will, however, only be made if that knowledge is accessible.

Put like this it will readily appear that the emphasis has changed from whether the defect was unable to be discovered to whether the knowledge was inaccessible. It is hard to see how the second test can fail to be easier than the first for the producer to satisfy. Thus the liability regime which the Directive was introduced to underpin appears to have been compromised and the fair apportionment of risk unbalanced. For that apportionment was surely achieved by first obliging the plaintiff to establish the defect. At that stage risks could be balanced against benefits, expectations and fears could be judged against reasonable social standards and the public interest in economic growth and industrial innovation measured against the private interest of the injured consumer in securing compensation.

Only when this onerous burden had been successfully discharged and the causative effect of the defect established would it have been open to the producer to plead that the defect was literally undiscoverable. In that way the risks would have been fairly apportioned and the purpose of simplification by imposing liability without fault achieved.

Let us conclude by returning to the example of thalidomide, if it were to be licensed for use today but with the New Zealand white rabbit still not being a species commonly used for laboratory testing. The plaintiffs could surely persuade the court that a sleeping remedy promoted for use in pregnancy could never properly carry the risk of phocomelia or other serious and permanent injuries and also that the product was in fact the cause of those injuries. The interpretation of the development risks defence by the Court of Justice would lead to the defence succeeding against the plaintiffs (because knowledge that thalidomide would produce phocomelia in the New Zealand white rabbit was not accessible to its producers). A defence, on the other hand, which involved the concept of undiscoverability would fail (because if the producers had in fact used all the species known to be available for testing the effect would have been clear). It is hard to see how any useful social purpose, let alone the stated purposes of the Directive, can be served by such a result. What will be the consequences in practice and indeed for the jurisprudence of the Community can only remain to be seen.

MODERNISING CIVIL JUSTICE

The 1998 Nottingham Law Journal Lecture

GEOFFREY HOON *

IT IS OFTEN SAID THAT THE LAW is a conservative, old-fashioned, backward-looking profession. A profession slow to change and happier relying upon the authority of precedent, rather than looking for new, creative solutions to problems. Despite the best efforts of John Grisham and *This Life*, the popular image of is often of dry, middle-aged men blowing the dust off old files, sitting in rooms lined with leather bound books. Of course, this is a caricature but characters often contain an element of truth, distorted by exaggeration, but still, in a sense, true.

Before the students among you start to reassess your choice of career, I do have some good news. There are plenty of lawyers out there who are working hard to dispel the old stereotypes. The positive way in which many have embraced information technology, for example, gives the lie to the image of a profession stuck in the past and reluctant to change.

Forward thinking firms of solicitors have, for example, seized a competitive advantage over their rivals by investing in sophisticated litigation management systems. They enjoy the security of systems which automatically flag up court deadlines in each of their cases, whilst the firm down the road continues to lose files and make endless applications for extensions of time.

Creative thinking is not something the public often associates with the legal profession but that perception is mistaken. In my practice at the Bar I was frequently struck by some of the novel and ingenious interpretations of the law advanced by my colleagues. Good lawyers are very skilled at deriving the maximum advantage for their clients from rules of court, statutes, and case law, no matter how unpromising the position may appear at first sight.

Creative thinking is particularly important for lawyers precisely because they tend to work within much more rigid, and clearly defined, boundaries than most other professions. No lawyer can invent the facts; but they can always be interpreted. That is obviously why lawyers make good politicians! No lawyer can invent case law; but precedents can be interpreted. Lawyers interpret the law in its application to particular cases every working day - this interpretation is essentially a creative process.

For those of you on the threshold of your careers, creative thinking and a positive attitude to change will be vital. They will be even more important in the future than they have been for successful lawyers in the past. Those of you who will work in any area of civil litigation are coming into the profession at a time of major reform. You will find yourself in an environment radically different from that experienced by your teachers. You are the first students of the civil law to be in this position in over one hundred and twenty years .

To succeed you will have to rise to the challenge of new rules of court, new procedures and, most importantly, a new culture of civil litigation. A culture based on proportionality, equality of arms, and improved co-operation between litigants. All in the interests of finding just solutions to disputes much earlier than is usually achieved at present.

The last great reform of the civil justice system took place under the direction of Lord Chancellor Selborne and was enshrined in the Judicature Acts of the 1870s. The impetus for reform came from public dissatisfaction with the cost, delay and complexity involved in bringing cases before the superior courts. Do these complaints sound familiar?

* M.P., Minister of State at the Lord Chancellor's Department, Barrister. This is the p text of the 1998 Nottingham Law Journal Lecture delivered by Mr. Hoon at the Law School on Friday, 1 May 1998.

A jumble of separate courts with sometimes overlapping, sometimes conflicting, jurisdictions and antiquated procedures were swept away. They were replaced by a Supreme Court divided into the High Court and the Court of Appeal. The judicial Committee of the House of Lords was constituted as the court of final appeal. In essentials this structure has endured down to the present.

Lord Selborne's reforms rationalised the structure of the courts. They also rationalised court procedure and administrative support. The most important reform of procedure was to allow the new courts to apply the rules and remedies of the common law and equity as the interests of justice demanded. This was the so-called fusion of the common law and equity.

Before the Selborne reforms, the remedies a successful litigants was entitled to expect depended very much upon the court in which he had chosen to issue his claim. This is a striking example of a weakness to which all legal systems are prone - the fossilisation of rules and procedures which have long since lost any useful purpose which they may have originally served. Like any complex system which requires constant maintenance, the law is liable to creeping obsolescence. A problem that can result in the blind following of outmoded ideas and practices for no better reason than that no-one has yet got round to scrapping them.

Our system of civil justice is littered with examples of outmoded practices; some of them are merely quaint and eccentric. Why, for example, is it necessary to adorn affidavits with bits of green ribbon and red paper discs, the ghost of the sealing wax used in former days? And why are so many Latin terms still used? I must say that I have a lot of sympathy with Lord Justice May's recently expressed view that it is time to do away with *mutatis mutandis*, *ex abundanti cautela*, *in terrorem*, and the rest. Latin terms add to the mystification of the law which we are trying to get away from.

Other instances of outmoded practice are much more serious because they can actually impede access to justice. For example, the archaic and obscure language and rules associated with the drafting of pleadings. The person in the street might be forgiven for thinking that the purpose of pleadings is to set out a case clearly for the information of the court and the other side so that everyone knows exactly what the dispute is about. Well, pretty much all of us here know that the person in the street's supposition is reasonable but wrong.

At the Bar, I came across some of the most uninformative documents that human genius is capable of producing. It is just possible that I myself may have drafted one or two pleadings that were somewhat opaque. The drafting of pleadings, like so much else in the litigation process, has become a tool to be used for tactical advantage rather than a means of getting closer to a just resolution of the dispute between the parties. This is one of the consequences of the uncontrolled adversarialism which Lord Woolf identified as a main cause of the deficiencies of our current system of civil litigation. The new rules will require practitioners to state their cases as fully and clearly as possible. The court will not tolerate attempts to circumvent these requirements.

Unfortunately, it is often difficult to secure a consensus that any given practice no longer serves any useful purpose. Outmoded practices usually have their defenders. Sometimes these defenders are respected and distinguished practitioners. There are always those who, like Voltaire's fatuous optimist Pangloss, think that all is for the best in the best of all possible worlds. If we were always to listen to the defenders of the *status quo*, nothing would ever change.

Then there are the pessimists who never tire of pointing out the difficulties of implementing successful reforms, so much so that they lose all sight of the benefits to be gained. If the pessimists always had their way, plans for reform would never get beyond the drawing board. Their attitude is perhaps best illustrated by a quotation attributed to Mr Justice Astbury who, on being asked to consider proposals for change, responded "Reform! Reform! Aren't things bad enough already?"

Of course, not all opposition to change is misguided. Change is not automatically a good thing because it does not always result in improvement. Change can make things worse. That is why it is important to avoid change for change's sake; there must be a genuine need for change. When undertaking radical and complex reforms, it can be helpful to look to the past to see if there are any lessons to be learned from the experience of previous generations.

Lord Selborne and other great legal reformers of the last century, like Lord Chancellor Brougham, were modernisers. They realised that obsolete practices had to be rooted out if the courts were to meet the increasingly complex demands that were being placed upon them by population and industrialisation. They swept away structures and practices sanctioned by long usage, but which had outlived their usefulness. The reformers found a system , inherited from the Eighteenth Century, which was failing to deliver justice in the changed circumstances of the Nineteenth. They left a reformed system able to cope with the needs of an industrial society.

I think that the parallels with the present reform programme are instructive. Much in the legacy of the Nineteenth Century remains valuable, but much is now outmoded by the changed conditions of late Twentieth Century society. This is a modernising Government that recognises the need to transform the civil justice system so that it can meet the needs of modern Britain, a society on the threshold of the Twenty First Century. The reform of civil justice is not an isolated undertaking but part of a coherent reform programme designed to revitalise the institutions of our society. The Government's constitutional reforms, notably devolution to Scotland and Wales, are designed to increase the accountability of government, to return power to the British people.

Giving power to individual citizens is also the impetus behind the incorporation of the European Charter of Human Rights into a domestic law. When the Human Rights Bill becomes law it will end the absurd situation of British citizens having to go to Strasbourg, with all the attendant expense and delay, in order to safeguard their human rights. We are bringing rights home.

At the heart of the Government's thinking lies the concept of citizenship. The Government wants to unlock the potential of the British people. We want everyone to participate as fully as they can in the life of society. A modern, democratic society depends on the informed and active involvement of all its citizens. This is your society. You are all its citizens.

Citizenship is about rights and responsibilities - how you can expect to be treated, and what others can expect from you. The law is central to the idea of citizenship because it protects rights and defines responsibilities. If you know your rights, you can use the law to defend them; in turn, you can help to build a decent society by understanding and respecting the rights of others.

A decent society needs an efficient and accessible civil justice system to enable citizens to enforce their rights. To be accessible the system must be comprehensible, affordable, fair, and capable of delivering justice within a reasonable timescale. It is because our current system is failing to meet these needs that the Government has embarked upon such radical and comprehensive reform.

To do so, it has drawn very heavily on the outcome of Lord Woolf's historic report on *Access to Justice*. In looking for ways to reform civil justice, Lord Woolf sought to go back to first principles. His Inquiry team examined every aspect of civil procedure and asked a number of basic questions. For example, what purpose does the procedure serve? Is it necessary? Can it be done better? Does it serve the interests of justice?

The Government believes that this is the right approach and has continued to use it during the drafting of the new rules. You will be able to judge the results when the new unified rules are published, expected to be in January 1999. However, we recognise your need to prepare for the changes. Since the publication of Lord Woolf's final report in July 1996, much work has been done by rule draftsmen and by the Rule Committee, which students and practitioners need to be aware of. Therefore, we are shortly to start publishing prevailing draft rules on the

Department's Website. While those accessing the site will need to treat the information with care, because of its draft nature and liability to change, it will, I am sure, provide valuable assistance. The state of the drafts will be clearly indicated .

I have set out the context for the present civil justice reforms at some length because I feel it is necessary to stress their historic nature and their important place within the Government's modernising agenda for Britain. I shall now move to a brief overview of the reforms themselves.

The ethos of the reforms is admirably summarised in the new Rule 1. This states that the overriding objective is to enable the court to deal with cases justly. Dealing with a case justly includes, so far as is practicable, ensuring that the parties are on an equal footing; saving expense; and dealing with the case in ways which are proportionate: to the amount of money involved; to the importance of the case; to the complexity of the issues; and to the parties' financial position. The court should ensure that a case is dealt with expeditiously and fairly; allotting to it an appropriate share of its resources, while taking into account the need to allot resources to other cases

At the heart of the reforms lies the idea of judicial case management. Judicial case management is not new. Some judges have always managed their cases (and I can recall one or two from my days in Nottingham who exercised fairly vigorous case management!) Case management is certainly nothing new in the Commercial Court, the Patents Court and on the Official Referees' corridor. And it is becoming more and more prevalent in our system every day.

One of the major achievements of Lord Woolf's reports was to influence the climate for change. Many judges have been encouraged to develop case management skills as a result. What our reforms will do is to ensure case management becomes the standard; with mechanisms to support the judges and assist its effectiveness.

One such mechanism is the pre-action protocol. Protocols will set clear standards of best practice in pre-issue conduct. There are currently four protocols, at advanced stages of readiness, covering personal injury claims; clinical negligence; road traffic accidents; and the use of experts. The protocols will be enshrined in the new Practice Directions.

Let me give you a flavour of the ingredients. The protocols cover such issues as the content of standard letters; joint instruction of a single expert, and alternatives to litigation. They set out reasonable timetables for communications between parties; investigation of claims; early disclosure of documents; exchange of witness summaries; and exchange of expert reports.

The protocols are intended to improve pre-action contact between the parties which can be virtually non-existent at present. Improved contact between the parties will facilitate better exchange of information and fuller investigation of a claim at an early stage. The parties will, therefore, be in a position to make a realistic assessment of the legal merits of a claim far earlier than now because they will have all the information needed to make an informed judgment.

We believe that this is likely to promote early settlement and reduce the need for litigation. Even where litigation is not avoided, the protocols will make it more likely that cases will be able to proceed to a reasonable timetable because the pre-action work has been done in an orderly fashion.

For types of litigation where protocols have been developed and agreed, judges will expect cases to be conducted in accordance with the protocols. If not, they will want to know why, and will have power to impose sanctions for non-compliance.

The protocols have been drawn up by working groups composed of representatives from the major interested parties: the Law Society; the Bar; the Association of British Insurers; organisations of claimant solicitors like the Motor Accidents Solicitors Society; defendant solicitors; the medical defence associations and organisations representing the victims of medical accidents. The protocols and the working groups that are producing them are making a significant contribution to the culture change that Lord Woolf has called for.

The members of the working groups represent opposing interests but they have, I am delighted to say, been able to set aside entrenched attitudes and are devising protocols that will benefit all sides. A genuine example of a partnership approach to change. I am encouraged to believe that we really are moving towards a new litigation culture that repudiates unnecessary conflict, concentrates on the central issues in a case and gets on with the job.

The personal injury protocol is currently being piloted by a group of volunteer solicitors and insurers. The road traffic accidents protocol working group is due to commence a similar pilot in the near future. With the agreement of the working groups, we aim to publish all of the draft protocols in the summer to assist practitioners in preparing for their introduction.

The attraction of these protocols is that everyone benefits: the clients, the legal advisers acting for claimants and defendants, the insurers, the NHS, doctors, the courts and, of course, the wider community. Even those that go to trial will have benefited because they will be better prepared when they issue their proceedings. The length of time taken to trial should, therefore, be reduced. We should see an end to the unedifying tales of negligence cases hanging over doctors for five or six years or road traffic accident victims having to wait three or four years before their case is settled at the door of the court. Almost every lawyer I know has a fund of horror stories of this kind. I am sure that everyone would like to hear fewer of them in the future.

Judicial case management comes into play once a case is defended. Most undefended cases will be able to proceed directly to default judgment as at present. Defended cases will be subject to differing degrees of case management according to the needs of the individual case. The court will have the power to penalise parties for non-compliance with directions or orders. Parties to defended actions will be sent an allocation questionnaire and it is at this point that case management will start to bite.

The allocation questionnaire will require the parties to state what attempts they have made to try mediation. Where mediation has not been tried, the parties will have an opportunity to request a stay for this purpose. The judge may encourage the parties to try to resolve their dispute by alternative means. The questionnaire will also provide the procedural judge with the information needed to allocate the claim to an appropriate track.

In allocating cases, the procedural judge will have regard to the standard scope of the procedures. Following public consultation, the Lord Chancellor has proposed to the Rule Committee that the Small Claims general limit should be £5,000 with a limit of £1,000 for personal injury and housing disrepair cases. He has also proposed that the Fast Track should include cases between £5,000 and £15,000, except personal injury and housing disrepair cases where the range will obviously be between £1,000 and £15,000. The Multi-Track will be available mainly to cases valued at £15,000.

When allocating a case, the procedural judge will consider not only the monetary value of the claim, but also the complexity of the law or the facts; the number of parties; the size or complexity of any counterclaim; and any requirement for extensive oral evidence from witnesses of fact or expert opinion.

Other than the jurisdictional changes I have just mentioned, the Small Claims procedure will retain broadly the same features as at present. We saw little reason to meddle with a success story. Some research, conducted by Professor Baldwin of the University of Birmingham, was published by my Department last December. It concluded that three quarters of a sample of 350 litigants could be described as content with the way their cases had been handled and supportive of an extension of the Small Claims jurisdiction. In 1996, there were 94,000 Small Claims hearings. There were only 712 applications for referral out of the procedure. This evidence strongly suggests that the Small Claims procedure is popular and effective.

I will, therefore, concentrate on the more novel features of the new system: the Fast Track and the Multi-Track. The Fast Track is intended as a limited procedure designed to take cases

from allocation to trial within a standard 30 week timetable. The use of expert evidence; the procedures available to the parties; and the length of the hearing will all be controlled.

As a result of the concerns expressed during consultation, we have modified the original proposals which excluded oral expert evidence from the Fast Track. We now propose that parties will be able to apply to adduce oral expert evidence at trial in exceptional circumstances. Both parties will be required to use their best endeavours to agree on the instruction of a joint expert and to produce a joint letter of instruction. They will have to convince the court that there is no scope for further minimising the areas of disagreement between the experts.

Some have attacked the Fast Track on the grounds that the limitations on the room for procedural manoeuvre will prevent the solicitor from doing a good job for the client. I do not share this view. I believe that the disciplines of the Fast Track will put a premium on better lawyers' skills. They will have to identify quickly the real legal issues in every case. The Fast Track will also demand efficient lawyers who ensure that their office systems can comply with the discipline of the standard timetable.

The Multi-Track will encompass all cases not allocated to the Small Claims procedure or the Fast Track. Multi-Track cases will be heard in the county courts and in the High Court. The procedure has been designed to be flexible; the degree of case management by the court will be tailored to meet the demands of individual cases. For example, the procedural judge may direct the holding of a Case Management Conference. This is designed to establish the issues and the likely timescale of the case. The parties will be expected to agree a preliminary statement of issues and the procedural judge will give detailed directions as necessary, for example, on disclosure and evidence.

The Case Management Conference will also present an opportunity to examine such matters as the scope for settlement and the attractiveness of a split trial. Another important feature of the Case Management Conference will be the examination of the level of costs incurred in the case to date. Both sides will be required to satisfy the judge that the costs incurred are proportionate to the needs a of the case.

Common to the Fast Track and the Multi-Track is the Listing Questionnaire. This will require the parties to estimate the length of the trial, to report on their compliance with directions, and to provide details of the witnesses they wish to call. In those Multi-Track cases where a Pre-Trial Review is appropriate, its purpose will be to resolve any discrepancies between the Listing Questionnaires, check compliance with directions, confirm the hearing dates, and establish the documentary evidence to be produced at trial. These features will enable the judge to set a timetable for the trial itself

Also common to both tracks is the window for trial, which will be set on allocation. The RAND Corporation research into the case management approach adopted by the American federal courts showed that the single major influence on reducing delay was the setting of a date for trial. The parties will have early notice of the period during which they can expect the case to be heard. This should act as a motivation to parties to manage the intervening steps in accordance with the directed timetable.

In the Fast Track and the Multi-Track, the court will have the power to limit the issues on which it will allow expert evidence. This will be reinforced by the paramount obligation that experts must assist the court impartially. Where the parties are unable to agree on a single expert, they will be required to try to agree the issues on which each party's experts should be instructed.

The rule of privilege regarding instructions to experts will be abrogated to the extent necessary to empower the court to require disclosure of the instructions. The court will have a discretion to appoint a single expert, choosing between the nominations of the parties, as a last resort and only on an application from one of the parties. The party applying for the single expert will be responsible for the fees of the expert pending further order.

The new approach to evidence highlights the important features of the reformed system: greater court control, greater co-operation between the parties and greater stress on defining the issues at an early stage. This, then, is the new landscape of civil litigation that is opening up. We will not, however, stop there. Tranche Two of the reforms will see us modernise procedures for housing cases. It also includes a major review of the enforcement system.

I would like to say a little more about enforcement because it is an extremely important test for the effectiveness of a civil justice system. There is little point in taking a dispute to law if the decision of the court cannot be enforced. The impact of our reforms to increase access to justice will be lessened if a significant proportion of successful litigants are unable to recover the money, or the property, which the court has awarded to them. The Baldwin research, into the experience of litigants using the Small Claims Court, clearly demonstrated a high level of dissatisfaction with the existing enforcement system.

In order to support the reforms to civil procedure and to address widespread public dissatisfaction, we have announced a wide-ranging review of the current methods of enforcement, including their scope and success rates. This is an essential initiative which is long overdue. We cannot stand by and watch as people are denied the fruits of justice. Too many people go through the worry of a court case only to find that their victory has won them nothing but more frustration and expense. And it is not just individuals who suffer. Businesses can also be badly hit if they cannot make their debtors pay up, endangering employment and harming the economy.

In this area, as in all others, we will be taking an open-minded, listening approach. The Government has no monopoly on good ideas, so we will be inviting groups of interested individuals to generate new proposals and practical solutions to the problems which weaken today's enforcement. We also plan to commission studies from academics on more technical issues, such as the law relating to bailiffs.

The review will be conducted in two phases. The first will examine the strengths and weaknesses of the existing enforcement mechanisms available to the civil courts; the availability of information and support offered to creditors and debtors; the law which governs bailiffs; and other key issues. The second phase will move from analysis to implementation of the necessary reforms.

The first phase of the review began last month and is scheduled to continue until July 2000. At a little over two years, this may seem like a long time, but it is essential to allow sufficient time for fundamental reform of this nature. We do not want to jump in feet first and replace one unsatisfactory system with another. We intend to take a measured, thoughtful approach, so that we identify and keep what is good about today's enforcement system, whilst making changes which are sure to bring benefits to litigants.

The civil justice reforms represent a massive collective effort. Much of the thinking was stimulated by Lord Woolf's Inquiry into *Access to Justice*. Lord Woolf sought out the views of judges, barristers, solicitors, industry, academics, consumer groups, trade unions, and, through his series of national roadshows, the wider public. He succeeded in building a consensus in favour of change along the lines outlined in his historic reports.

The Government has continued this inclusive approach during the detailed policy development of the reforms. Key stakeholders have been involved in a number of working groups, like those on clinical negligence, multi-party situations and transitional arrangements. The contributions of these groups formed the basis of the public consultation papers published by my Department on these issues. Since last summer, my Department has issued no fewer than ten public consultation papers on various aspects of the reforms, giving rise to muttering, from some, that too much consultation is going on. Unfortunately, in Government, it is not possible to please all of the people or of the time.

An important mechanism for ensuring that the improvement of the civil justice system becomes a continuous process is the Civil Justice Council, which met for the first time in March.

The Council brings together members with a broad range of experience in the civil justice field, encompassing the judiciary, the legal professions, civil servants concerned with the administration of the courts, and those experienced in consumer affairs, lay advice, and representing particular kinds of litigants.

The Council has hit the ground running. It has signalled its intention to consider and advise on key areas of the system, including Alternative Dispute Resolution; the funding of litigation; court fees; enforcement; and the provision of information and advice to litigants. We would certainly expect to see its work informing the Government's thinking.

In many ways those of you here who are yet to start your careers are in a better position than those already established in practice to embrace the coming reforms. You will probably find it easier to learn the new rules and the new ethos of civil litigation than those who have been using the old rules for years and have, perhaps, picked up one or two bad habits.

I do not, however, agree with those who say that the reforms will fail because practitioners are too stuck in their old ways to change. I am confident that the overwhelming majority of practitioners want to make a success of the new system. No lawyer that I know wants to be part of a profession or a system which is seen to be failing the people it is supposed to serve. I am confident that the positive attitude to change demonstrated by the forward-thinking elements of the profession will prevail. These are exciting times to be involved in the civil justice; my advice to you, is go out there and make the reforms work for you and your clients.

INTERNATIONAL PRODUCT LIABILITY LITIGATION: JURISDICTION AND FORUM NON CONVENIENS IN ENGLAND

STUART DUTSON *

INTRODUCTION

THE QUESTION WHETHER A COURT CAN EXERCISE JURISDICTION in international product liability litigation is a problem that has often bedevilled judges, jurists and practitioners alike. Whilst product liability problems can be entirely domestic, the nature of the design, manufacture, supply, and consumption of products, and the damage that they can do if defective, is such that a product liability problem can involve a plethora of material international elements.[1] The internationalisation of world trade bears this out further - a consumer reaching for a piece of food or selecting a motor vehicle, or a business purchasing new equipment or obtaining intermediate goods, may well find that the product that it selected was manufactured overseas. The product or one or more of its components may have been designed overseas and manufactured there or elsewhere. However, the international dimension in a product liability case need not arise solely in the design and manufacture stages - the product may have been supplied in a different country and the damage could occur in yet other country but not become apparent until the injured party has entered yet another country. Adding yet another level of complexity, any one of these stages in a product liability claim - design, manufacture, supply and damage - may itself have been spread over more than one jurisdiction. In factual scenarios such as these the first issue to which lawyers address themselves (the question of jurisdiction) may appear to resemble Fermat's Last Theorem - the answer best assumed as a fact without any attempt to determine the precise answer.

The aim of this article is to identify and analyse the means by which jurisdiction can be established in the English courts against a foreign manufacturer (whether domiciled within or outside the EEA) in a product liability action brought under the tort of negligence, and Part 1 of the Consumer Protection Act 1987 (hereinafter "CPA"). It will also discuss the law of *forum non conveniens* as it applies in England to product liability actions.[2]

SUBSTANTIVE PRODUCT LIABILITY LAW

The effect of the CPA is to make the producer of a product liable in damages for personal injury and some forms of property damage caused by a defect in the product, without the necessity

* LL.B. (Hons), B. Bus. (QUT), PhD (Cantab). Schmitthoff Lecturer in International Commercial Law, Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London. The author is grateful to Mr. Richard Fentiman, Queens' College, Cambridge; Mr. John Collier, Trinity Hall, Cambridge; Dr. Lawrence Collins Q.C., Herbert Smith, Solicitors, London; Professor Peter Nygh, University of New South Wales; and Ms. Anne Wallace, Queensland University of Technology, for their helpful comments on the thesis upon which this article is, in part, based.

1 Cf. Fawcett, J.J. "Products Liability In Private International Law: A European Perspective" (1993) I Recueil des Cours 13 at pp. 26 – 27, 46, 84 – 85; Kaye, *Private International Law of Tort and Product Liability: Jurisdiction, Applicable Law and Extraterritorial Protective Measures* (Dartmouth, 1991) at pp. 108 – 109; and The Law Commission and the Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict*, Working Paper No. 87 (LC) and Consultative Memorandum No. 62 (SLC) (HMSO, 1984) at pp. 169 – 170. North has described product liability as "the most common international tort": Special Public Bill Committee – House of Lords *Private International Law (Miscellaneous Provisions) Bill [HL] Proceedings of the Committee* (HMSO, 1995) in oral evidence at 40 col. 2.

2 Some jurists have considered product liability cases and jurisdiction issues but they have only done this in cases in which the defendant was domiciled in the EC. None have dealt with R.S.C. O. 11 or cases in which the defendant is domiciled outside the EC. Nor have they dealt with the application of *forum non conveniens* principles to product liability cases. See Fawcett, "Products Liability in the Conflict of Laws" (1989) 42 Current Legal Problems 167; Kaye, at n. 1 *supra*.

for the plaintiff to prove that the producer was guilty of fault, though certain defences may be raised by the producer.[3] "Defect" is defined widely under the Act and in negligence cases to include design defects, manufacturing defects, and instructional defects.[4]

The Act provides, in effect, that the following persons are to be taken to be a producer: the producer of the product, every person who has held himself out as the producer of the product,[5] any person who imports the product into the EC.[6] Producers of component parts of a finished product are also producers under the Act. The Act provides that where two or more persons are liable for the same damages under the Act their liability shall be joint and several.[7]

There are a number of cases in which it may well be worth a plaintiff's while to pursue a foreign manufacture in a product liability case. The plaintiff may have no relevant contract with anyone and there may be no negligent party within the jurisdiction to pursue or who is worth pursuing. In these circumstances a plaintiff's only possible claim will be in negligence or under the CPA against a foreign party such as the manufacturer, designer and/or assembler.

If the importer into the Member States has nominal capital, no (or insufficient) assets and no (or insufficient) insurance cover, then he may not be worth pursuing under the CPA. The same can be said of cases in which the importer, perhaps being a small £2 concern, disappears or is no longer extant. While a judgment can be obtained against a subsidiary of a pecunious foreign holding company in these circumstances, its enforcement against the holding company can be obtained only in a limited number of countries.[8] Additionally, if a product is directly imported by a business to be used in its own enterprise, then the only claim that a person suffering injury or damage caused by a defective product can make under the CPA will be against the foreign manufacturer.

JURISDICTION GENERALLY

Jurisdiction established by means of service of the court's originating process is "personal jurisdiction" as opposed to "subject matter jurisdiction". The former is jurisdiction in the sense of amenability of the defendant to the courts writ.[9] The latter is jurisdiction in the sense of entertainment of disputes as to a particular subject matter and is particularly relevant in cases in which the relevant law is derived from a statute (such as the CPA).[10] Generally, both "personal" and "subject matter" jurisdiction must be present in any case if the court is to be correctly seized of jurisdiction to be able to hear and determine the dispute.[11]

3 Sections 2(1) and 4(1) CPA.

4 See section 3 of CPA. Cf. paragraph 15 of the Explanatory Memorandum to the Trade Practices Amendment Bill 1992 (Commonwealth) (the Australian legislation that replicates the CPA); *Voth* v. *Manildra Flour Mills* (1990) 171 C.L.R. 538 *per* Brennan J. at 576; *Grehan* v. *Medical Incorporated* [1986] I.R. 528 at 534; Keeton, ed. *Prosser and Keeton on Torts*, 5th ed. (West Publishing, 1984) at p. 695; Miller, *Product Liability and Safety Encyclopaedia*, (Butterworths, 1979) at paragraphs III [14] – [19]. Paragraph [15] states that "[i]t should be noted that there are a number of different types of potential defects. Design defects relate to matters such as the form, structure and composition of the goods. Manufacturing defects are those related to matters such as the process of construction and assembly. Instructional defects are those caused by incorrect or inadequate warnings and instructions. All these categories of 'defect' fall within the meaning ascribed to defect in section 75AC." Cf. Fawcett, n. 1 *supra*, at pp. 201 and 211 – 212. Contrast Waddams, *Products Liability*, 3rd ed. (Carswell, 1993) at p. 152 and Tebbens, *International Product Liability: A Study of Comparative and International Legal Aspects of Product Liability* (Sijthoff & Noordhoff, 1980) at p. 285.

5 Hereinafter, the "own-brander".

6 Section 2(2) CPA. The term "producer" as used in this article will mean the actual producer and own-brander (if any) unless otherwise indicated.

7 Section 2(5) CPA.

8 It appears that it will not be possible in the vast majority of common law countries: *Amust Computer Corporation Pty Ltd.* v. *Australia Entre Business Centres Pty Ltd.* (No. 2) (1987) A.T.P.R. 40 – 829 and *Adams* v. *Cape Industries plc* [1990] Ch 433 (C.A.). However, recovery may be possible against an American Holding Company in these circumstances.

9 See *MacKinnon* v. *Donaldson, Lufkin and Jenrette Securities Corp.* [1988] Ch. 482 at 493; *David Syme & Co. Ltd.* v. *Grey* (1992) 115 A.L.R. 247 *per* Gummow J. at 256 – 257. See further Dutson, "The Conflict of Laws and Statutes" (1997) 60 M.L.R. 668.

10 *Ibid.*

11 *Ibid.*

In England in an action *in personam* the rules as to legal service of a writ define the limits of the court's personal jurisdiction.[12] If a defendant is not in England when served with the court's process and does not submit to the court's jurisdiction, then the English court has no personal jurisdiction at common law to entertain an action *in personam*[13] against them.[14] However R.S.C. Order 11 and its predecessors,[15] have modified this.[16] These rules give the courts a discretion to allow service of the court's process (or notice thereof in lieu) outside the court's territorial jurisdiction. More recently and importantly the Brussels[17] and Lugano[18] Conventions have modified this position in respect of defendants domiciled within the EEA.

In the case of an action commenced in an English court against a defendant domiciled within the EEA "personal jurisdiction" under the CPA and a parallel negligence action will be determined in accordance with the Brussels and Lugano Conventions[19] which were brought into force in the United Kingdom by the Civil Jurisdiction and Judgments Act 1982 (as amended by the Civil Jurisdiction and Judgments Act 1991). However, as against defendants domiciled outside the EEA, subject to any agreements as to jurisdiction made between the parties,[20] "personal jurisdiction" is determined in accordance with the traditional English rules as to service out of the jurisdiction.[21] There appears to be no reason why a plaintiff cannot use the Conventions' jurisdictional rules within the EEA against, for example, an EEA - domiciled importer, in conjunction with the utilisation of the traditional rules against a non-EEA domiciled manufacturer;[22] an American or Japanese domiciled manufacture can therefore be joined in the same action as an English or German domiciled exporter.

EXTRATERRITORIAL SERVICE PROVISIONS WHICH MAY BE EMPLOYED WHEN THE DEFENDANT IS DOMICILED WITHIN THE EEA

The courts of "the place where the harmful event occurred"

It has been concluded by the present author[23] that the causes of action created by the CPA should be characterised as tortious for private international law purposes.[24] Article 5(3) of the Conventions grants special jurisdiction in matters relating to tort or delict to the courts of "the place where the harmful event occurred". Article 5(3) has been considered by the European

12 Collins, ed. *Dicey and Morris on The Conflict of Laws*, 12th ed., (Sweet & Maxwell, 1993) at p. 270.

13 Such as an action in tort or pursuant to the CPA.

14 *Mercedes-Benz AG* v. *Leiduck* [1996] 1 A.C. 284 (P.C.) at 296 – 297; *Jackson* v. *Spittall* (1870) L.R. 5 C.P. 542; *Dicey and Morris* at p. 313; Cairns, *Australian Civil Procedure*, 3rd ed. (The Law Book Company, 1992) at p. 46; and Sharpe, *Inter provincial Product Liability Litigation* (Butterworths, 1982) at p. 2.

15 Originally sections 18 and 19 of the Common Law Procedure Act 1852.

16 Cf. *Mercedes-Benz AG* v. *Leiduck*, *supra*, at 296 – 297 and *Flaherty* v. *Girgis* (1987) 162 C.L.R. 574 *per* Brennan J. at 599 – 600. R.S.C. O.11 and its sub-rules will hereafter be referred to collectively as "the extraterritorial service rules".

17 The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968.

18 The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988.

19 Hereinafter referred to collectively as "the Conventions". The provisions of the Conventions which are relevant to this article are identical.

20 See article 17 of the Conventions. However, situations in which the producer and the plaintiff have some pre-accident relationship are likely to be atypical in product liability cases.

21 I.e. R.S.C. O.11. See article 4 of the Conventions and see generally Briggs in Rose, ed. *Restitution and the Conflict of Laws* (Mansfield Press, 1995) at p. 55. Note however that if an action has been commenced in one Contracting State a court in another Contracting State cannot duplicate those proceedings albeit that the proceedings in both, or one only, of the States were commenced by the court(s) assuming jurisdiction pursuant to their own traditional jurisdictional rules rather than under the Conventions: see article 21 of the Conventions and *Overseas Union Insurance* v. *New Hampshire Insurance*, Case C-351/89, [1991] E.C.R. I- 3317.

22 Cf. Fawcett, n.1 *supra*.

23 Dutson,"Characterisation of Product Liability Claims in Private International Law", (1997) 2 University of Queensland Law Journal, forthcoming.

24 Cf. *Sedgwick Limited* v. *Bain Clarkson Limited (t/a Bain Hogg Limited)* (1995) A.T.P.R. 41 – 411 at 40,559 – 40,560.

Court of Justice in three types of case:[25] where the place of the events giving rise to the damage and the place where the damage occurs, being a single instance of damage, are not the same;[26] where the plaintiff has suffered indirect damage;[27] and where it is difficult to ascertain the place in which the damage occurred because the causal events gave rise to more than one instance of damage.[28] This last type is not of interest for present purposes because the court in *Metall und Rohstoff AG* v. *Donaldson Lufkin & Jenrette Inc.* ("*Metall*")[29] addressed this point and the court in *Shevill*[30] was concerned with allocating jurisdiction between different countries, rather than merely deciding whether the instant country could take jurisdiction (as is the case under Order 11). In *Bier* v. *Mines de Potasse d'Alsace SA* ("*Bier*")[31] the court held that the place where the harmful event occurred under article 5(3) encompassed both the place where the damage occurred and the place of the event giving rise to the damage. It is this interpretation of article 5(3) which Order 11 rule 1(1)(f) patently attempts to, and does, replicate. In *Dumez France and Tracoba SA* v. *Hessiche Landesbank*[32] the court pointed out that article 5(3) supported the need for a connecting factor between the dispute and the court hearing the case.[33] Consequently, the court held that the phrase "the place where the damage occurred", as used in *Bier*, is the place where the tortious conduct which gave rise to the damage directly produced its harmful effects upon the person or the property of the person who is the immediate victim of that event.[34] The court further clarified the law in this area in *Marinari* v. *Lloyds Bank plc* [35] where it stated that "the place where the harmful event occurred" could not be construed so extensively as to encompass any place where the adverse consequences of an event that has already caused actual damage elsewhere could be felt.[36] Consequently it did not include the place where financial loss resulting from initial damage suffered by the plaintiff in another State, is sustained or felt by the plaintiff.[37]

The editors of *Dicey and Morris* have suggested that the place where the damage occurred under article 5(3) is "the place where the physical damage is done or the recoverable economic loss is actually suffered."[38] In the one factual situation which the European Court of Justice has not yet considered article 5(3) – the case in which there was more than one place where the events giving rise to the damage could have taken place - an English court has adopted a different approach to that offered in *Bier*. In *Minster Investments Ltd.* v. *Hyundai Precision & Industry Co. Ltd.* Steyn J. resorted to the English "where in substance the cause of action arises" test.[39] He stated that this approach was derived from the terms of article 5(3), and that the decision in *Bier* was not to be treated as providing comprehensive guidance on that provision.

In *Jacob Handte GmbH* v. *Traitements Mecano-chimiques des Surfaces*[40] the European Court of Justice was dealing with a claim under French law whereby a sub - buyer brought an action directly against a manufacturer claiming damages on the ground that the product did not

25 Cf. *Shevill* v. *Presse Alliance SA*, Case C-68/93, [1995] 2 A.C. 18, ECJ, *per* Darmon A.G. at 34.

26 *Bier* v. *Mines de Potasse d'Alsace SA*, Case 21/76, [1976] E.C.R. 1735.

27 *Dumez France and Tracoba SA* v. *Hessiche Landesbank* , Case C-220/88, [1990] E.C.R. I- 49.

28 *Shevill* v. *Presse Alliance SA*, *supra.*

29 [1990] 1 Q.B. 391 (C.A.).

30 *Supra.*

31 *Supra.*

32 *Supra.*

33 *Supra*, Darmon A.G. at 34.

34 *Supra*, Darmon A.G. at 36.

35 Case C-364/93, [1996] Q.B. 217, ECJ.

36 *Ibid*, at paragraph [14].

37 *Ibid*, at paragraphs [15] and [21]. Cf. *Kitechnology BV* v. *Unicor GmbH Plastmaschien* [1994] I.L. Pr. 568 (C.A.).

38 *Op. cit.* at p. 362.

39 [1988] 2 Ll.L.R. 621. Cf. Fawcett, *op. cit.* at p. 69. Contrast Kaye, n.1 *supra*, at pp. 20 – 22; and Reed and Kennedy, "International Torts and *Shevill*: the Ghost of Forum Shopping Yet to Come" [1996] L.M.C.L.Q. 108 at p. 116.

40 Case C-26/91, [1991] I.L.Pr. 5.

comply with various regulations dealing with safety at work and was unfit for its purpose. The court decided that, whilst this action was characterised as contractual in French law, it was not so characterised for the purpose of the Brussels Convention. In his opinion, Advocate General Jacobs discussed the application of article 5(3) of the Convention to the case if the action were to be characterised as delictual. He stated that, in such a case, the harmful event would be the supply of the defective product by the manufacturer to another party - the buyer. Further, he stated that that event occurred at the place of performance of the manufacturer's obligation to supply goods of sound quality to the buyer which, he stated, was presumably at the manufacturer's premises or at the buyer's premises.[41] He continued "it may be noted that such a supply can properly be treated as a 'harmful event' within the meaning of article 5(3). It is clear that article 5(3) is intended to refer to any event which could give rise to liability in delict."[42] He also stated that in such a case the place where the damage occurred under article 5(3) would also be the place where the manufacturer supplied the defective product to the buyer.[43] Advocate General Jacobs specifically considered a case in which "the goods, instead of simply being of inferior quality, were dangerous and caused physical harm to the sub–buyer's person or property."[44] He stated that "[d]ifferent considerations would apply... in such a case the sub-buyer would be the immediate victim."[45] The patent implication of this passage in context was that the Advocate General believed that in these circumstances article 5(3) would allow for the manufacturer to be sued at the place where the sub-buyer, as opposed to the buyer, suffered damage.

Fawcett has addressed the issue of the application of article 5(3) to an action brought under legislation which, like the CPA, implements the Product Liability Directive.[46] He considered the question as to which place would be "the place of the event giving rise to the damage" under the Directive.[47] He determined this issue by applying "the English solution"[48] to each type of possible defendant under the Directive.[49] In the case of the manufacturer Fawcett offered three possible solutions. He first suggested that the "cause of action against the manufacturer arises in the State in which the product is manufactured."[50] However, he noted that this may prove difficult to ascertain in cases with complex factual scenarios.[51] His second solution rested upon the distinction between a product, on the one hand, that is defective because of the way it was manufactured, and a product, on the other, which is defective because of a design fault or failure to warn. In the latter two cases he stated that the cause of action arises in the place of design or the place where the necessary warning should have been given, respectively.[52] Finally, he stated that "it could be said that the cause of action arises in the State in which the product is circulated."[53] He noted that the "major drawback" of this solution is "the uncertainty over the precise moment when a product can be said to have been put into circulation."[54] He stated that this could be the State in which the product is first circulated by the manufacturer

41 *Ibid*, pp. 16-17.

42 *Ibid*, p. 17 n. 97.

43 *Ibid*, p. 17.

44 *Ibid*, p. 18.

45 *Ibid*, p. 18.

46 Directive 85/374. See Fawcett, *op. cit.* at p. 64ff.

47 At p. 68 ff.

48 The "where in substance the cause of action arises" approach - as applied to article 5(3) by the court in *Minster Investments Ltd.* v. *Hyundai Precision & Industry Co. Ltd.;* Kaye, *supra*, pp 20 – 22, denies that there is any utility in this approach to article 5(3).

49 Viz. The manufacturer, an importer or a supplier.

50 *Op. cit.* at p. 70. Cf. Tebbens in Tebbens *et al* (eds.), *Civil Jurisdiction and Judgments in Europe* (Butterworths, 1992) at p. 92.

51 *Ibid*, p. 71.

52 *Ibid.*

53 *Ibid*, p. 71. Cf. Tebbens, n. 4 *supra*, at pp. 293 – 294 and 309 where he favours the place where the product is put on the market.

54 *Ibid*, p. 72.

i.e. "the place of delivery by the manufacturer to other in the course of business"[55] or "the State in which the product is last circulated (whether by the manufacturer or by a supplier) prior to the damage." He noted one "clear reservation" to a State of circulation test; "it does not work well... in cases where the product is routinely used outside of the State of delivery." [56] As regards the importer, Fawcett stated that "[h]ere the cause of action could be said to arise either in the State into which the importer imported the goods into the European Community or in the State in which he first circulated the product"[57] and, as regards the supplier "the cause of action doubtless arises in the State in which the supplier suppliers the product."[58]

Tebbens has stated that in a case brought under legislation implementing the Product Liability Directive, the events giving rise to the damage for the purpose of article 5(3) could be the place of production and the place of release into circulation of the product.[59] On a previous occasion he favoured the placing of the product on the "market" for ultimate sale.[60]

The event giving rise to the damage for the purpose of article 5(3) (as interpreted in *Bier*) in an action against a producer under legislation implementing the Product Liability Directive, is the production of a defective product. The elements of the cause of action under the Directive and the legislation implementing it are threefold (i) defect; (ii) damage; and (iii) that the defect caused the damage.[61] The events that give rise to liability in tort are[62] therefore threefold. However, damage is covered by the second limb of the *Bier* interpretation of article 5(3). In *Bier* the European Court of Justice was at pains to distinguish between the event giving rise to the damage and the damage itself (either of which could be the harmful event for the purpose of article 5(3).[63] The three types of defect (manufacturing, design and instructional) become relevant at this point. In cases of a manufacturing defect it is the production of a defective product that is the event giving rise to liability in tort and the event giving rise to damage for the purpose of article 5(3) as interpreted in *Bier*. In cases of a design or instructional defect the same can be said of the places of design and marketing respectively. Except in instructional defect cases, the placing of the product on the market and the circulation of the product find no place in the elements of the cause of action under the Directive or the legislation implementing it - a producer is not made liable in cases of a manufacturing or design defect because a defective product that caused injury or damage that he had produced was marketed or circulated - he is liable because he produced or designed a defective product that caused damage or injury. The product may well be placed on the market or circulated by a separate legal entity altogether. Indeed, it will often be the case that the producer has very little or no effective control in placing the product on the market for reasons such as the dominance of the position of its buyer in its relationship with the producer. Can it be the placing on the market by the buyer which gives rise to liability in tort on the part of the producer,[64] especially when the actions of the separate buyer or seller do not necessarily give rise to liability in tort on the part of that party? Further, many products are designed to leave their market: aircraft, ships, buses and cars (and the component products that constitute their parts) may well leave the country in which they were marketed regularly or permanently.[65] Many products are placed on the

55 *Ibid.*

56 *Ibid.*

57 *Ibid*, p. 73.

58 *Ibid.*

59 Tebbens *et al*, n. 50 *supra*, at p. 92.

60 Tebbens, n. 4 *supra*, pp. 293-294 and 309.

61 Articles 1 and 4 of the Directive.

62 Cf. *Jakob Handte GmbH* v. *Traitements Mecano-chimiques des Surfaces, supra, per* Jacobs AG at p. 17 n. 97.

63 Cf. *Marinari* v. *Lloyds Bank plc*, Case C-364/93, [1996] Q.B.217, E.C.J. at 228-229 paragraphs [11] – [12].

64 Cf *Jakob Handte GmbH* v. *Traitements Mecano-chimiques des Surfaces, supra, per Jacobs AG* at p. 17 n. 97.

65 Cf. Tebbens, n. 4 *supra*, pp. 386-390 and the problems that he there addresses in accommodating aircraft and ships into his "market choice of law" formula. Tebbens' solution in these cases is to employ the place of production.

market with the hope or probability that they will leave it with the utmost celerity, for example, duty - free goods and plug adapters. Is the place where these products were placed on the market to be the place of the event giving rise to the damage? If this were so then article 5(3) would allocate jurisdiction to a State that has no interest in exercising it, a State in which the product is rarely, or in which it was only ever present for a short period while every effort was being made to remove it from the jurisdiction and both seller and ultimate buyer were aware of this fact. No such problems arise if the place of production or design respectively, is selected. Similar arguments can be made with respect to Order 11 rule 1(1) (f).[66] Accordingly, a plaintiff will be able to use article 5(3) to commence an action under the CPA or in negligence in an English court against a producer domiciled within the EEA if; the plaintiff suffered damage in England; if the producer is domiciled in England; in the case of a manufacturing defect, if the product was produced in England; in the case of a design defect, if the product was designed in England; or in the case of an instructional defect, if the product was marketed in England.

Article 6(1) – The courts of the place where any one defendant is domiciled

Article 6(1) of the Conventions provides that a person, who is one of a number of defendants, may be sued in the courts for the place where any one of them[67] is domiciled. Article 6(1) is applied where it is expedient to hear and determine actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.[68] It is applied in similar circumstances to R.S.C. Order 11 rule 1(1)(c)[69] - a party may be sued in England under this article only if he could have been properly joined in the original action had he been within the jurisdiction.[70]

In the case of a negligence action it appears that the plaintiff will be able to join the foreign manufacturer as a party to an action; in negligence against the assembler[71] of the goods, if any, who may well be within the jurisdiction;[72] in contract against the seller of the product to the plaintiff (if any) who may well be within the jurisdiction;[73] or, against the importer, own-brander or supplier brought under the CPA;[74] because in each case they can be joined in the original action pursuant to the ordinary rules for joining defendants[75] - their liability arises out of the same transaction.[76] In each case the plaintiff would have been able to join both defendants in the same action had the foreign manufacturer been within the jurisdiction.[77]

The CPA provides for the importer of the goods into the relevant jurisdiction, any own-brander of the goods, and a supplier of the goods who fails to respond to a request for the identity of the manufacturer or his supplier, to be liable under the Act[78] in addition to the actual

66 See below.

67 This party will be referred to as the "original defendant".

68 *Kalfelis* v. *Schroder, Munchmeyer, Hengst & Co.*, Case C-198/87, [1988] E.C.R. 5565.

69 The analogous provision in cases in which the defendant is not domiciled in the EEA. This provision is discussed in detail below.

70 *Kalfelis* v. *Schroder, Munchmeyer, Hengst & Co., supra* ; and *Molnlycke AB & Anor.* v. *Procter & Gamble Ltd. & Ors. (No 4)* [1992] RPC 21 (CA) at p. 27.

71 The principle in *Donoghue* v. *Stevenson* [1932] A.C. 562 extends in its application to assemblers: *Howard* v. *Furness, Houlder Ltd.* [1936] 2 All E.R. 296.

72 *The Manchester Courage* [1973] 1 Lloyd's Rep 386, *Adstra Aviation Ltd.* v. *Airparts (NZ) Ltd.* [1964] N.Z.L.R. 393, *Pratt* v. *Rural Aviation Ltd.* [1969] N.Z.L.R. 46; Sharpe, *op. cit*, at pp. 32, 33; Romero,"The Consumer Products Warranties Act (Part II)" (1979-80) 41(2) Saskatchewan Law Review 261 at p. 269-270; Waddams, *op. cit.* at p. 154; and *Dicey and Morris*, at p. 327, illustration 6; and p. 343, illustration 3, footnote 98.

73 *Adstra Aviation Ltd.* v. *Airparts (NZ) Ltd.;* Sharpe; Romero, at p. 269-270; Waddams; and *Dicey and Morris*, all *op. cit.* Cf. *The Manchester Courage* and *Pratt* v. *Rural Aviation Ltd., supra.* Note that the cause of action against the defendants does not have to be the same: *Osterreicheische Export AG* v. *British Indemnity Insurance Co.* [1914] 2 K.B. 747.

74 Cf. n. 73 and *Bank of New South Wales* v. *Commonwealth Steel Co. Ltd.* [1983] 1 N.S.W.L.R. 69.

75 *Societe Commerciale de Reassurance* v. *Eras International Ltd.* [1992] 1 Ll. L.R. 570 (C.A.) at 592. Cf. Fawcett, J.J. "Multi-party Litigation in Private International Law" (1995) 44 I.C.L.Q.R. 744 at p. 748.

76 *Op. cit.* n. 74.

77 Cf. *Jan Poulsen & Co.* v. *Seaboard Shipping Co. Ltd.* [1995] I.L.Pr. 698 at 704 (S.Ct. B.C.).

78 In this case of the dilatory supplier is deemed to be the manufacturer.

manufacturer. The importer, own-brander, supplier and actual manufacturer[79] are jointly and severally liable,[80] and the plaintiff is entitled to sue any combination of them in the same action. In the case of the CPA the plaintiff will establish jurisdiction against the importer into the EU and an EEA domiciled own-brander or supplier using the Conventions.[81] Therefore, in the case of actions brought under the CPA, the actual foreign manufacturer could be a party to an action against the importer, own-brander or supplier brought under the relevant Act[82] because in each case they can be joined in the original action pursuant to the ordinary rules for joining defendants - the liability arises out of the same transaction, they are jointly and severally liable for the same damage and the case against each will largely be identical to the case against the other. Additionally, in the case of actions brought under the CPA, it appears that the plaintiff will be able to join the foreign manufacturer as a party to an action in negligence against the assembler of the goods, if any, who may well be within the jurisdiction; and an action in contract against the seller of the product to the plaintiffs (if any), who may also be within the jurisdiction; because they can be joined in the original action pursuant to the ordinary rules for joining defendants - the liability arises out of the same transaction. In each of these cases the plaintiff would have been able to join defendants in the same action had the foreign manufacturer been within the jurisdiction.

Article 6(2)- Third party proceedings

Article 6(2) of the Conventions provides that a person domiciled in a Contracting State may be sued as a third party in any third party proceedings in the court seized of the original proceedings, unless they were instituted solely with the object of removing them from the jurisdiction of the court which would be competent in his case. Accordingly, an importer sued pursuant to the CPA may be able to issue a third party notice claiming contribution or indemnity from the foreign manufacturer.[83] If the importer, assembler, owner-brander, supplier, seller, or other party made liable in negligence, contract or CPA proceedings merely seeks contribution or indemnity from the foreign manufacturer as opposed to counter-claiming from the plaintiff then they can rely on article 6(2) to establish jurisdiction in an English court in an action against the third party.

EXTRATERRITORIAL SERVICE PROVISIONS WHICH MAY BE EMPLOYED WHEN THE DEFENDANT IS DOMICILED OUTSIDE THE EEA

Is R.S.C. Order 11 applicable to the CPA?

Section 6(7) of the CPA provides that "it is hereby declared that liability by virtue of [Part I] is to be treated as liability in tort for the purposes of any enactment conferring jurisdiction on any court with respect to any matter." Section 6(7) does not classify liability pursuant to Part I as a tort for all purposes, only for enactments conferring jurisdiction. The question arises whether (whether or not the law on characterisation would result in the CPA being characterised as a tort) section 6(7) provides that liability under the CPA is in tort for the purpose of the English extraterritorial service rules.

79 Section 2(2)(b) and (c) ; and 2(3) of the CPA. See also Dutson, "International Product Liability Litigation", *supra.*

80 Section 2(5) of the CPA.

81 If the supplier is not domiciled within Europe then (subject to any agreement as to European jurisdiction: see article 17 of the Conventions) any attempt to serve him under R.S.C. O.11 will require the same analysis as that outlined below in respect of the foreign manufacturer and the CPA because the supplier is made liable in the same circumstances as the manufacturer by section 2(3).

82 Fawcett, n. 75 *supra*; Sharpe; Romero and Waddams, all *supra*. Cf. *Colonna* v. *Healy Motors Ltd.* (1952) 5 W. W. R. 446 (Alberta S.C.); *Eversure Textiles Manufacturing Co. Ltd.* v. *Webb* [1978] QdR 347; *Wesc Banking Corp. Ltd.* v. *Commonwealth Steel Co. Ltd.* [1983] 1 N.S.W.L.R. 735; *Adstra Aviation Ltd* v. *Airports (NZ), supra*; and *Dicey & Morris* at p. 327, illustration 6.

83 *Dicey & Morris* at p. 327, illustration 7.

If section 6(7) of the CPA is to apply to Order 11, then the Rules of the Supreme Court, or at least Order 11 itself, must be an "enactment" which "confers jurisdiction" on the court. These two issues will now be addressed. Order 11 and the remainder of the Rules were made by judges acting under statutory authority.[84] Section 21(1) of the Interpretation Act 1978 provides that "in this Act... 'subordinate legislation' means orders in council, orders, rules, regulations... and other instruments made or to be made under any act." Accordingly, it appears that the Supreme Court Rules are indeed subordinate legislation.[85] Furthermore, a number of decisions in common law jurisdictions have held that the term "enactment" includes items of subordinate legislation such as regulations, by-laws and rules of court.[86] It appears, therefore, that the term "enactment" refers equally to both primary and subordinate legislation. Accordingly, it follows that Order 11 is an "enactment".[87]

Order 11 endows the court with a discretion to allow service of the court's process on a defendant who is outside England if specified conditions are met. It therefore confers jurisdiction on the Supreme Court by allowing for extraterritorial service, and thereby personal jurisdiction in the courts when service takes place, where such service and such jurisdiction did not exist prior to Order 11 and its predecessors.[88] It therefore appears that by virtue of section 6 (7) of the CPA, liability under the C A is to be treated as a tort for the purpose of Order 11.[89]

The "claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction"

Order 11, rule 1(1)(f) provides for extraterritorial service where a "claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction."[90] Whether an action is "founded on a tort" and whether the requirements of Order 11 have been satisfied, is determined in accordance with the *lex fori*.[91]

Prior to the amendment of Order 11 in 1987 the English tort extraterritorial service rule provided for a claim founded on a "tort committed within the jurisdiction." The new version of the tort rule was adopted to bring Order 11 into line with article 5(3) of the Brussels Convention which confers special jurisdiction on courts in matters relating to tort or delict and with the decision of the European Court of Justice in *Bier*.[92]

In *Metall* [93] the Court of Appeal considered Order 11 rule 1(1)(f) in some detail and in so doing provided the only reported guidelines for interpretation to date. The court appears to have

84 Section 84 Supreme Court Act 1981.

85 Cf. Bennion, *Statutory Interpretation: A Code*, 2nd ed., (Butterworths, 1992) at p. 172.

86 *Drywall Services Grand Centre Ltd.* v. *P.C.L. Constructors Northern Inc.* (1991) 47 C.P.C. (2d) 33 at 34 (regulations and rules of court); *Allsop* v. *North Tyneside M.B.C.* The Times, 18 October 1991, p. 455 (delegated legislation); *Wilkin* v. *White* (1979) 108 D.L.R. (3d.) 468 (by-laws); and *R.* v. *Conway* [1943] E.D.L. 215 (South Africa). Cf. *Black* v. *Fulcher* [1988] 1 N.Z.L.R. 417 at 419 (C.A.); *Rathbone* v. *Bundock* [1962] 2 Q.B. 260 at 273; and Bennion, *op. cit.* at pp. 172, 179, 284-287 and 487-488.

87 Cf. Bennion, *op. cit.* at pp. 179 and 287.

88 See n. 15 *supra* ; *Flaherty* v. *Girgis*, *supra*, *per* Mason A.C.J., Wilson and Dawson JJ. at 598; *Golliath Portland Cement Co. Ltd.* v. *Bengtell* (1994) 33 N.S.W.L.R. 414 at 417; and Goldring J., "Product Liability And the Conflict of Laws in Australia" (1978) 6 Adelaide Law Review 413 at p. 420. Cf. *Societe Commerciale de Reassurance* v. *Eras International Ltd.*, *supra* at 587; *Hodge* v. *Club Motor Insurance* (1974) 7 S.A.S.R. 86 *per* Bray C.J. at 92, 93; and Goldring and Young, *Product Liability: Remedies and Enforcement*, Australian Law Reform Commission Research Paper No. 5, (Australian Law Reform Commission, 1989) at 117 paragraph 244.

89 Cf. Nelson-Jones and Stewart, *Product Liability: The New Law under the Consumer Protection Act 1987* (Fourmat Publishing, 1988) at p. 98; and Cromie, "Commercial Claims in Europe" (1992) New Law Journal 1423 at p. 1423.

90 The expression "damage" in this section of this article refers to damage suffered within England and Wales.

91 *Metall*, *supra*, overruled in *Lonrho plc* v. *Fayed* [1992] 1 A.C. 448 but not on this point; and *Dicey and Morris* at p. 1508.

92 *Op. cit.*, see also *Metall*, *supra*, at 437 ; *Societe Commerciale de Reassurance* v. *Eras International Ltd.*, *op. cit*, at 589; North, *Essays in Private International Law* (Clarendon Press, 1993) at p. 8; and North and Fawcett, *Cheshire and North's Private International Law* , 12th. ed., (Butterworths, 1992) at p. 199.

93 *Supra*, overruled in *Lonrho plc* v. *Fayed*, *supra*, but not on these points.

stated that the substance test[94] is, after the re-drafting of the tort extraterritorial service rule, only relevant in England for choice of law[95] and *forum non conveniens* [96] purposes.[97] The court made no reference to the pre-existing law on where a tort is committed in the context of the new Order 11 tort extraterritorial service provision. It held that it is not necessary that all the damage should have been sustained within the jurisdiction; it is enough if some significant damage has been sustained in England. Nor is it necessary that the whole act has been committed within the jurisdiction;[98] the court must look at the tort alleged in a common-sense way and ask whether damage has resulted from a substantial and efficacious act committed by the defendant within the jurisdiction, whether or not other substantial and efficacious acts have been committed elsewhere.[99] The editors of *Dicey and Morris* state that "damage sustained within the jurisdiction must refer to recoverable damage, including recoverable economic loss. In Canada and Australia, similar wording has been held to apply to consequential pecuniary damage sustained in the forum flowing from physical injury caused outside the forum."[100]

In respect of the "defendants act" limb and its application to the CPA, the three types of defect identified in the cases and literature may assume some significance.[101] In the case of a manufacturing or design defect the relevant act of the defendant appears to be the manufacture or design of the product respectively. In these types of case they will be the only relevant acts of the manufacturer unless it markets the product in the jurisdiction itself. In the cases with which this article is concerned, the manufacture and design will take place outside the jurisdiction. In cases of instructional defect the failure to warn or adequately to warn within the jurisdiction could assume the significance of a substantial and efficacious act committed with in the jurisdiction. This act may occur where the product was marketed. However, in these cases the injury or damage will typically have occurred within the jurisdiction. Accordingly, it appears that in product liability cases this limb adds very little to the first limb.

One possible source of jurisprudence on the present Order 11 rule 1(1)(f) is the European material on the interpretation of the equivalent European provision.[102] As Order 11 rule 1(1)(f) was adopted in order to bring the tort rule into line with the European regime it appears that, while English courts presently appear to be adopting different approaches to the English and European tort/delict jurisdictional rules,[103] and while an English court interpreting Order 11 cannot be bound by a European Court of Justice decision interpreting article 5(3) of the Brussels Convention,[104] it might nonetheless be influenced by the Convention and relevant European

94 As used by the English courts in the application of the former extraterritorial service rule.

95 *Ibid*, p. 446. Cf. *Dicey and Morris* at p. 1512 and *semble* 341; and Morse,"Product Liability in the Conflict of Laws" (1989) 42 Current Legal Problems 167 at pp. 172, 173.

96 *Ibid*, pp. 488, 489.

97 Cf. *Cheshire and North*, p. 553; Morse, *supra*, at 172, 173; and Collier, *The Conflict of Laws*, 2nd ed. (Cambridge University Press, 1994) at pp. 87 and 230. Contrast *MacGregor* v. *Application des Gaz* [1976] QdR 175 at 176 and *My* v. *Toyota Motor Co. Ltd.* [1977] 2 N.Z.L.R. 113 at 117. In both cases the *Distillers* approach was applied to provisions providing for extraterritorial service "where any act for which damages are [claimed/sought]...was done [within/in] the [jurisdiction]"; Sykes and Pryles, *Australian Private International Law*, 3rd ed. (The Law Book Company, 1991) at p. 42.

98 This much is obvious from the wording of O.11 r.1(1)(f). The court however did then proceed to expound a test of sorts as to when this portion of the rule is satisfied.

99 *Metall, op. cit.* at 437.

100 *Dicey and Morris* at p. 341.

101 See n. 4 *supra*.

102 In a number of decisions in which the courts have been required to interpret O. 11 judges have given some consideration to the European regime and expressed a desire to interpret O. 11 in accordance with the Brussels Convention: *Societe de Reassurance* v. *Eras International Ltd.*, *supra*, at 590-591(a case dealing with O. 11r.1(1)(f) (and Article 5(3)); *Suskina (Cargo Owners)* v. *Distos SA* [1979] A.C. 210 *per* Denning M.R. at 233, 234 (C.A.), *per* Lord Diplock and Hailsham at 258, 259 and 262, 263 respectively (H.L.); *Kleinwort Benson Ltd.* v. *City of Glasgow D.C.* [1996] 2 All E.R. 257 *per* Leggatt L.J. (dissenting, but not on this point) at 262 and Millett L.J. at 272; and *James North Ltd.* v. *North Cape Ltd.* [1984] 1 W.L.R. 1428 at 1434 (C.A.). Cf. *Cheshire and North*, p. 199.

103 See the discussion of article 5(3) above.

104 Cf. *Kleinwort Benson Ltd.* v. *City of Glasgow D.C.* [1996] Q.B. 57, E.C.J.

decisions.[105] The Court of Appeal in *Metall* appeared to state that Order 11 rule 1(1)(f) should be interpreted in accord with the "correct construction" of article 5(3).[106] Accordingly, it appears that reference to European decisions on the corresponding European provision may be of assistance. However, one possible limitation to the utility of jurisprudence dealing with article 5(3) in the interpretation of Order 11 rule 1(1)(f) is that, because article 21 of the Conventions prevents multiple proceedings arising in respect of any one matter, it may be that the European courts have not been, and have not needed to be, too precise in the definition of the place where the harmful event occurred for the purposes of article 5(3). In contrast, there is little to prevent multiple proceedings being initiated in respect of the actions with which Order 11 is concerned. Accordingly, it may be that the English courts are required, of necessity, to ensure that the matter has a greater connection with England than article 5(3) requires with a European country, before jurisdiction can be established.

If the European decisions considered above are to provide any guidance then it appears that, in contrast to the views of the editors of *Dicey and Morris*,[107] the compass of the concept of damage will not include any indirect damage. The nomenclature used in *Dumez* was not employed in *Metall*. However, a *Dumez* type approach to Order 11 rule 1(1)(f) is not inconsistent with *Metall* and a similar principle may yet develop in respect of Order 11 rule 1(1)(f). This would exclude indirect damage (such as financial loss resulting from direct injury or damage) from Order 11 rule 1(1)(f).[108] The European decisions would also reiterate that it is not necessary that all the damage should have been sustained within the jurisdiction to satisfy the rule. In European law the greatest uncertainty appears to be over the of the place of the event giving rise to the damage in a case under legislation implementing the Directive. In interpreting article 5(3) the court in *Minster Investments*[109] used English reasoning which, it appears, is now used in England exclusively to determine the *locus* of a tort for the purpose of the choice of law rule in tort or in the determination of a *forum non conveniens* issue – viz. the "substance of the cause of action approach".[110] As the court in *Metall* appears to have excised this language from the analysis of the tort extraterritorial service provision it would seem antithetical that it be reintroduced into Order 11 rule 1(1) (f) by virtue of reliance on European jurisprudence. Tebbens and, in particular, Fawcett have offered suggestions as to where this will be the case. However, Tebbens fails to explain his reasoning in any detail. Fawcett relies primarily upon the English "substance of the cause of action approach", noted above. It appears that the essential element for this purpose will be the nature of the defect with the result that the place of the event giving rise to the damage will vary depending upon what type of defect the product is suffering from. In the case of a manufacturing defect, the event will be the production of the product; in the case of a design defect, it will be the design of the product; and in the case of an instructional defect, it will be the marketing of the product.

105 Cf. *Metall, op. cit.*, at 437; *Cheshire and North*, p. 199; and n. 102 *supra*. Note also that when interpreting O. 11 "it is not enough simply to read the words of the rule and see whether, taken literally, they are wide enough to cover the case. Regard must be paid to their intent, their spirit..."; *Mercedes – Benz AG* v. *Leiduck, supra.*

106 *Metall, op. cit.* at 437. Cf. n. 102 *supra.*

107 *Dicey and Morris*, p. 362.

108 Contrast Davies, "Conflict of Laws Issues in Fatal Accidents Actions" (1993) 1 Torts Law Journal 45 at p. 47 where *Metall* is described, incorrectly in the present author's opinion, as a decision that supports service outside the jurisdiction under O.11 r.1 (1)(f) where a plaintiff has been injured outside the jurisdiction, but suffers a continuing need for medical treatment and a continuing loss of earning capacity, within the jurisdiction.

109 *Supra.*

110 In a jurisdictional, as opposed to choice of law context, it may be that the "substance of the cause of action" approach is now only relevant within the choice of law rule's role in determining whether the claim is "founded on a tort" within O. 11 r.1 (1) (f), and not in determining the ultimate question whether "the damage was sustained, or resulted from an act committed, within the jurisdiction."

CONCLUSIONS ABOUT JURISDICTION

In the cases with which this article is concerned, those in which some damage has been sustained within the jurisdiction will be more likely to arise and thereby attract the operation of Order 11; a plaintiff injured or suffering damage within England due to a defect in a product manufactured outside Europe will be entitled to serve a writ on the foreign manufacturer under this rule. If decisions dealing with article 5(3) are relevant to the proper interpretation of Order 11 rule 1(1)(f) then it appears that "damage" may not include any indirect damage such as financial loss resulting from physical damage.

As regards the second limb of Order 11 rule 1(1)(f) - "defendant's act" – it appears that the law dealing with the former English head of extraterritorial service in cases of tort may not be relevant to the new rule; no authority exists, however, on exactly what constitutes a "substantial and efficacious act" by the defendant. Examples of "acts by a foreign manufacturer that might qualify as substantial and efficacious" could include the marketing or circulating of a product within England. However, it may well be the case that these acts are undertaken by a local supplier or agent and not the foreign manufacturer itself, in which case it appears that they cannot qualify as acts committed by the manufacturer. The present author favours the view that in cases in which Order 11 rule 1(1)(f) is being applied to the CPA a distinction may be drawn between the three recognised types of defect. Moreover, if decisions dealing with article 5(3) are relevant to the proper interpretation of Order 11 rule 1(1)(f), then it appears that the law dealing with the former English head for extraterritorial service in cases of tort could resurface under this limb of the new rule. It appears that this law would also favour the use of the threefold taxonomy of "defect". In interpreting article 5(3) in *Minster Investments Ltd.* v. *Hyundai Precision & Industry Co. Ltd.* [111] Steyn J. resorted to the English "where in substance the cause of action arises" (the test applied to determine whether "the tort was committed within the jurisdiction" under the former English tort extraterritorial service rule). The cases in which this test has been applied would suggest that in the situations with which this article is concerned the only occasion on which a defendant will commit an act within the jurisdiction will be in the case of an instructional defect. In these cases the defendant's act will take place either at the place of manufacture or within the jurisdiction in which the goods were placed on the market for distribution with the manufacturer's knowledge. In cases of a manufacturing defect the place of the defendant's act will be the place of manufacture or initial supply, and in the case of a design defect the place will be where the product was designed. Accordingly, if this line of authority is followed, then in the cases with which this article is concerned, extraterritorial service will not be permissible in cases of a manufacturing or design defect.

If decisions dealing with article 5(3) are relevant to the proper interpretation of Order 11 rule 1(1)(f) then it also appears that a person will be able to commence an action under the CPA, or in negligence, in an English court against a foreign producer if the plaintiff suffered damage in England, or, in an instructional defect case, if the product was marketed in England. In the present author's opinion, whether or not article 5(3) is relevant to the proper interpretation of Order 11 rule 1(1)(f), these conclusions replicate the correct determinations reached upon the application of Order 11 rule 1(1)(f) to a product liability problem.

Accordingly, a plaintiff will be able to use Order 11 rule 1(1)(f) to commence an action under the CPA, or in negligence, in an English court against a foreign producer if the plaintiff suffered damage in England, if the foreign producer itself marketed the defective product in England, or, in an instructional defect case, if the product was marketed in England whoever undertook the marketing.

[111] [1988] 2 Ll.L.R. 621. Cf. Fawcett , n. 1 *supra*, at p. 69. Contrast Kaye, n. 2 *supra*, at pp. 20 – 22; and Reed and Kennedy, n. 39 *supra*, at 116.

Necessary or proper party

The Supreme Court Rules contain a provision which allows for extraterritorial service if the party to be served [112] is a necessary or proper party to a claim brought against another party duly served or to be served.[113] The original defendant may be served either within or without the jurisdiction.

In the case of a negligence action or an action under the CPA a foreign manufacturer can be joined as a necessary or proper party in the same circumstances as were discussed with respect to article 6(1) above.

There are English decisions which state that the secondary defendant cannot be served under Order 11 rule 1(1)(c) if the sole, as opposed to predominant, purpose of the action against the original defendant is to enable or facilitate jurisdiction against the secondary defendant.[114] The express requirement that the proceedings be "properly brought" against the original defendant has been replaced by a requirement that an application made under this head be supported by an affidavit which includes a deposition to the effect that there is a real issue between the plaintiff and the original defendant which the plaintiff may reasonably ask the court to try.[115] There is no authority as to whether this alteration affects the authority of the older English decisions, however, a number of jurists believe that the end result will be the same under the new version of the rule.[116] The action against the supplier in the case of the negligence action, or, the importer, own-brander or supplier in the case of a CPA action will be sufficient to satisfy this requirement. That the own-brander, supplier or importer will not be able completely, or perhaps even partially, to satisfy any judgment against it and that the action against the own-brander, supplier or importer was brought for the predominant, as opposed to sole, purpose of suing the foreign manufacturer and thereby gaining access to a pecunious defendant, does not detract from the fact that there is an action properly brought against the original defendant which has a real issue to be tried and in which the plaintiff genuinely desires to succeed and recover some damages.[117] Accordingly, this extraterritorial service rule could prove to be particularly useful in cases with which this article is concerned.

Contribution or indemnity for a liability enforceable by proceedings in the court

In England the necessary or proper party head[118] includes within its compass third party proceedings brought by virtue of Order 16 rule 3(4). Therefore, an importer sued pursuant to the CPA may be able to issue a third party notice claiming contribution or indemnity from the foreign manufacturer.[119] If the importer, assembler, own-brander, supplier, seller, or other party made liable in negligence, contract or CPA proceedings merely seeks contribution or indemnity from the foreign manufacturer as opposed to counter-claiming from the plaintiff, then they can rely on the necessary or proper parties head to effect service on the third party.

112 Herein referred to as the secondary defendant.

113 R.S.C. O.11 r.1(1)(c). The latter party is referred to herein as the original defendant.

114 *Coppin* v. *Tobler Brothers Canberra Marine Centre Pty Ltd.* [1980] 1 N.S.W.L.R. 183; *Rosler* v. *Hilbery* [1925] Ch. 250; and *Multinational Gas Co.* v. *Multinational Gas Services Ltd.* [1983] Ch 258 (CA). Cf. Collier, *supra*, at p. 83. The position is the same in Canada: *Jan Poulsen & Co.* v. *Seaboard Shipping Co. Ltd.* [1995] I.L.Pr. 698 at 702 (S. Ct. B.C.). However, the editors of *Dicey & Morris* favour the less stringent view of the minority in *Multinational Gas Co.* v. *Multinational Gas Services Ltd.* See *Dicey & Morris*, p. 325.

115 R.S.C. O.11 r.4(1).

116 Collier, *supra*, p. 83; and *Cheshire and North*, p. 194.

117 Cf. *Multinational Gas Co.* v. *Multinational Gas Services Ltd.*, *supra*, *per* May L.J. at 276 and 279; and Dillon L.J. at 285 – 287. Contrast Lawton L.J. at 268, and *The Electric Furnace Co.* v. *Selas Corporation of America* [1987] R.P.C. 23 at 33 (C.A.).

118 R.S.C. O.11 r.1(1)(c).

119 *Dicey & Morris* at p. 327, illustration 7.

The CPA and negligence actions out of English courts against either an EEA or a non-EEA domiciled manufacturer

It appears that a plaintiff can issue and serve originating process covering claims both in negligence and under the CPA on a foreign manufacturer, assembler or designer in any of the following cases:

1. Pursuant to article 5(3) or Order 11 rule 1(1)(f) where; the plaintiff suffers some significant injury or damage within England; the foreign producer itself markets the defective product in England; or, in an instructional defect case, the product is marketed in England whoever undertook the marketing; or

2. pursuant to article 6(1) or Order 11 rule 1(1)(c) in the negligence action if an action is also brought against the assembler, if any, in negligence; against the importer or other party made liable by the CPA; or against the seller to the plaintiff, if any, in contract. In the case of the CPA action, against the importer or other party made liable by the CPA; against the assembler, if any, in negligence; or against the seller to the plaintiff, if any, in contract - where the court has personal jurisdiction over the latter party(s) under Order 11 or the Conventions.

It appears that an assembler sued in negligence, a seller sued in contract, or an importer or other party sued under the CPA can serve the foreign manufacturer with a third party notice claiming contribution or indemnity under article 6(2) or Order 11 rule 1(1)(c).

FORUM NON CONVENIENS

The law dealing with the circumstances in which a court will stay its own proceedings[120] on the basis that, whilst its jurisdiction has been regularly invoked it is an inappropriate forum, or that there is a more appropriate forum elsewhere, is termed *forum non conveniens* and is dealt with extensively in all of the leading private international law texts.[121]

This section will deal with a number of discrete topics concerning the doctrine of *forum non conveniens* as it applies in England to product liability actions. These issues may well arise in many international product liability cases.

Summary of the law on forum non conveniens

A defendant seeking to have the proceedings stayed on the grounds of *forum non conveniens* must establish that there is some other available forum, having competent jurisdiction, that is clearly or distinctly more appropriate than the English forum for the trial of the action.[122] The court will look first to see what factors there are that point in the direction of another forum.[123] These are termed "connecting factors" and they indicate which forum is the "natural forum" in the sense of the forum with which the action has the most real and substantial connection.[124]

120 In England the law dealing with whether; a court will grant leave to serve its process out of the jurisdiction; a court will grant leave for a plaintiff to proceed who has served his process out of the jurisdiction and the defendant has failed to enter an appearance; a defendant served out of the jurisdiction can have service set aside (or can have a court stay its own proceedings on the basis that, whilst its jurisdiction has been regularly invoked, it is an inappropriate forum); all include, *inter alia*, the application of the principle of *forum non conveniens*: *Spiliada Maritime Corp.* v. *Cansulex Ltd.* [1987] 1 A.C. 460. The four applications of the principle will be collectively referred to by the term "a stay of proceedings". For the differering onus in the different types of application see *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, *supra*.

121 See, e.g. *Dicey & Morris*, chapter 12; Collier, chapter 8; and Nygh, *Conflict of Laws in Australia*, 6th ed. (Butterworths, 1995) chapter 7.

122 *Spiliada*, *supra*, at 476ff.

123 *Spiliada*, *supra*, at 477.

124 *Spiliada*, *supra*, at 477 – 478. The High Court of Australia is of the opinion that the terms "natural forum" and "more appropriate forum" are interchangeable in English law: *Voth* v. *Manildra Flour Mills Proprietary Limited*, *supra*, *per* Mason C.J.; Deane, Dawson, Gaudron JJ at 557, Brennan J. at 572 agreeing. This appears to accord with the decision in *Spiliada*, *supra*, at 477 – 478.

These will include factors affecting convenience or expense, and other factors such as the place where the parties reside or carry on business.[125] Thus,

> [i]f the court concludes at this stage that there is no other available forum which is clearly more appropriate for the trial of the action it will ordinarily refuse a stay ... If, however, the court concludes at this stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.[126]

The Law Governing The Relevant Transaction

The law governing the relevant transaction has been recognised as a connecting factor in a number of cases.[127] The House of Lords in *Spiliada* placed no greater or lesser emphasis on this factor as compared with the other factors that were there discussed.

As already noted, in the present author's opinion, the better view (based on the purposive and presumption methods for determining the territorial scope of a statute) is that the CPA was intended to have application to producers both within and without both the UK and the EC, and that, so far as its territorial scope is concerned, it applies to all injuries or damage that occur in the UK.[128] Therefore, in all cases in which the injuries or damage occur within the relevant jurisdiction the CPA will be the applicable substantive law. This is a factor in favour of not granting a stay at least as regards the CPA action. Moreover, it appears that where the plaintiff's cause of action derives from a local forum statute this factor weighs particularly heavily against granting a stay.[129]

However, it may yet prove to be the case that the territorial scope of the CPA will be determined in accordance with the choice of law rule in tort.[130] And it will always be the case that whether the English common law tort of negligence will be applicable will be determined by that rule. In cases in which the tort is a foreign tort then in accordance with the English choice of law rule in tort, the law of the place where the tort was committed becomes relevant either under the second limb of the Private International Law (Miscellaneous Provisions) Act 1995 or as the *lex causae* rule. As we have already seen, defective products under the CPA, or in a negligence action, can be divided according to three categories of defect: design, manufacturing and instructional.[131] As was concluded above, it appears that in cases of a manufacturing defect the place where the tort was committed will be the place of manufacture or initial supply; in the case of a design defect it will be the place where the product was designed; and in the case of an instructional defect the tort will be committed either at the place of manufacture or the jurisdiction in which the goods were placed on the market for distribution with the manufacturer's knowledge. In the cases with which this article is concerned the place of manufacture or initial supply and the place of design will be outside the jurisdiction. Therefore, in cases of

125 *Spiliada, supra,* at 478.

126 *Ibid.*

127 See, e.g., *Voth* v. *Manildra Flour Mills Proprietary Limited, supra*; *Oceanic Sun Line Special Co.* v. *Fay* (1988) 165 C.L.R. 197 *per* Deane J.;and *Spiliada, supra.* Cf. *Piper Aircraft Co.* v. *Reyno* 454 U.S. 235 at 260 – 261 (1981).

128 Dutson, "International Product Liability Litigation" (1996) 22 Monash U.L.R. 244.

129 See, e.g., *Green* v. *Australian Industrial Investment Ltd.* (1988) 25 F.C.R. 532 at 539 and 545; *Merpro Montassa Limited* v. *Conoco Speciality Products Inc.* (1991) 28 F.C.R. 387 at 395; *DA Technology Australia Pty Limited* v. *Discreet Logic Inc.*, unreported, Federal Court of Australia, Gummow J., 10 March 1994, at 18 – 19; *Australian Commercial Research and Development Ltd.* v. *ANZ Bank Ltd.* [1989] 3 All E.R. 65 at 72 – 73; *Astra AB* v. *Delta West Pty Ltd.*, unreported, Supreme Court of Victoria, Ashley J., 5 December 1994, at 19; *Anglo-Australia Foods* v. *Von Planta* (1988) 20 F.C.R. 34 at 43 – 44; and *Diethelm & Co. Ltd.* v. *Bradley* (1995) A.T.P.R. 41-388 at 40-327.

130 See Dutson, at n. 128 *supra.*

131 See above.

132 *Metall* (C.A.), *op. cit.* at 484 and 488 – 489 (overruled in *Lonrho plc* v. *Fayed, op.cit.*, but not on this point); *Cordoba Shipping Co. Ltd.* v. *National State Bank, Elizabeth, New Jersey* [1984] 2 Lloyd's Rep. 430; *Caltex Singapore Pte Ltd.* v. *BP Shipping Ltd.* [1996] 1 Lloyd's Rep. 286 at 289; and cf. *Sedgwick Limited* v. *Bain Clarkson Limited (t/a Bain Hogg Limited), op. cit.*, at p. 40,560 where the court stated that "[I]t would be possible that a *forum non conveniens* application could still succeed, notwithstanding that the entire cause of action arose within the jurisdiction."

manufacturing or design defects, this is a factor in favour of granting a stay in any negligence action. However, in cases of instructional defects, because the tort will not be a foreign tort, this will be a factor against granting a stay.

Natural forum in tort actions
In a number of decisions English courts have stated that the jurisdiction in which a tort is committed is *prima facie* the natural forum for the determination of the dispute.[132] Having decided that a tort had been committed in London, the English Court of Appeal in *Metall und Rohstoff AG* v. *Donaldson Lufkin &* Jenrette *Inc.*[133] stated that

> ...in considering the question of discretion [to set aside service of a writ served out of the jurisdiction under Order 11 rule 1(1)(f) on *forum non conveniens* grounds], we, therefore, start from the presumption that it is just and reasonable that the defendants should answer the plaintiffs' claim based on this tort in the courts of this country.

It has been concluded by the present author that the better view is that the CPA should be characterised as creating causes of action in tort for private international law purposes.[134] Accordingly, these English decisions would appear to be applicable to any actions under the CPA, *a fortiori* where the courts determine that the appropriate method for determining the territorial scope of the statute is the application of the rules of private international law.[135]

133 *Op. cit.*
134 See Dutson at n. 23, *supra.*
135 See Dutson at n. 9, *supra.*

COMPASSING THE DEATH OF THE QUEEN'S CONSORT: WOULD IT BE HIGH TREASON?

MICHAEL GUNN * and *ANN LYON* **

IT WOULD HAVE BEEN HIGH TREASON under the Statute of Treasons of 1351,[1] punishable, then, by death by hanging,[2] for someone to have compassed the death of Queen Elizabeth the Queen Mother from 10th December 1936 to 6th February 1952, when she was wife to the King regnant, George VI.[3] Should the present Prince of Wales re-marry, it will, following his accession to the throne, be high treason to compass the death of his Queen. Would it currently be high treason to compass the death of Prince Philip, Duke of Edinburgh, husband to the Queen regnant, Elizabeth II punishable by imprisonment for life?

At first pass, the answer to this question would appear to be obvious. Applying the normal principles of statutory interpretation by which the masculine includes the feminine and vice versa, it would follow that the phrase "King's wife" includes the phrase "Queen's husband". However, the position is not quite so simple. Sir Matthew Hale, in his *History of the Pleas of the Crown*, states specifically that it is not treasonable to compass the death of the Queen's husband, and, in the complete absence of case law in this area, this view has been followed in all the texts that deal with the point since.[4]

This issue appears, admittedly, to be of academic rather than practical importance.[5] The

* Professor of Law & Head of the Department of Academic Legal Studies, Nottingham Law School, Nottingham Trent University.
** Lecturer in Law, School of Law, De Montfort University.

1 25 Edw. 3, Stat. 5, c. 2. It was a product of the Parliament of 1351-52, and its date is variously given by historians as 1351 and 1352, since it is not possible to place it precisely within that Parliament.

2 The penalty was indeed death until 30th September 1998 when the Treason Act 1814, s. 1 was amended by the Crime and Disorder Act 1998, s. 36(4) such that the penalty is now life imprisonment. The Treason Act 1790 s. 1, providing that the punishment was death by hanging (commutable to life imprisonment), has been repealed. The Crime and Disorder Act 1998, s. 36(4) came into force on 30th September 1998: The Crime and Disorder Act 1998 (Commencement No. 2 and Transitional Provisions) Order 1998, para., 2(1)(g). The United Kingdom is now in a position to comply with Article 1 of the Sixth Protocol to the European Convention on Human Rights that provides "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." This paves the way for the incorporation of the European Convention on Human Rights through the Human Rights Act 1998.

3 The term "regnant" denotes a reigning monarch, that is a monarch in his or her own right, as distinct from a King or Queen consort. In England and Scotland, with the exceptions of Philip II of Spain (husband of Mary I), and Henry Stuart, Lord Darnley (second husband of Mary Queen of Scots), all kings have been Kings regnant. Prior to Elizabeth II, Mary I, Mary Queen of Scots, Elizabeth I, Mary II, Anne and Victoria were all Queens regnant. The husbands of Anne and Victoria were not kings.

4 The current edition of *Halsbury's Statutes*, in printing the text of the Statute of Treasons, states categorically that its protection extends to the King or Queen regnant for the time being, and the Queen Consort, but not the husband of the Queen regnant (vol. 11(1), p. 35). See also *Blackstone's Criminal Practice 1991* (Blackstone, 1991) para. B9.6 and *Halsbury's Laws of England*, 4th ed., re-issue (Butterworth., 1990), vol. 11(1), para. 76. Michael Gunn first became interested in this point whilst writing the relevant sections of these two works. The same point of view is also taken by some historians. See Loach, J., *Parliament and the Crown in the reign of Mary Tudor* (1986), pp. 92, 94, 103 and, especially, 117.

5 The authors have been unable to discover an instance of an attack on the husband of the Queen regnant in the absence of the Sovereign herself. During the summer of 1842, Queen Victoria was shot at on no less than three occasions when in the company of Prince Albert, but official papers show that all these instances were treated for legal purposes as attacks on the Sovereign alone (see *infra*). Further, it seems likely that a person who committed an act which threatened the personal safety of the Sovereign or another person within the scope of the Statute of Treasons would now be prosecuted under the ordinary criminal law. This is confirmed by Henry Boyd-Carpenter of Messrs Farrer & Co, writing in a personal capacity to Michael Gunn on 11th April 1997, who remarks that treason is now regarded as a political crime and that a distinction is likely to be made between acts which threaten the security of the State as such, and acts which threaten the personal safety of the Sovereign as an individual. Mr Boyd-Carpenter does not, however, entirely rule out the use of the law of treason in the case of a personal attack that was politically motivated. An exception occurred in 1981 when Marcus Serjeant, who fired a starting pistol at the Queen during Trooping the Colour, was prosecuted and convicted under the Treason Act 1842 (as to which, see n. 101, below). That Act creates a specific offence of discharging a firearm at the Sovereign. This may be explained by doubt on the part of the prosecuting authorities as to whether the act constituted an assault worthy of prosecution, given that neither the Queen nor anybody else present suffered any actual bodily harm. In order for a conviction for assault to be secured, the prosecution would have had to prove that the Queen, as victim, was put in fear of immediate and unlawful personal violence. There were, presumably, doubts as to the propriety, or even the legality, of calling the Queen to give evidence in her own courts in a prosecution brought, legally speaking, by her, although such direct evidence would not have been called for had the defendant been prepared to plead guilty. Had the Queen fallen from her horse and suffered injury, it would presumably have been possible to charge assault occasioning actual bodily harm under Offences Against the Person Act 1861, s. 47.

Government's announcement, on 27th February 1998, that it intends to introduce legislation to amend the Act of Succession such that, in the future, the eldest child of the Sovereign will succeed to the throne irrespective of gender makes the status of a Queen's consort,[6] for the purposes of the Statute of Treasons, of considerably greater significance than hithertofor. It is reasonable to anticipate that Queens regnant will become considerably more frequent than has previously been the case.

In deciding what is the true interpretation, the terms of the Statute of Treasons must be considered carefully. Insofar as is relevant, the Statute provides that it is treason "when a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen, or of their eldest son and heir...."[7]

It has always been assumed, correctly, that the Statute applies to the Sovereign, that is the monarch regnant at any one time, and not solely to a male Sovereign. Normal rules of statutory interpretation imply that the word "King" in any statute includes a Queen regnant,[8] and, for the avoidance of any doubt, the Interpretation Act 1978, section 10 provides that: "In any Act a reference to the Sovereign reigning at the time of the passing of the Act is to be construed, unless the contrary intention appears, as a reference to the Sovereign for the time being."

This provision applies to an Act whenever it was passed.[9] As for the rules relating to gender generally in the Interpretation Act, section 6 provides: "In any Act, unless the contrary intention appears, (a) Words importing the masculine gender include the feminine...."

This provision also applies to any Act whenever it was passed, and to offences triable on indictment.[10] It should then follow that the reference in the Statute of Treasons to "our Lady his Queen" should now be interpreted as a reference to the spouse of the monarch regnant. If so, the phrase must include the husband of a Queen regnant, that is, a Queen's husband as well as a King's wife.

To consider the application to the problem of the Interpretation Act 1978 further, it is necessary to consider its precursors. The 1978 Act replaced the Interpretation Act of 1889. The 1889 Act provided, at section 1(1), as follows:"In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, unless the contrary appears, -

(a) Words importing the masculine gender shall include females...."

This provision was itself a re-enactment of an existing rule (indeed these words form the heading of the first part of the 1889 Act) that had appeared in the first interpretation statute, Lord Brougham's Act of 1850, "An Act for shortening the Language used in Acts of Parliament". The relevant provision in the 1850 Act is section IV, which has the side note "Interpretation of Certain Words for Future Acts". The section provides:"Be it enacted, that in all Acts Words importing the Masculine Gender shall be deemed and taken to include Females ... unless the contrary as to Gender ... is expressly provided...."

In the manner that we have so far reproduced the relevant provisions, it would seem that the masculine includes the feminine, but only in relation to statutes passed after 1850. This would support the view of the authors of Halsbury's Laws and Halsbury's Statutes, the origi-

6 The Succession to the Crown Bill 1997 (which did not become law) provides, at s. 1, "(1) In determining the line of succession to the Crown and to all the rights, privileges and dignities belonging thereto no account shall be taken of gender, notwithstanding any custom or rule of law to the contrary. (2) This section does not affect any succession to the Crown before the date on which this Act was passed."

7 The Statute further provides that it is high treason to violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir, to levy war against our Lord the King in his realm, or to be adherent to the King's enemies in this realm, or elsewhere. All twentieth century cases of treason have involved adherence to the King's enemies in time of war. See, for example, *R v Casement* [1917] 1 K.B. 98, *R v Joyce* [1946] A.C. 347.

8 This broad statement draws together a number of relevant rules of statutory interpretation considered in detail in Bennion, F.A.R., *Statutory Interpretation*, 2nd. ed. (1992). In particular, the presumption that an up-dating construction is to be given (p. 617 *et seq.*), the purposive construction approach (p. 659 *et seq.*) and the presumption against absurdity.

9 Interpretation Act 1978, s. 22(1) and Sch. 2, para. 1.

10 Interpretation Act 1978, s. 6.

nal expression of which appeared in the first third of the twentieth century prior to the 1978 Act,[11] as to the interpretation of the Statute of Treasons 1351 being limited to King's wives and not capable of extension to Queen's husbands.

However, section 1(2) of the 1889 Act goes on to provide:"However, the same rules[12] shall be observed in the construction of every enactment relating to an offence punishable on indictment or on summary conviction when the enactment is contained in an Act passed in or before the year one thousand eight hundred and fifty."

This means, on the face of the 1889 statute, that the masculine gender includes the female in the Statute of Treasons 1351 as treason is an offence triable on indictment, and that this has been the position since the enactment of the 1889 statute.

Therefore, the only possible ground upon which *Halsbury's Laws* and *Halsbury's Statutes* may have set out the correct modern interpretation of the 1351 Statute is by reliance on the phrase "unless the contrary intention appears" in section 1(1) of the 1889 Act and section 6 of the 1978 Act. This phrase would have to mean that Sir Matthew Hale's view indeed establishes a relevant contrary intention.

It is clear that a contrary intention may appear either expressly or by implication.[13] We believe that the opinion of Sir Matthew Hale is an incorrect application of the law of treason, and that Hale's view is open to challenge. Thus, there would be no contrary intention that could affect the application of the Interpretation Act 1978, and so the provisions of the Statute of Treasons are as applicable to Prince Philip and the husband of any future Queen regnant as to a Queen consort.

In order to develop our thesis, we consider in more detail Hale's view and then consider the validity of that view by examining first, the context in which the Statute of Treasons was originally passed,[14] secondly, the Treason Act 1555 and its context, and, thirdly, the position of subsequent Queens regnant (Anne and Victoria).

HALE'S VIEW

Sir Matthew Hale, in his *History of the Pleas of the Crown*,[15] states that it is not the case that the protection of the law of treason applies to a Queen's husband. He based his assertion on the Treason Act of 1555,[16] which expressly made the compassing of the death of Philip of Spain, husband of the then Queen regnant, Mary I, treasonable. His view was as follows:

> The husband of a queen regent [regnant] is not a king within this law [the Statute of Treasons], for the Queen still holds her sovereignty entirely, as if she was sole: *vide 1 Mar. cap.2. sess.3* and for the remedy hereof there was a special temporary Act made enacting and extending treason as well to the compassing of the death of King *Philip* of *Spain* husband to Queen *Mary*, as of the Queen, and for the making of other acts against the King, as against the Queen, within

11 *Halsbury's Laws of England*, first edition, appeared between 1907 and 1917; *Halsbury's Statutes*, first edition, appeared between 1929 and 1930.

12 Section 1(1)(b) makes it clear that the singular includes the plural and vice versa, which is also taken from the 1850 Act, section IV, but this rule is not relevant for the present purposes, and so is omitted.

13 Compare section IV, 1850 Act, which requires an *express* contrary intention. See Bennion, *op. cit,*. p. 417.

14 It is submitted that the rule of statutory interpretation permitting the taking into account of the enacting history of a piece of legislation (Bennion, *op. cit.*, p. 445 *et seq.*) must, in the case of ancient legislation and in the absence of detailed reporting of parliamentary proceedings at the time of enactment, permit a consideration of the relevant political climate as well as what can be discerned about what was said in Parliament.

15 The full text was not published until 1736, though it is the work of Sir Matthew Hale (1609-1676), see Heward, E., *Matthew Hale* (1972), pp. 132-134.

16 1 & 2 P. & M., c.10. The Act, following from some of the provisions of the marriage treaty, was intended to make it clear that Philip's role, if Mary were to predecease him, was to be relatively limited, and to vest the succession to the English throne in the children of their marriage rather than Philip's son by his earlier marriage, Don Carlos, the heir to his continental domains.

> the compass of high treason, during the continuance of the marriage between them. *1 & 2 Phil. & Mar. cap.10* so that it seems, tho' the husband of a Queen regent be as near to him, as the wife of a King regent, the statute of *25 E. 3* declaring the compassing of the death of the King's wife to be treason did not extend to the husband of a Queen regent.[17]

Hale's view has been followed in all the major texts that have dealt with the point since.[18] His assertion is that the 1555 Act would not have been passed unless it was necessary. Challenging a view propounded by Hale is not undertaken lightly. His views hold an authoritative position. He was held in high regard by his contemporaries, and subsequent lawyers hold that same regard, for his scholarship and diligence, and for the *History of the Pleas of the Crown* in particular.

As regards the status of *The History of the Pleas of the Crown*, such treatises (in part because of the status of its author) have long been accepted as authoritative guides to the law.[19] The courts have a tendency to desire not to overturn accepted interpretations of the criminal law.[20] Hale's views are nevertheless open to reconsideration, even when they have been followed in the past, as is made clear by the decision of the House of Lords in *R.* v *R*[21] to reject the once accepted, though deplored, rule that a man could not be guilty of rape if he had non-consensual sexual intercourse with his wife.[22] We are of the view that Hale's opinion has always been legally wrong and that it is not an opinion that has had practical application and so it is right and proper to investigate its accuracy and to refuse to follow the opinion when it is discovered that it is wrong.

Sir Matthew Hale himself was a very highly regarded lawyer, judge, law reformer, legal historian and jurist. In a modern biography of him, Heward states that the *History of the Pleas of the Crown*

> is undoubtedly the most important of Hale's works and is the result of a lifetime's study of the criminal law.... This book is a *tour de force*. It is systematic and detailed and a modern publisher would describe it as indispensable for any lawyer practising criminal law. It has always been judged as of the highest authority.[23]

Hale clearly was thorough, principled, honest and careful. He was highly regarded at the time.[24] Thus

> Matthew Hale was one of the outstanding judges of the seventeenth century. He was a lawyer of great learning and a fearless judge who resisted all pressures put upon him by Oliver Cromwell and Charles II and could not be solicited by bribes or any other inducements.... His outstanding quality was his integrity.... Hale was an extremely thorough and accurate lawyer and it was this thoroughness which took him back to the sources of the law. During the course of his researches he became a legal historian and some of his knowledge he passed on to students in his books on the common law. There is a clarity about his writing which was the result of his orderly thinking.... He saw clearly how the law gets out of date and requires renewing and

17 1 Hale P.C. 106. See also Co. P.C., 6 & 7.

18 See n. 4, above..

19 See Bailey, S.H. and Gunn, M.J., *Smith and Bailey on the Modern English Legal System*, 3rd ed. (1996), p. 448.

20 See, e.g., the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234; the reasons given in the House of Lords in *D.P.P.* v *Morgan* [1976] A.C. 182 for not overruling the rule established by the Court for Crown Cases Reserved in *R.* v *Tolson* (1889) 23 Q.B.D. 168 in relation to the law of bigamy (that a belief that a spouse was dead had to be based on reasonable grounds rather than be an honest, but not necessarily reasonable, belief); and Bailey and Gunn, *op. cit.*, pp. 437-438.

21 [1992] 1 A.C. 599.

22 For a critical review of this approach by the courts, see Giles, M., "Judicial Law-Making in the Criminal Courts: the case of marital rape" [1992] *Criminal Law Review* 407.

23 Heward, E., *Matthew Hale* (1972), at pp. 132-133. See also Holdsworth, W.S., "Sir Matthew Hale" (1923) 39 L.Q.R. 402

24 *Ibid, passim*, and specifically, e.g., the rules that he laid down to be observed in his conduct as a judge at p. 67.

> compared the law with the Argonauts' ship which was the same when it returned home as it was when it went out, though in that long voyage it had successive amendments and scarce came back with any of its former materials.... Hale's legal influence does not lie in his judgments but in his statements of the existing law contained in such books as *The History of the Pleas of the Crown*, which were learned, authoritative and complete and in the maintenance of the highest standards in his professional life and work.[25]

However, the possibility of the Treason Act 1555 being a piece of legislation passed for the avoidance of doubt in circumstances which were unprecedented, at least in England, was not one to which Hale adverted. Hale did, though, recognise that there had not been a Queen regnant (other than Maud[26]) and concluded in *The Prerogatives of the King* that "such marriage doth not at all divest the queen regent from the regality nor transfer the sovereignty to her husband."[27] He recognises that this is one of the functions of the 1555 statute. Indeed it might be best regarded as one of its primary functions.[28] If so, it is best to suggest that Hale read rather more into the 1555 statute than it warranted and that, therefore, it can be strongly argued that it was an "avoidance of doubt" statute. Strength is given to this thesis by the circumstances in which the legislation was passed and by the peculiar circumstances of the marriage of Mary and Philip, which are considered in detail below.

THE STATUTE OF TREASONS IN ITS POLITICAL CONTEXT

In 1351 the King regnant was Edward III (1327-77). In using the words "our Lord the King", meaning the King for the time being,[29] Parliament could not have intended the Statute of Treasons to apply solely to Edward III, and this interpretation has always been followed by the courts. Support is given to this interpretation when the political background against which the Statute was passed is examined. In 1351 Edward III was 39 years old. He had reigned for 24 years, for the first three years as a minor under the tutelage of his mother and her lover, Roger Mortimer, but from 1330 as a ruler in his own right, and his right to the throne had never been questioned. From 1346 to the early 1360s he was at the zenith of his power and influence as the result of his military successes against the French. Although England had lost between a third and a half of its population to the Black Death of 1348-49, this had had little or no effect on the King's political position and prestige, either in England or on the international stage.

Although he had succeeded to the throne following the deposition and murder of his father, Edward II (1307-27), Edward III's reign had been, and was to remain, remarkably free of the armed risings which threatened the security of the great majority of medieval English kings.[30] The Statute was, therefore, passed, not as a reaction to rebellion or plots against Edward III himself, but rather as the most long-lasting among a series of statutes dealing with legal matters produced by Parliament in the middle years of his reign. If the phrase "our Lord the King" is not to be interpreted simply as Edward III during his lifetime, but as the King for the time

25 *Ibid*, at pp. 9-11.

26 Though he seems to have thought that Maud could be counted as such.

27 Yale, D.E.C., *Sir Matthew Hale's The Prerogatives of the King* (1976), at p. 69.

28 See *infra*, for a consideration of the political context in which the legislation was passed.

29 In contrast to the Treason Act 1555 (see below) which specifically names Philip of Spain.

30 The only major challenge to Edward III's authority came in the final year of his reign, when a number of his adherents and advisors were impeached by the Good Parliament of 1376. Serious armed uprisings took place during the reigns of most of Edward III's predecessors, led in some cases by disaffected barons and in others by royal relations desirous of greater power, and were to continue under his successors. Edward's grandson and immediate successor, Richard II (1377-99) was deposed and murdered by his cousin, afterwards Henry IV, who was himself the focus of several rebellions. The later years of Henry VI (1422-61) were marked by strife, which continued into the reign of Edward IV (1461-83) and brought about the downfall of Richard III (1483-85). Rebellions against reigning monarchs only finally ceased after 1745.

being, then the phrase "our Lord the King" ought to encompass "our Lady the Queen regnant". By logical extension, the phrase "our Lady his Queen" should include "our Lord her husband".

J.G. Bellamy has made a detailed study of the medieval law of treason.[31] He admits that the scholar is in serious difficulties in ascertaining the intention behind the passing of the Statute of Treasons and its particular terms, since no record has survived of the deliberations of the Parliament of 1351-52, nor is the Statute mentioned by any contemporary chronicler.[32]

> In 1352 Edward III was a hero with both the baronage and the commonality, and there was very little likelihood of treasonable crimes being committed in such numbers and of such variety that the exact intention of the Statute would be displayed in trial and sentence. On the whole historians have concluded that Edward's design was either legal or political, the advocates of each type of motivation being fairly evenly divided.[33]

Hale suggested, and other writers prior to Bellamy followed him, that the genesis of the Statute lay in three major cases of 1347-48.[34] Bellamy, however, sees the question as being much more complex, and as involving major political as well as legal issues. He reviews the domestic political history of the period 1311-48 and concludes that the origins of the Statute lay in the attempts of magnates and others to assume royal powers on various occasions. This led to an extension of the common law of treason by the royal judges.[35] By the 1340s, the requirements of the war with France led to a need for increased royal revenue. It was the need to preserve peace at home and to prevent popular unrest in order to persuade Parliament to grant increased taxation which precipitated a series of major statutes on legal matters in the period 1340-52.[36] In order to obtain the necessary revenues, the King was prepared to concede to Parliament a narrowing of the definition of treason, and of what constituted high treason as distinct from petty treason, and, further, allowed the power to define what was treasonable to pass from the Crown to Parliament. Thus:

> In allowing parliamentary legislation to give a decidedly narrow interpretation to treason the King was seriously diminishing his chances of obtaining permanent forfeitures [of land for treasonable acts], and on the face of it, at least, undermining the Royal Prerogative. Previously the Crown itself had decided what offences constituted treason and the yardstick had been the political implications of each case: there had been no absolute consistency. From the King's point of view treason was a casualty in a period of increasing legal definition. Those who benefited from the termination of the vague and elastic periphery of treason were the magnates.[37]

Bellamy thus sees the Statute of Treasons as representing concessions by the King in order to preserve the goodwill of Parliament and of the magnates for the raising of taxes for his wars:

> The Act did not come about because of some general affection that Edward III felt for his magnates or because secure on his throne and basking in the glory of his French victories he

31 *The Law of Treason in the Later Middle Ages* (1970).

32 *Ibid*, p.61.

33 *Ibid*, p.59.

34 *Ibid*, p.61.

35 *Ibid*, pp.61-74.

36 *Ibid*, pp.77-82.

37 *Ibid*, p.87. Forfeiture of property for treason was only abolished by the Forfeiture Act 1870. Forfeiture had been a major source of income for the Crown when persons had been found guilty of treason and a matter of real concern when relatives and successors were arguing for pardons or restoration of property rights.

> felt the time had come to put right the miscarriages of justice of his father's reign. It came as a direct result of the royal judges trying to extend the common law of treason. Their reason for so doing was the better enforcement of law and order at a time when the King was often outside the realm engaged on military expeditions. For these wars he needed supply and the taxpayer paid more willingly when law and order were maintained at a high level...The period from the outbreak of the Hundred Years War to 1352 was one of increasing legal definitions which seems to have had its origins in the increase of the power of Parliament as a result of the King's pressing need for taxes. The discretionary powers of the royal judges steadily declined because they hesitated to use them and the Royal Prerogative came under hostile scrutiny. Any definition of Royal Prerogative was to the King's detriment since it meant a contraction of the nebulous periphery of royal competence....[38]

On this basis, the terms of the Statute relating to the compassing of the death of the King, his Queen, and the Prince of Wales represent a narrowing of the common law, such that it was no longer potentially treasonable to compass the death of the King's younger children, or, for example, his brothers or sisters.

However, this takes us no further in deciding whether, in 1351-52, the phrase "our Lady his Queen" was intended to protect the husband of a Queen regnant as well as the wife of a King. It might, of course, be suggested that Parliament referred expressly to "our Lady his Queen" as the consort of the King, and that the intention of Parliament was to limit the ambit of the provision to a Queen consort. This is certainly a possibility in the context of the remainder of the provisions dealing with treasonable acts against members of the royal family, which are specific as to gender. "If a *man* do violate the King's companion [always construed to mean wife], or the King's eldest *daughter* unmarried, or the *wife* of the King's eldest son".[39] Behind these provisions presumably lay the need to ensure the legitimacy of a putative heir to the throne. Although it is not clear whether it was accepted at the time that a woman could succeed in her own right, it was at least arguable that she could transmit the capacity to succeed to her sons, so that the chastity of the King's unmarried eldest daughter, and thus the paternity of a future King, was in need of protection as much as the paternity of a putative child of the King or of the Prince of Wales.[40]

Alternatively, and in favour of the thesis that Parliament did not expressly intend to exclude the husband of a Queen regnant from the protection of the Statute, it may simply be argued that in 1351-52 Parliament had no experience of female rulers, and therefore of "Queen's husbands", and simply used the expressions "our Lord the King" and "our Lady his Queen" to express the norms of its time. In 1351 there had never been a Queen regnant, accepted as such,

38 Bellamy, *op. cit.*, p.100-101.

39 Authors' emphasis. No prosecutions have ever taken place on the basis of these provisions. Ian Ball, who attempted to kidnap Princess Anne in 1973, was prosecuted for the attempted murder of the princess's detective, and various offences under the Offences Against the Person Act, but threatening the life of, or kidnapping, the Sovereign's eldest daughter is not treasonable in the absence of violation. It is commonplace for statutes concerned with the sexual violation of women or men that the perpetrators can only be male. See, e.g. Sexual Offences Act 1956, ss. 1-7 (as amended). Where a woman is the offender, the provisions either involve her permitting a man to have sexual intercourse with her (such as incest contrary to Sexual Offences Act 1956, s. 11), or are covered by the more general offence of indecent assault (contrary to the 1956 Act, ss. 14-15). This approach reflects a failure to accept that a woman may be the active sexual partner.

40 It does, however, seem curious that the protection given by the provision only applies while the King's eldest daughter remains unmarried.

either in England or elsewhere in Western Europe.[41] There had never been a husband of a Queen regnant. Matilda (Maud) daughter of Henry I (1100-35) claimed the English throne as the only legitimate child of her father and as his designated heir. But she was never crowned. Her position as monarch was never fully accepted because of the lengthy and bitter civil war between her and her cousin, Stephen of Blois (1135-1154), who seized the throne on Henry's death.[42] Alexander III of Scots (1249-1286) named his infant granddaughter, Margaret, as his heir in 1285, following the deaths of all his children. After his death she seems to have been accepted in Scotland, and by Edward I of England (who claimed to be the feudal overlord of Scotland), as the rightful heir. However, she was never acknowledged as Queen as such, and she never set foot in Scotland, dying in September 1290 while on her way to Scotland from Norway.[43] Edward I himself laid down an order of succession to the English throne in 1290, following the deaths of three of his sons, naming his two surviving sons in order of birth and any subsequent sons, and then his daughters in order of birth,[44] but in the event he was succeeded by a son (Edward II).

However, recent events in 1351-52 suggest that the possibility of a Queen regnant may not merely not have been contemplated by Parliament, but actively rejected. The French crown passed uninterruptedly from father to eldest son from Hugh Capet in 987 to Louis X, eldest son of Philip IV, who succeeded in 1314 and died in 1316. Louis X left a posthumous son, John I, who died at five days old, possibly by murder, and two daughters whose paternity was doubted by contemporaries. The French invoked Salic Law, rather doubtfully derived from the Franks, and declared that no female could succeed, so that John I was succeeded by his two uncles, Louis X's younger brothers, in turn. Each of these (Philip V, 1316-21, and Charles IV, 1321-28) died leaving only daughters. On the death of Charles IV, his cousin Philip of Valois, who

41 The only female rulers in Western Europe, prior to the accession of Isabella of Castile in 1474, were all in the Byzantine Empire. Irene (797-802), widow of the Emperor Leo IV, initially acted as regent for their 10-year-old son, Constantine VI (780-97), and later usurped the Crown when he grew to adulthood and proved less amenable to her authority. Constantine was blinded, deliberately clumsily to ensure his death, and Irene herself only reigned for five years before being deposed in her turn. She was certainly not regarded in the west as a legitimate ruler; indeed it was the perceived absence of a legitimate emperor in the east that led to Charlemagne's crowning as western Emperor on Christmas Day 800. The other example dates from the 11th century. Emperor Constantine VIII died in 1028 leaving only daughters and was initially succeeded by the second, Zoe (the eldest daughter having entered religion). However, for most of her reign, which lasted until her death in 1055, Zoe did not attempt to rule in isolation, but successively elevated three husbands and an adopted son to the status of co-emperor with her. Additionally, from 1042 she was forced to recognise her younger sister, Theodora, as co-empress, and Theodora herself reigned briefly as sole Empress in 1055-56. Somewhat earlier, the sister of the fifth century Emperor Theodosius II reigned as co-empress with her brother. In the Latin Kingdom of Jerusalem, initially established in 1100 in the aftermath of the First Crusade, and under western European rather than Byzantine influences, a number of male rulers gained the throne after marriage to a female heir, but none of the heiresses concerned appear to have been held capable of ruling in their own right, and the practice seems to have been for the leading political and religious figures of the Kingdom to decide on a suitable candidate, and then give him legitimacy by having him marry the heiress. The extreme case is that of Isabella, daughter of Baldwin IV, who was married four times, the latter three in order to secure the kingship for the favoured candidate. Even if the various heiresses were considered to have been Queens regnant, which is not clear, their husbands were not "Queens' husbands", since they were themselves Kings regnant, and two at least continued to reign after the deaths of their wives. It was argued, however, at least in some quarters, that Guy of Lusignan (1186-90) no longer had any right to the throne after the death of his wife, and John of Brienne (1210-25) nominally acted as regent for his infant daughter until her marriage after the death of his wife in childbirth. However, Lusignan had long since lost all credibility as a ruler and as a military leader, and the argument of lack of entitlement after his wife's death could simply have been used as a convenient pretext to set him aside. See Robinson, J.J., *Dungeon, Fire and Sword* (1994), pp. 135-36, 141-42, 169-70, 189-90, 230-31. The concept of the "Crown Matrimonial" continued into the sixteenth century, with Lord Darnley being titled "King" during his marriage to Mary Queen of Scots.

42 At that time, and until the accession of Edward I in 1272, a monarch was not regarded as a king until he had been sanctified by God at his coronation. Until he was crowned he was styled Lord (*Dominus*), and his reign was dated from his coronation, a view which Matilda herself seems to have accepted as she never styled herself as Queen, but as the Lady of the English (*Domina Anglorum*). See Barlow, F., *Edward the Confessor* (2nd ed., 1997), pp. 60-69 for information on the sacerdotal significance of the coronation in England. The dispute was eventually resolved, in 1153, by Stephen accepting Matilda's eldest son, the future Henry II, as his heir, following the death of his own elder son.

43 From 28th April 1286 until the summer of 1292, when John Balliol was declared to be the rightful heir to the Scottish throne by a court presided over by Edward I and installed as King, the throne was vacant and six "Guardians of the Realm" ruled Scotland as delegates and trustees of the Crown, on behalf first of Margaret and then on behalf of the rightful heir as named by the court, whoever he might be. Alexander III's position was unusual in that his granddaughter was the only living descendant of his own grandfather, William the Lion (1165-1214). The nearest alternative heirs were the descendants, through females, of William the Lion's sister and younger brother.

44 Rymer, T. (ed.), *Foedera, Conventiones, Literae etc.* (1727-1735), vol. II, p. 497. Powicke, F.M., *King Henry III and the Lord Edward, The Community of the Realm in the Thirteenth Century* (1947) vol. II, pp. 732-733, 788.

was already acting as regent during the wait to see whether Charles's unborn child should prove to be a boy, and who was the son of Philip IV's younger brother, took the throne as Philip VI. Edward III, then under the tutelage of his mother and her lover following his father's deposition and murder, initially accepted Valois' claims, and, indeed, did homage to him for his French domains as Duke of Guyenne in 1329. However, in 1339 he proclaimed himself King of France as the grandson of Philip IV through his mother, on the basis that, although a woman could not herself reign, she could act as the conduit through which the capacity to reign was transmitted from her father to her son.[45]

Whether it can be argued on the basis of Edward III's pretensions to the throne of France that he and his Parliament were not prepared to countenance a female sovereign in England is problematical. It might be argued that Edward simply regarded Valois as a usurper, and that his claims were based on hostility to Valois and later his (male) heirs. However, if this was so, why did Edward not promote the cause of Philip V's eldest daughter, or, if he believed a woman could not reign, of her son Charles of Navarre, born in 1322?

On this basis, it seems unlikely that Parliament in 1351-52 implicitly accepted that there might in the future be a Queen regnant who might be married. Most probably, the possibility was simply not considered. Any possibility of a future Queen regnant must in any event have appeared remote. Edward III fathered six sons, four of whom were alive in 1351.[46] The eldest, Edward the Black Prince, was then aged 21. Although all were as yet unmarried, they had survived the not inconsiderable hazards of medieval infancy and might reasonably be expected to produce legitimate sons in the future.[47]

Be that as it may, the Statute of Treasons did not unambiguously exclude the husband of a Queen regnant from its provisions, thus the normal rules of statutory interpretation ought to be applied today. Therefore, just as a Queen regnant is a King, a Queen's husband is coterminous with a King's wife.

THE TREASON ACT OF 1555 IN ITS POLITICAL CONTEXT

English legislative history is littered with examples of legislation passed in order to deal with uncertainties. It should be borne in mind that Mary I was the first Queen regnant in England, and only the third in the whole of Western Europe. All her heirs were female. Further, she was only the second Queen regnant to marry, and the first to marry while reigning.[48] Parliament in 1555 was, therefore, dealing with a situation that was without precedent in England and with only a single partial precedent elsewhere in Western Europe. On that basis, it remains possible to argue that Hale was mistaken, and that the Statute of Treasons applies to Queen's husbands in the same way as to King's wives.

Declaratory legislation prior to treason act 1555

Before examining the Treason Act 1555, it is important to note that the initial sessions of

[45] Even if the basic premise is accepted, there remain considerable flaws in Edward's claim, since Philip V and Charles IV both left daughters whose legitimacy was accepted, one of whom had produced a son as early as 1322. Although Edward III could argue that as the grandson of Philip IV he was closer to the common ancestor (an argument used by the Bruces in relation to the Scottish succession in the 1290s and rejected), the grandsons of Philip V and Charles IV were closer to the most recent kings.

[46] The second son, William of Hatfield, had died in childhood, and the youngest, Thomas, Duke of Gloucester, had yet to be born.

[47] In the event, the Black Prince died in 1376 leaving only one surviving child, the future Richard II (1377-1399), then aged nine, who was himself childless at the time of his deposition and death. Lionel, Duke of Clarence, died in 1368 leaving only daughters. The three who survived Edward III (John of Gaunt, Duke of Lancaster; Edmund, Duke of York; and Thomas, Duke of Gloucester) all fathered sons.

[48] Isabella of Castile (1474-1503), her grandmother, had married Ferdinand, heir to the neighbouring kingdom of Aragon, in 1469, after being named as heir by her half-brother but before her accession. The other contemporaneous Queen regnant, Mary Queen of Scots, who had succeeded her father, James V, within days of her birth in December 1542, did not marry until 1558.

Parliament called by Mary are littered with legislation that is declaratory of Mary's position. This is unsurprising in view of the controversy surrounding Mary's accession to the throne and the fact that she was the first Queen regnant (assuming that it is reasonable to discount both Maud and Jane). The statute 1 Mar. sess. 2, cap. 1 declares Mary's birth to have been legitimate. Not only does this contribute to the regularisation of her claim to the throne,[49] but also it undermines the divorce of her father and mother (which was of personal interest to her) and contributes to an undermining of the religious Reformation position that had commenced under Henry VIII, and to which his divorce from Catherine of Aragon was instrumental. It also contributed to the move to return to the 'traditional' faith.

An even clearer example of declaratory legislation, it is submitted, is 1 Mar., sess. 3, cap. 1 which states, at section II, that one of the purposes of the legislation is "[f]or the avoiding and clear Extinguishment of which said Error and Doubt, and for a plain Declaration of the laws of this Realm in that Behalf." This legislation makes clear that Mary as a Queen regnant is to be recognised as having all the powers, etc that are invested in a King regnant, whereas legislation prior to Mary's reign "attribute[d] all royal power 'unto the name of the King.'"[50] As background, it is important to note that it is possible that Mary's reign, and that of her step-sister Elizabeth, was indeed a factor in the "anti-women in power" literature of the late sixteenth century,[51] which is another reason why declaratory legislation might have been important.

The only doubt about the status of this piece of legislation is raised by Loach who questions whether there was a need for it. Ralph Skinner speaking in the House of Commons drew "attention to the odd behaviour of the government in proposing a statute to deal with a doubt that had never yet been voiced."[52] This, we submit, is, in fact, a viewpoint in favour of the proposition that the legislation was passed for the avoidance of doubt. Further, there is the proposition that the legislation was introduced as a response to a thesis, reported by the Imperial Ambassador Renard, put forward by two English lawyers that "by English law, if His Highness [Philip] marries the Queen she loses her title to the Crown and His Highness becomes King."[53] The same argument may be applied to the Treason Act 1555, and, indeed, rejection of the idea that a Queen by marriage gives up her power to her husband was the focus of Sir Matthew Hale's treatment of the 1555 statute in his *The Prerogatives of the King*.[54] Thus the focus of the legislation should, indeed, be regarded as being declaratory.

Further, Mortimer Levine has pointed out that this statute (i.e. 1 Mar. sess. 3 cap. 1) bears two potential meanings. First, that it may be read as making a queen regnant the equivalent of a king regnant (or a woman, "albeit a particular one", the equivalent of a man). Alternatively, it simply enables a queen regnant to exercise what is nevertheless kingly power. Thus, Mary is a king for the purpose of ruling.[55] It is submitted that the preferable reading is the first.[56] The evidence for this is threefold. First, the legislation was not passed at the commencement of Mary's reign when there was considerable doubt as to the validity or potential for success of her claim to the throne. Secondly, it was passed in the immediate aftermath of Wyatt's rebellion that was, in part, predicated on the basis of concern about rule by a woman who was of the traditional faith. Thirdly, the provisions read as though they are declaratory, indeed section II says as much. Levine points out some evidence against this argument. He draws attention to

[49] According to Loach, "some statutory proposal was thought to be desirable to prevent the validity of the marriage, and hence of Mary's claim to the throne, from appearing to rest solely on the judgment of the pope:" Loach, *op. cit.*, p. 78.

[50] Levine, M., "The place of women in Tudor government" in Guth, D.J. & McKenna, J.W., *Tudor Rule and Revolution* (1982) at p. 109. See also Eales, J., *Women in early modern England, 1500-1700,* (1998), chap. 6.

[51] See Levine, *op. cit.*, at pp. 110-114, 116 and 118-123. See also, e.g., McCullough, D., *Thomas Cranmer* (1996).

[52] Loach, *op. cit.*, p. 96.

[53] Renard to the Bishop of Arras, *Cal. S.P., Span.*, XII, p. 15.

[54] Yale, D.E.C., *Sir Matthew Hale's The Prerogatives of the King* (Selden Society, 1976), p. 69.

[55] Levine, *op. cit.*, at p.110.

[56] See Loades, D., *The Reign of Mary Tudor* (2nd ed., 1991), pp. 72-85 which deals with the political background in detail.

Elizabeth's golden speech of 1601 in which she referred to herself as a King.[57] This, we submit, is not sufficient to undermine the thesis that we propound.

Background to the Treason Act 1555

There were many reasons of a political nature for the passing of the Treason Act 1555. These were quite independent of any protection which the Statute of Treasons might or might not be supposed to provide for the husband of Mary I. The Act of 1555 did not deal simply with the extension of the existing treason laws to Philip, but much more widely with his position and powers in the event of Mary's predeceasing him, particularly in relation to any children of the marriage. The late Jennifer Loach, in her magisterial study of Parliament in the reign of Mary, dwelt far more on these issues than on the extension of the law of treason to Philip,[58] though she was a supporter of the Hale view.[59] Indeed, the rest of the statute was seen at the time to be of greater significance as it was a further means of ensuring that Philip did not become too powerful but took his power through the Queen. In fact, there was a contemporary view that the legislation was not necessary for this purpose, as the marriage treaty was already binding upon Philip.[60] We take the view that the extension of the law of treason to Philip was also declaratory, but for the reason, not that there was a pre-existing arrangement, that the issue had never arisen before and so clarification was required.

The marriage of Mary to Philip of Spain raised a number of new and difficult issues even before the personalities of the two parties are considered. Mary did not marry an Englishman, nor did she marry a minor member of a continental royal family.[61] Philip, whom she married in 1554, was heir to his father, the Holy Roman Emperor Charles V, in most of his lands and dignities, though not as Emperor. He had ruled Spain as his father's regent since 1543. Not only was he the *de facto* King of Spain, but also he was heir to the Netherlands. As ruler of Spain, he was ruler of vast areas of the New World. He was, to say the least, very far from being a petty foreign princeling such as most later Queens regnant were to marry.[62] Charles seems to have selected

57 Levine, *op. cit.*, at p. 110, which includes a relevant extract of Elizabeth's speech. For the full text of that speech, see Neale, J.E. (1953), *Elizabeth I and Her Parliaments, 1584-1601*, at pp. 390-1.

58 Loach, J., *op. cit.*, chapters 5 and 9.

59 *Ibid*, at pp. 92, 94, 103 and, especially, 117. This support is significant, but, we venture to suggest, is based on the same errors as those of Sir Matthew Hale.

60 This was the view of the Imperial Ambassador, Simon Renard, see Simond Renard to Philip, December 1554, *Cal.S.P. Span.* XIII, p. 129.

61 Mary herself believed it vital that she marry and produce issue, since in the Sixteenth Century mind, government was not woman's work and she needed a husband to support her. See *infra*. Further, there was a need to produce an heir. There were very few potential suitors. In England consideration was given to Edward Courtenay, son of the Marquess of Exeter, whose personal behaviour and ambition were to rule him out; and Reginald, Cardinal Pole (then a deacon) who was never a realistic option. Following Mary's accession, there seems to have been a sense that there would be both a lack of propriety and practical difficulties in her marrying an Englishman, who would, of course, be one of her subjects, especially as marriage to a member of the English nobility would tend to encourage factional strife such as had been seen in the Wars of the Roses (see Loades (1991), *op. cit.*, pp. 64-65). There were no adult princes of the blood in France at this time (*ibid.*, p. 65, n. 29). As the elder daughter of Henry VIII, and until 1533 his only legitimate child, Mary had, during her minority and prior to the annulment of her parents' marriage, been a significant prize on the European marriage market. In 1518, at the age of two, she was betrothed to the French dauphin, who was even younger, but this arrangement came to nothing. In 1521 negotiations began for her marriage to her older cousin, the Holy Roman Emperor Charles V. Again this came to nothing on the grounds that Mary was ten years below the legal minimum age for cohabitation and it would thus be many years before she could produce an heir. Another cousin, James V of Scots, was also considered as a potential bridegroom at various times, along with a number of French princes, the younger brother of the King of Portugal, the son of the Duke of Cleves, Ferdinand, brother of the Emperor, and the Emperor himself once again. However, for a number of reasons, including the question, after 1533 of her legitimacy, none of these potential matches came to fruition.

62 It is of interest that all the three earliest Queens regnant in Europe married heirs to other kingdoms. Isabella of Castile married Ferdinand, who succeeded his father as King of Aragon in 1479, and Mary Queen of Scots married the French Dauphin, afterwards Francis II, as her first husband. More recent Queens regnant, with the exception of Elizabeth I, who never married, and Mary II, have married minor members of continental royal dynasties. Anne married George of Denmark, a younger son. Victoria married the younger son of the Duke of Saxe-Coburg-Gotha, a small German state, although the dukedom was to descend to Victoria and Albert's second son after the death of Albert's elder brother without legitimate issue. Prince Philip was born a Prince of Greece and Denmark, but out of the direct line of succession, even if the Greek throne had not been a highly unstable one. Apart from Mary, only Victoria married after her accession. The same pattern seems to have been followed in continental Europe, although examples are fewer. Maria Theresa of Austria married Franz Stephen of Lorraine, Duke of Lorraine, a relatively minor ruler, and both the present Queen Margarethe of Denmark and the last two Dutch queens have married non-royal persons. All were married at the time of accession.

Mary as a bride for his son, who was eleven years her junior and already a widower with one child, primarily for political reasons connected with continental affairs, although he had long regarded her with fatherly affection, and she indeed looked on him as a father. Before 1551 Charles V's designated successor as Emperor had for some 20 years been his younger brother, Ferdinand, King of the Romans. However, by 1551 Charles was regretting this arrangement. In a Habsburg family compact, reached after long and difficult negotiations, it was agreed that Ferdinand would remain the next Emperor, but that Philip would succeed in the Netherlands and Northern Italy, as well as in Spain. It was agreed that the imperial succession would subsequently alternate, following Ferdinand's death, between the two branches of the Habsburg house, first Philip and then Ferdinand's son Maximilian, King of Bohemia.

This arrangement was contrary to the interests of Ferdinand and Maximilian, especially as the Netherlands formed the core of Charles V's power. Further, Philip was extremely unpopular in the Netherlands. Loades postulates that by the autumn of 1553, shortly after Mary's accession, Charles had decided to abdicate, as he was to do early in 1555, and wished to strengthen his son's position following the abdication as much as possible. As a King in England, and effective ruler, with the resources of England to draw on, Philip would have a much greater chance of holding the Netherlands than he would as a Spanish prince with no resources north of the Pyrenees.[63] Further, the marriage offered the opportunity to re-colonise England for the Catholic faith.[64]

Mary and Philip

The personalities of Philip and Mary added an additional twist to the difficulty of the situation. Mary's views on the ability of herself as a woman to rule seem to have had two sides to them. On the one hand, she was in no sense an ineffectual character. She had had to cope with, and overcome, her father's rejection of her following the repudiation of his marriage to Catherine of Aragon. She had had to take decisive action in order to reach the throne in the teeth of the opposition centred on Lady Jane Grey.[65] She also believed it her mission to restore England to the Catholic faith. Further, she was for the first seventeen years of her life the only living legitimate child of Henry VIII, and his heir in default of a son. She had been educated as an heir,[65a] and was, moreover, the granddaughter of a Queen regnant in Isabella of Castile. On the other hand, Mary's was not an unconventional character. She seems to have been influenced by the *mores* of her time, in which women generally occupied a subordinate position,[66] at least to the extent of desiring some male assistance in ruling, as is indicated by her ready acceptance of advice from Charles V.[67] Further, she could look to no previous Queen regnant ruling in isolation to act as a role model. Isabella had ruled jointly with her husband. Though on her death in 1504 she was nominally succeeded by her daughter, Juana *'la Loca'*, Juana was known to be mentally unstable even before her mother's death, and was declared insane following her husband's death in 1506. Effective power in Castile passed on her accession to her father, Ferdinand of Aragon, until his death in 1516 and then to Juana's son, Charles V, as successive

63 Loades (1991), *op. cit.*, pp. 62-63.

64 For additional support for the thesis propounded in this paragraph, see Loach, *op. cit.*, chapters 5 and 9.

65 It may not be too far-fetched to suggest that in character she had more in common with her half-sister Elizabeth I than the traditional image of her suggests. See Loades, D., *Mary Tudor: A Life* (1989) *passim* and Loades (1991) *op. cit.*, passim and Loach, *op. cit.*, p. 1 *et seq.*

65a "Fears about women rulers need....to be balanced by the widely accepted contemporary arguments that all these queens had legitimate claims to the English monarchy", Eales, *op. cit.*, p.50.

66 As Loades points out, "Not only was [a woman] supposed to honour and obey her husband in all things, but he also obtained full control over her property and retained it if she died without children," (Loades (1991), *op. cit.*, p. 1). The position in relation to property remained so for another three centuries, until the Married Woman's Property Act 1882.

67 One might draw a parallel with the young Queen Victoria, who at the beginning of her reign looked on her first Prime Minister, Lord Melbourne, as a mentor and father figure, and then, following her marriage, relied heavily on Prince Albert as a confidential adviser and as a *de facto* partner in government, although he held no official position in England. Indeed, almost all the ministerial correspondence with Buckingham Palace on the assassination attempts of 1842 (RA M67) is addressed, not to the Queen, but to Prince Albert. See *infra*.

regents for Juana. She died in 1555, having been confined in a fortress for 46 years.[68] Mary regarded herself as a ruler, and the conclusion of modern writers such as Loades is that she was largely an effective one, but, like Queen Victoria during her marriage to Prince Albert, she desired the support of a husband. It may not be overstating the case to suggest that she wished to rule in partnership with a husband, after the model of her maternal grandparents.[69]

Philip of Spain, for his part, seems to have desired a greater role in England than Mary, and her Parliament, were prepared to concede to him.[70] In 1554 he was aged 27; he had been prepared for his role as ruler of Spain from 1541. In May 1543, at the age of 16, he had been formally designated as regent of Spain and left in authority there by his father.[71] At this point, says his most recent biographer, "Philip...became effective and permanent ruler of Spain."[72] Philip had thus been a *de facto* king since the age of 16 and even in his teens was not prepared to follow his father's advice in all things. Even in 1544, "Charles [V] was to find that his son was no compliant servant of his policies."[73] In this light, it would seem unlikely that Philip was prepared simply to be a "Queen's husband", without a major political role. Indeed, there is some evidence, albeit inconclusive, that Philip had no wish to be known simply as a Queen's husband.[74] Philip married Mary (whom he had never met prior to the marriage) "purely [as a] political move. He was not enthusiastic about it, but deferred to his father's wish absolutely."[75]

The marriage of Mary and Philip

The marriage was brokered by the Emperor himself. In the marriage treaty[76] he was concerned to protect the interests of his son, and any children his son might have by Mary. To this end, Philip was to be accorded the Crown Matrimonial, that is, to be King consort rather than to be known by other and lesser titles. He was to have no claim to England should Mary predecease him, and was not to act alone in England, but only to "assist his consort in the task of government".

Indeed, Philip was a King in his own right at the time of his marriage, having been formally invested as King of Naples and Duke of Milan in England on 24th July 1554, the day before the wedding ceremony. According to Kamen, Charles V effectively abdicated from these realms and passed them to his son, allowing Philip to marry Mary as her equal. From this point Philip

68 See Green, V.H., *The Madness of Kings* (1993), pp. 87-94. Philip made "customary visit[s] to his grandmother [which] were a painful duty," see Kamen, H., *Philip of Spain* (1997), p. 50.

69 This is reflected in, e.g., the pre-1555 legislation, and in the original sources and subsequent materials (see Loades (1989), and (1991), Loach, Levine, Kamen, *op. cit.*, passim) about this period. Clearly, Philip had every intention of becoming more dominant and, when this did not happen and his father abdicated, he concentrated on continental affairs.

70 This view may be derived from the work of Loades, and see Loach, *op. cit.*, pp. 191-198.

71 Kamen, *op. cit.*, pp. 8-10.

72 *Ibid,* p. 10.

73 *Ibid,* p. 17.

74 Early in 1554, after the initial proxy marriage had been concluded, Philip, on being allowed sight of the marriage treaty, made a formal declaration of repudiation of the treaty in front of witnesses, on the basis that he had not been a party to the negotiations, and found himself committed to conditions which filial duty and circumstances forced him to accept, but that his conscience could not bear. See Rodriguez-Salgado, M.J., *The Changing Face of Empire, Charles V, Philip II and Habsburg Authority 1551-1559* (1988), pp. 82-83. Rodriguez-Salgado (*op. cit.*, p. 86 n. 56) refers to the 1632 work *De Bello Belgica* by Strada where comment is made on "Philip's annoyance at being called and considered the Queen's husband". In correspondence with Michael Gunn, Dr Rodriguez-Salgado has said that the point may have been put more strongly than perhaps the evidence allows, but, we would submit, the evidence which does exist suggests that, Philip, whose pride and consciousness of his status emerges from his writings and activities, was concerned during the marriage negotiations to be styled as King rather than merely as the Queen's husband. Rodriguez-Salgado notes that Philip did not attempt to correspond directly with Mary, despite her wish that he do so, until after it was agreed that he should bear the title of king, and suggests that he would not risk a loss of face if the negotiations fell through. His letters to Mary and her courtiers, written after he was informed by Charles V that the title of king had been agreed, were signed *Philippus Rex*, and this, in the eyes of the Spanish ambassador to London, was premature, on the grounds that the title of king could not be used until after the marriage was consummated: *Ibid,* p. 83, n. 35. "The English are already calling him King of England, though it is said that he is only to be called so after the consummation of the marriage:" Simon Renard to the Emperor, April 17th, 1554, *Cal. S.P., Span.*, XII, p. 718. None of this is inconsistent with him being a Queen's consort as the source of his power in England.

75 Kamen, *op. cit.*, p. 54.

76 See Hughes, P.L. & Larkin, J.F., *Tudor Royal Procalamations, Col II: The Later Tudors (1553-1587)* (1969), No. 398.

signed letters as king-prince (*el rey principe*) and refused to allow any mention of Milan, considering that it had been granted to him in 1540.[77] This formal investiture as a King makes it less likely still that Philip would have been prepared to have been known in England as a Queen's husband, or treated simply as a consort with no real power.

Philip was proclaimed King of England in the course of the marriage ceremonies. Despite the hereditary claim of Mary to be Queen regnant, the regnal style is not, after her marriage to Philip, only a reference to herself but is to Philip and Mary (and note he comes first[78]) as King and Queen. The realms that were mentioned were brought to the marriage not only by Mary but also by Philip.[79] The only other joint regnal style is for William III and Mary II, but then both had a legitimate claim to the throne. Otherwise all the regnal style for all Queen's regnant has been to the Queen alone. Clearly this is significant, though not too much must be made of it in view of the fact that Mary was the first Queen regnant. In practice, and contrary to his own expectations and those of his father, Philip's position was analogous to that of a Queen consort, and in some ways inferior to the normal position of a Queen consort. He had no power in England independent of Mary, his activities in England were restricted by the terms of the marriage treaty, and, since he was given no lands in England, had neither revenues nor patronage of his own. He was not accorded the final legitimising of his position by a coronation.[80] His position was also difficult in that the marriage of the Queen to one of the leading Catholic rulers of Europe caused disquiet in an England riven with religious discord.[81]

The Treason Act 1555

Although the Act of 1555 is now styled the Treason Act 1555, it deals additionally with matters other than treason, and once this is recognised its significance alters entirely. In September 1554, two months after the marriage, the Queen believed she was pregnant, and this seems to have concentrated the minds of Parliament in dealing with certain matters left unclear by the marriage treaty. The Queen was then 38 years old, a very late age for a first pregnancy in the Sixteenth Century, and her health had been fragile for much of her life.[82] The incidence of death in childbirth in the Sixteenth Century was extremely high, and Queens were no more immune from this danger than their subjects.[83] It was therefore vital for Parliament to make provision for a regency in the event of Mary's death leaving an infant to succeed her. This was all the more important given that the father of this putative heir was a foreign ruler in his own right, a situation which was absolutely unprecedented,[84] and, further, that the succession in the event

77 Kamen, *op. cit.*, p. 57.

78 The announcement of their presence in the House of Lords also puts the King (Rex) before the Queen (et Reginae), see, e.g., *House of Lords Journal*, 1554, Sess. 1 & 2 Phil. & Mar., p. 464.

79 Hughes & Larkin *Tudor Royal Proclamations, op. cit.*, No. 414, "Announcing the Regnal Style of Philip and Mary", dated 25th July 1554: "Philip and Mary by the grace of God King and Queen of England, France, Naples, Jerusalem, and Ireland; Defenders of the Faith; Princes of Spain and Sicily; Archdukes of Austria; Dukes of Milan, Burgundy, and Brabant; Counts of Hapsburg, Flanders and Tyrol." Of these, Philip brought to the marriage Naples (of which he was announced King shortly before the marriage), Spain, Sicily, Austria, Milan, Hapsburg and Flanders.

80 So hotly contested was this matter that Mary never made a formal proposal to Parliament, it having been accepted that the consent of Parliament was essential, see Loach, *op. cit.*, pp. 122 and 191-198.

81 *Ibid*, pp. 234-35. From the late summer of 1555, once it became clear that Mary's supposed pregnancy was false, Philip turned his attentions to his continental domains. He arrived in Brussels on 8th September, and returned to England only once more, from 20th March to 3rd July 1557. On a personal level his attitude to Mary seems not to have progressed much beyond formal and chivalrous politeness, as witness his recorded reaction to the news of Mary's death, "The Queen my wife is dead. May God have received her in this glory. I felt a reasonable regret for her death," (Philip to the Princess Dowager of Portugal, 4th December 1558, *Cal. S.P., Span.* XIII, p. 440) although Mary for her part seems to have fallen passionately in love with him, or at least with the ideal of him.

82 Loades (1989), *op. cit.*, p. 234, n. 23.

83 Mary's paternal grandmother, Elizabeth of York, died in childbirth in 1503, and her father's third wife, Jane Seymour, in giving birth to Edward VI in 1537. Mary's last stepmother, Catherine Parr, of whom she seems to have been very fond, died in 1548 bearing a child by her fourth husband, Thomas Seymour. Philip of Spain's first wife, Maria of Portugal, had died giving birth to Don Carlos, and his third wife, Elizabeth of Valois, was to die in childbirth in the future. Philip's mother had also died in childbirth.

84 Given the absence of previous Queens regnant, all previous infant rulers had succeeded their fathers, most frequently with a paternal uncle as regent (although Mary of Guise was acting as regent at this time for her daughter, Mary Queen of Scots).

of Mary's remaining childless was problematic. Mary had declared at the time of her accession that she did not wish her younger half-sister, the future Elizabeth I, her heir on the basis of Henry VIII's will, to succeed her. Indeed Mary had kept Elizabeth first in the Tower and then under virtual house arrest following her supposed complicity in Sir Thomas Wyatt's rising of November and December 1554.[85]

A Bill to extend treason to the Queen's husband was discussed in Parliament in April 1554, but then abandoned.[86] Then, a Bill "for the limitation of treasons" was discussed in Parliament on several occasions in November and early December 1554, but was then dropped as unsatisfactory. Discussions with the Queen and, through the imperial ambassador, with Philip, then followed. A new Bill was heavily amended in committee, and, as eventually passed, gave custody of both heir and realm to Philip until the fifteenth birthday of a daughter and the eighteenth birthday of a son, the terms of the marriage treaty to remain in force during such regency. Clearly, there was concern about a possibility of usurpation of power by Philip and his Spanish followers in the event of Mary's premature death. A proposal that Philip should be given rights of succession was rejected out of hand,[87] and the original Bill indeed envisaged a council of six earls, six bishops and six barons to assist Philip during the infant monarch's minority.

The text of the sections dealing with treason strongly suggest that the Act is one which ought to be read in the context of its own time. Indeed it should be viewed as a measure intended to remove once and for all any vestige of doubt that England's first Queen regnant was as much a Sovereign as her male predecessors:

> Forasmuch as the great mercy and clemency heretofore declared by the Queen's Highness in releasing the penal laws made by her progenitors hath given occasion to many cankered and traitorous hearts to imagine, practise, and attempt things stirring the people to disobedience and rebellion against Her Highness,[88] common policy and duty of subjects require that some law be...established to restrain the malice of such wicked and evil doers whereby they may be prohibited to blow abroad such shameful slanders and lies as they daily invent and imagine of Her Highness and of the King's Majesty her most lawful husband, which when they be heard cannot be but...detested by all good men considering that they touch Their Majesties, upon whom dependeth the whole unity and universal wealth of this realm: in consideration whereof it be enacted....
>
> That if any person or persons...during the marriage between the King and the Queen's Majesties, do compass or imagine to deprive the King's Majesty that is now from the having and enjoying jointly together with the Queen's Highness the style, honour and kingly names of the realms and dominions unto our said Sovereign Lady the Queen's Highness appertaining, or to destroy the King that now is during the said matrimony, or to destroy the Queen's Majesty that now is, or the heirs of her body begotten being kings or queens of this realm or to levy war...[against the King, the Queen or her heirs, or to depose the Queen or her heirs from the imperial crown]...Or if any person or persons...by preaching, express words or sayings, shall maliciously, advisedly, and directly say, publish, declare, maintain or hold opinion that the King's Majesty that now is, during the said matrimony, not to have or enjoy jointly together with the Queen's Majesty the style, honour, and kingly name of this realm, or that any person

85 Loades (1989), *op. cit.*, pp. 206-07, 212-17 and Loades (1991), *op. cit.*, p. 78 look at all the potential candidates, and he concludes that Mary's choice was Margaret Douglas, Countess of Lennox, the child of Margaret Tudor's second marriage, to Archibald Douglas, Earl of Angus. Other potential candidates were Mary Queen of Scots, the granddaughter of Margaret Tudor's first marriage, and Frances Brandon, daughter of Henry VIII's other sister, Margaret Tudor, and her daughters, but there was a doubt over Frances Brandon's legitimacy.

86 *House of Lords Journal*, 1554, Sess. 1 Mar., pp. 450-457.

87 Loades (1989), *op. cit.*, p. 235. In the event, Mary's pregnancy proved false, although preparations for childbirth were made in May 1555 and continued until late July, *ibid*, pp. 248-52.

88 The possibility of rebellion against Mary was real. She had been installed as Queen as the result of a rising against Lady Jane Grey, who was named as heir by Edward VI and proclaimed Queen after his death. Her marriage to Philip was far from popular and there had, prior to the marriage, been plans for risings in Leicestershire, Kent, Sussex and Devon, with French assistance (Loades (1991), *op. cit.*, pp. 69-81). The Queen's religious policy also aroused much opposition.

> or persons, being neither the King's or the Queen's Majesty that now are, during the said matrimony between them ought to have or enjoy the style, honour and kingly name of this realm, or that the Queen's Majesty that now is during her life is not or of right ought not to be Queen of this realm, or after her death that the heirs of Her Highness's body being kings or queens of this realm of right ought not to be kings or queens of this realm or to have and enjoy the same, or that any person or persons other than the Queen's Majesty that now is, during her life, ought to be queen of this realm, or after her death other than the heirs of her body being kings or queens of this realm, as long as any of her said heirs of her body begotten shall be in life, of right ought to have and enjoy the imperial crown of this realm; That then every such offender, being thereof duly convicted or attainted by the laws of this realm, their abettors, procurers and counsellors, and all or every their comforters knowing the said offences or any of them be done, and being thereof convicted or attainted as is aforesaid for his or their such offence shall forfeit and lose to the Queen's Highness, her heirs and successors, all his and their goods and chattels and the whole issues and profits of their lands....
>
> [c.2. Persons guilty of offending for a second time shall be deemed guilty of high treason.]

These sections, therefore, deal with persons who cast doubt on the title of Philip or Mary, or the two together, or their issue, to the Crown. They seem to deal as much with Mary's position as with Philip's. C.4 and c. 5 deal with the arrangements for a regency:

> c.4. And be it further enacted...that if any person or persons...during the said marriage, shall compass or imagine the death of the King's Majesty that now is, and the same maliciously, advisedly and directly, shall utter and attempt by any writing, printing, overt deed or act; or if any person or persons...shall maliciously, advisedly and directly, by writing etc. shall deny the title of the King or the Queen and their issue they shall be deemed guilty of high treason.
>
> c.5 If any person, during the time when the present King has charge of such heirs attempts to destroy the said King or to remove him from the government of such minors, and is lawfully convicted by the laws of this realm, he shall be condemned a high traitor.

Looked at in its entirety, we submit that the 1555 Act was very much a product of its own time, and the particular political and religious milieu in which it was enacted, rather than dealing with a loophole in the existing Statute of Treasons that was identified by Parliament following the marriage of Philip and Mary. Although in relation to early statutes it is perhaps dangerous to attach too much significance to the form of words used, it is of interest that the Act deals with Philip by name, given that all Mary's living heirs were female, and might reasonably be expected to marry.[89]

ANNE

Our thesis on the law of treason is supported by the absence of consideration of this subject during the reign of Queen Anne.[90] Anne's husband, Prince George of Denmark, whom she married in 1683, prior to her accession, was, unlike Philip of Spain, not accorded the Crown Matrimonial. It would appear that the question of whether he was covered by the Statute of

[89] Margaret Douglas was already married, to Matthew Stuart, Earl of Lennox (their union produced Lord Darnley, second husband of Mary Queen of Scots and a future holder of the Crown Matrimonial). Lady Jane Grey had been married at the time she was named by Edward VI as his heir and when she was proclaimed Queen. Elizabeth I was unmarried at her accession, and remained so, but marriage negotiations were put in train on a number of occasions - indeed, Philip of Spain, a widower following Mary's death, was considered as a possible suitor.

[90] William of Orange, consort of Mary II, was a King regnant as William III (1688-1702), and continued to reign as King regnant after Mary's death in 1694, and so the issue that we have raised was not relevant.

Treasons was not considered during her reign.[91] Given the historical context, it seems surprising that no legislation was enacted, unless it was considered unnecessary on the basis that the phrase "King's wife" includes a Queen's husband. However, one must be cautious in making assumptions from silence. It is equally possible that the absence of consideration stemmed from an absence of physical attacks on Prince George.

Queen Anne succeeded at a time of marked political and religious discord, and, indeed, a mere fourteen years after a revolution. Her father, James II (1685-88), had been deposed following the birth of her half-brother, James Francis Edward, "the Old Pretender", and the throne had then been offered to Anne's elder sister, Mary II, and her husband, William of Orange. They, however, had no children and the succession again became a live issue following the death of Anne's last surviving child in 1700. James II died in exile in 1701, but his son was then proclaimed king as James III in France and was regarded by supporters in the British Isles as the rightful Sovereign. Indeed, there was an abortive rising on his behalf in Scotland in 1708.[92] George of Denmark died on 28th October 1708. He seems in life to have been something of a nonentity, but, against this background of very real threat to his Queen's position, it seems surprising that no amendment to the Statute of Treasons was made unless the explanation was that it was considered unnecessary. Treason law was the subject of Parliamentary consideration in this period, but both the statutes passed dealt only with procedural matters, imposing safeguards for the protection of persons tried for treason.[93]

VICTORIA AND ALBERT[94]

Queen Victoria was shot at no less than six times during her marriage to Prince Albert, on three occasions when in the company of the Prince. Papers in the Royal Archives show that the scope of the existing treason law was considered in detail at this time, but no proposals were made for the amendment of the Statute of Treasons to protect the husband of a Queen regnant.[95] Concerns expressed by Prince Albert himself and by the Queen's ministers relate entirely to the protection the law provided for the person of the Sovereign alone. However, the official opinion of the day, presumably drawn from Hale's views, was that the existing treason law did not cover a Queen's husband.

Queen Victoria and Prince Albert were shot at on 29th May 1842, when returning to Buckingham Palace by carriage from a church service in the Chapel Royal, and a second time on the following day. Parliament made a loyal Address to the Queen expressing thanks for her deliverance, which omitted any mention of Prince Albert and in doing so seems to have caused the Queen some offence. The Home Secretary, Sir James Graham, writing on 1st June, explained:[96]

91 The authors are indebted for this information to Professor W.A. Speck, Professor Emeritus of History at the University of Leeds.

92 A second and much more serious rising, including a landing in Scotland by the Pretender and a French army, took place in 1715, but by this time both Queen Anne and her husband were dead.

93 Treason Act 1695, (7 & 8 Will. 3, c. 3), Treason Act 1708, (7 Anne), which extended the provisions of the 1695 Act to Scotland following the Acts of Union.

94 Apart from the Treason Act 1799 (see below), all legislation concerning treason passed between 1714 and 1842 dealt with procedural and sentencing matters. The Treason Act 1790, (30 Geo. 3, c. 48) replaced death by burning for women convicted of high treason with death by hanging, and that of 1814 (54 Geo. 3, c. 146) replaced the traditional punishment of hanging, drawing and quartering for male traitors with simple hanging.

95 All material contained in the Royal Archives is used by gracious permission of Her Majesty the Queen and with thanks for the expert guidance provided by Sheila de Bellaigue, Registrar of the Royal Archives, and her colleagues.

96 RA B5/12.

> The two Houses of Parliament followed the exact precedent which had been established in Oxford's case [an earlier shooting incident in 1840] and altho' the life of the Prince, so dear to Your Majesty, is highly valued by all your loving Subjects, yet the Crime of Treason attaches only to an attack on the Sacred Person of Your Majesty...Hence the omission in the former case of any allusion to the Prince and the silence of Parliament on the present occasion is to be ascribed to the same cause; not to any cold indifference, which the general feeling of attachment to the Prince entirely forbids....

In all three of the shooting incidents of 1842 (the third occurred on 3rd July) the concern was entirely with whether shooting at the Sovereign with a pistol loaded only with blank cartridge or wadding fell within the scope of existing treason law.[97] The evidence of Colonel Wilde, an equerry to Prince Albert who was riding alongside the carriage, in relation to the second incident was that pistol wadding fired from a range of seven feet might cause injury to the skin or even set fire to clothing.[98] However, there was considerable doubt in the minds of the judiciary that this was sufficient to constitute "compassing or imagining the death" of the Sovereign under the Statute of Treasons or even "compassing or imagining the wounding" of the Sovereign under the Treason Act 1799.[99]

Prince Albert, to whom much of the ministerial correspondence was addressed, was clearly unhappy. He wrote that:

> In considering the Protection which the Law ought to give to the Sovereign it must be considered
> 1. That the life of the Sovereign is the most important in the Kingdom;
> 2. That it is the most exposed
> 3. That the liability to be hurt is increased when the Sovereign is a female
> 4. That the proneness of the People to committ [sic] attempts on the Person of the Sovereign is increased in our times by the increase of democratical & republican Notions & the Licenciousness [sic] of the Press.
> If these premises are acknowledged as just & if you compare them with the unanimous opinion of the Law Officers of the Crown upon the Present Statute on High Treason it becomes evident that the law as it at present stands does not afford that Protection to the Sovereign's Person which the acknowledged Premises require.[100]

Given that Prince Albert was present with the Queen during both incidents and was in as much danger as she was, as well as believing it his duty to protect her, it is of considerable interest that he did not mention his own position. Nor did the ministers and Law Officers of

[97] It was never established whether the pistol used in the second incident was loaded with ball, as the evidence of the witnesses conflicted; the pistol used in the third incident had been loaded with powder only. See file RA M67/30-39, 46-50.

[98] RA M67/39.

[99] 39 & 40 Geo. III, c. 93. This Act, which was passed in the aftermath of an attack on George III in his carriage while on his way to the State Opening of Parliament, made it treasonable to compass the wounding of the King, the Queen Consort, and the King's eldest son and heir. It was repealed in 1848. In a memorandum of a meeting in the House of Lords held on 30th June 1842 (RA M67/42) following the conviction of John Francis for high treason in relation to the second of the 1842 incidents (Lord Lyndhurst L.C., Tindal L.C.J., Patterson J., Gurney B. and Sir James Graham), "[t]he judges were unanimous in this opinion, that, under this indictment, if there were wadding only over the Powder and even if had struck Her Majesty, and inflicted a slight injury, under the statute 39 & 40 Geo. III, c. 93, the Treason would not be complete, unless the guilty intent to kill could be clearly and satisfactorily inferred." On this basis the judges recommended, not that Francis's conviction be quashed, but that his death sentence should be remitted to "Transportation for Life to the penal settlement where the hardest Labor [sic] is exacted".

[100] Undated memorandum to the Cabinet, written c. 2nd July 1842, RA M67/44.

the Crown give any consideration to his status under the existing treason law.[101] Were it not for Graham's statement in his letter of 1st June, we might conclude that this was because there was no necessity to consider it, given that the Queen was present with Prince Albert and Prince Albert was not attacked alone. However, it may be argued that Graham, and those who drafted the Parliamentary Address, based their view on Hale's, and looked no further.

CONCLUSION

Whether it would be treasonable under existing law to compass the death of Prince Philip or the husband of any future Queen regnant is a subject for academic speculation rather than a matter of any practical urgency. Reviewing the currently received wisdom, we have argued that the view of Sir Matthew Hale is an over-generalisation from the Treason Act 1555. That statute was, we believe and contrary to Hale's conclusion, a product of its own time. It was concerned only with the very specific and urgent political situation pertaining at that time. It was never intended to establish a general principle. On that basis, the normal modern rules of statutory interpretation ought to be applied to the Statute of Treasons 1351. Thus, as we believe that there is no specific or implied exclusion of the husband of a Queen regnant,[102] the masculine should not only be construed to include the feminine, so that "our Lord the King" includes "our Lady the Queen regnant", but also the feminine encompasses the masculine and therefore "our Lady his Queen" includes "our Lord her Husband".

[101] A memorandum was prepared by the Attorney General, Frederick Pollock, and the Solicitor General, William Follett, on 6th July 1842 (RA M67/71) and submitted by the Prime Minister, Sir Robert Peel, to Prince Albert on the following day. This was followed by a memorandum from Lord Lyndhurst L.C. (RA M67/72). Peel then wrote to Prince Albert on 9th July (RA M67/75), stating that the Cabinet had that day agreed to introduce a Bill which would dispense with the procedural requirements imposed by the Statute of William III in relation to trials for treason founded on attempts to wound the Sovereign (such dispensation already applied to trials based on attempts to kill the Sovereign under the Treason Act 1799) and to create a specific offence of discharging or attempting to discharge any weapon at the person of the Sovereign or the carriage in which the Sovereign is travelling, punishable by transportation for up to seven years, or a fine, or imprisonment with or without hard labour and/or corporal punishment. In replying on 10th July (RA M67/76) Prince Albert's only concern was that the proposed sentence was insufficiently severe. The Bill was introduced into the Commons by Peel himself on 12th July, and received by the House "with acclamation" and without a dissentient voice, "but on the contrary with the strongest demonstration of Loyalty and affectionate attachment to Her Majesty" (Peel to Prince Albert, 12th July 1842, 5.15pm, RA M67/79) and was duly passed and received the Royal Assent as the Treason Act 1842.

[102] The only basis for exclusion being Hale's view.

SPONSORSHIP, INTERNATIONAL SPORTS ASSOCIATIONS, AND LITIGATION – FROM THE PERSPECTIVE OF GERMAN LAW

KLAUS VIEWEG *

THIS ARTICLE AIMS TO OUTLINE THE LEGAL CONFLICTS which arise from sponsorships concerning international sporting federations and to discuss the issues which face national courts in such cases. It will address, in particular, key questions about the international jurisdiction of national courts in Europe, on the basis of German Private International Law rules.[1] It will then present the substantive legal issues concerning sport-related rights under German law, issues which are critical in the field of sponsorship.

INTRODUCTION

Growing economic relevance of sponsorship of international sports associations

Sponsorship is a central element of commercialised sport since international sports associations rely heavily on sponsorship for their revenue. Sponsorship allows the sponsee to receive an allocation of money, facilities or services in exchange for granting the sponsor rights in connection with media coverage relating, *inter alia*, to the use of the sponsor's name, brand or image in connection with the sponsored activities. These rights, together with merchandising and advertising rights, exclusive supply rights, broadcasting and other media rights, might be termed "sports rights".[2]

In recent years the revenue of international sports federations has increased considerably through sponsorship. The International Olympic Committee ("IOC"), for example achieved a total sponsorship income for the 1976 Montreal Olympics of less than U.S. $5 million from some 650 sponsors.[3] By contrast, the 30 sponsors of the 1992 Barcelona Olympics paid about U.S. $550 million. Indeed, the twelve "official sponsors"[4] alone together paid approximately U.S. $170 million between 1989 and 1992.[5] More recently, the first major sponsor of the soccer World Cup held in France in 1998, MasterCard International, agreed to provide U.S. $100 million by way of sponsorship.[6]

Relevant legal relationships

Sponsorship affects a number of legal relationships in addition to that between the sponsor and sponsee. Thus, for example, it may affect the relationships between the sponsor, sponsee, media (primarily television companies), the organisers of sports events, the owners of sporting facilities and/or equipment, persons or organisations connected with the sponsee by statute or contract, sponsoring agencies and, of course, spectators and the sporting competitors themselves.

* Dr. iur (Muenster), Professor of Civil Law, Commercial Law, German and International Business Law and Director of the Institute of Technology and the Law, Faculty of Law, University of Erlangen-Nurnberg.

1 See Vieweg, "Sponsoring und Internationale Sportverband" in Vieweg (ed.) *Sponsoring im Sport* (1996) at p. 53 *et seq.*

2 See Vieweg, "Sponsorship und Sportrecht" (Teil I); Sp*uRt* (Zeitschrift fur Sport und Recht) 1994, p. 6 *et seq.*

3 *Frankfurter Allgemeine Zeitung* of 29.7.92.

4 The participants in the so-called "TOP-2-Programme".

5 *Frankfurter Allgemeine Zeitung* of 27.1.93, p.23

6 *Frankfurter Allegemeine Zeitung* of 11.2.95, p.25.

Cases and legal problems

The increasing economic importance of sports sponsorship and the number and complexity of the legal relationships upon which it impinges have given rise to several practical legal problems with the result that sports law is increasingly developing into a branch of commercial law, often dealing with novel legal questions. Indeed, a survey of current cases indicates at least twelve problems arising in connection with sponsorship and international sports federations.[7] They have arisen in the following contexts:-

(1) Controversy concerning the allocation of the sporting events of an international sports federation to a particular venue which is associated in some way with a sponsor, e.g. the allocation of the 1996 Olympic Games to Atlanta, the headquarters of the IOC's main sponsor, the Coca-Cola company.[8]

(2) Disputes concerning financial participation in sponsorship revenues, e.g. the conflict between the Federation of International Summer Sports Associations ("ISOIF") and the IOC.[9]

(3) The requirement of sponsorship as a condition for participation in a sporting event, e.g. the requirement of the International Volleyball Federation ("FIVB") that national associations participating in the world league must procure a sponsor paying at least U.S. $250,000 per year.[10]

(4) The dependence of international sports federations events upon sponsors e.g. the Hawaii-Ironman (organised by the World Triathlon Corporation) can only maintain its status if sponsorship money can guarantee an adequate prize for the winner.[11]

(5) The influence of third parties upon the policy of international sports federations through sponsors, e.g. the organisation known as "Atlanta Plus" required the exclusion of teams from the 1996 Olympic Games if they discriminated against women. Part of Atlanta Plus' strategy was reportedly to influence the sponsors of the IOC and of the Atlanta Games.[12]

(6) Disputes arising from the degree of exclusivity expected by sponsors, e.g. the controversy between General Motors and Audi arising from the close similarity between the four rings in Audi's emblem and the logo of the five Olympic rings.[13]

(7) Competition between sponsors of international sports federations and those of the athletes, e.g. for Shaquaille O'Neal to be allowed to play for the US team in the 1994 Basketball World Championships, required an agreement between the US Basketball Association, which had a binding sponsorship contract with Coca-Cola, and the sponsor of the player, Pepsi-Cola.[14]

(8) Competition between the sponsors of the promoter of an event and those of the athletes, e.g. the winners of the 1993 World Athletics Championships in Stuttgart received a Mercedes provided by the promoter's sponsor. The personal sponsor of the world long jump champion, Heike Drechsler, was, however, BMW.

(9) Disputes may arise because of a lack of rules or contractual provisions specifying the ownership of advertising rights.

7 To these might be added the impact on sponsorship contracts, sporting federations and events of any proposed prohibition by the United Kingdom or by the European Community of advertising or sponsorship of sporting events by tobacco companies.

8 *Sueddeutsche Zeitung* of 24.6.92, p.3.

9 *Frankfurter Allgemeine Zeitung* of 6.4.96, p.32; see also *Frankfurter Allgemeine Zeitung* of 7.8.95, p.20 and of 15.8.95, p.25.

10 *Frankfurter Allgemeine Zeitung* of 4.11.93, p.37.

11 *Frankfurter Allgemeine Zeitung* of 17.10.94, p.32.

12 *Frankfurter Allgemeine Zeitung* of 7.2.95, p28.

13 *Frankfurter Allgemeine Zeitung* of 28.1.88, p.23.

14 *Frankfurter Allgemeine Zeitung* of 26.3.94, p.25.

(10) Unilateral claims of rights by international sports federations, e.g. the International Bobsleigh Federation ("FIBT") claims the right to advertise on the helmets, upper arms and shoulders of bobsleighers on the basis of a decision of its congress.[15]

(11) Decisions of international sports federations which might affect the value of advertising to a sponsor, e.g. Volvo has sponsored horse-riding for many years to a total of approximately U.S. $5million. The Federation Equestre International ("FEI") transferred the rights to a specialised sports channel (Deutsches Sportfernsehen) which transmitted to considerably fewer people than the previous broadcaster, the network of the European Broadcasting Union.[16]

(12) The termination, non-extension and/or non-completion of sponsorship contracts on specific grounds, e.g. because of deterioration of a sponsor's image if athletes get suspended because of doping.

It is then, within the context of controversies such as these that jurisdictional and conflict of laws issues arise and in which this article will focus on the international jurisdiction of the German Courts and the national law applied by those courts to specific issues.

INTERNATIONAL JURISDICTION OF THE GERMAN COURTS – JURISDICTION AND FORUM SHOPPING

When a legal dispute involving an international sports federation exceeds the bounds of its own jurisdiction the central problem which arises is as to the courts of which country have jurisdiction over the dispute. The jurisdiction of a particular forum is, of course, determined by its own national law *(lex fori)*. The result, therefore, can be that the courts of more than one country might assert jurisdiction, a situation which gives the plaintiff a choice of forum and which gives rise to the possibility of "forum shopping" where the plaintiff seeks to litigate his dispute in the forum which offers him the most procedural advantages.

In the Member States of the European Union and in Iceland, Norway and Switzerland, the Brussels and Lugano Conventions apply. They create a single system of directly applicable rules of competence regulating general, exclusive and special jurisdiction. The Conventions ascribe general jurisdiction to the country in which the defendant is domiciled. They also prescribe certain heads of exclusive jurisdiction which, if they are established, will confer jurisdiction upon the courts of a particular country and will displace general jurisdiction. In addition, they provide for instances of special jurisdiction in which, if the necessary grounds are established the plaintiff may choose to litigate in the courts of a State other than that having general jurisdiction. In each of the States Parties to the Conventions, the rules of the Conventions are superior to the autonomous national law.[17]

The Conventions' regime frequently applies in sports cases, firstly because most of the international sports federations have their domiciles in one of the States Parties. Secondly because the scope *ratione materiae* of the Conventions, namely "civil and commercial matters" embraces most aspects of sponsorship, including anti-trust aspects.[18]

The Conventions apply to sports sponsorship disputes as follows: First, the courts of a particular State Party will have general jurisdiction if the defendant (sports federation, club, athlete, sponsor or owner of a sports venue) is domiciled there.[19] Consequently, the German

15 FIBT, International Reglement, articles 1.13.2.1, 1.13.3.1, and 1.13.3.2.

16 *Frankfurter Allgemeine Zeitung* of 23.3.95, p.34 and of 27.4.95, p.33.

17 The Conventions, article 3.

18 Kropholler, *Europaeisches Zivilprozessrecht, Kommentar zu Eug Vue und Lugano-Uebereinkommen*, 5th ed. (1996) article 1, no.14.

19 Brussels Convention, article 3, no.53.

courts have general jurisdiction in civil and commercial claims brought, for example, against the International Amateur Basketball Federation or the International Rifle Shooting Union which are domiciled in Germany. They would also have jurisdiction over claims brought by an international federation against the corresponding German association in the particular discipline or against a German domiciled athlete.

As we have seen, however, if another State has exclusive jurisdiction according to the Conventions the general jurisdiction will be displaced. Article 16(2) of the Brussels Convention provides that, "in proceedings which have as their object the validity of the constitution, the nullity, or the dissolution of companies or other legal persons or associations of natural or legal persons, or the decisions of their organs", the courts of the Contracting State in which the company, legal person or association has its seat are to have exclusive jurisdiction. Furthermore, subject to article 16, article 17 of the Convention permits parties, one or more of whom is domiciled in a Contracting State, to confer exclusive jurisdiction upon the Courts of a Contracting State by agreement made or evidenced in writing.

These heads of jurisdiction are likely to apply to disputes concerning the validity of decisions of the executive bodies of international sports federations. In such cases the courts of the domicile of the federation would, therefore, have (exclusive) jurisdiction, even though the federation may be the plaintiff and the defendant may be domiciled elsewhere.

If there is no question of exclusive jurisdiction, the plaintiff may be able to choose between proceeding in the courts of the State in which the defendant is domiciled (general jurisdiction) or in another State on the basis of special jurisdiction determined in accordance with articles 5 and 6 of the Conventions. These, in particular, provide grounds for special jurisdiction in matters of contract[20] (conferring jurisdiction on the courts of "the place of performance of the obligation in question"); tort[21] (conferring jurisdiction on the courts of "the place where the harmful event occurred"); and in cases concerning the activities of a branch or agency.[22]

The "place of performance" of a contract must be determined by reference to national conflict of law rules. In Germany the relevant rules are to be found by reference to article 27 *et seq.* of the Introductory Act of the Civil Code[23], according to which "the place of performance" of a sponsorship contract will differ depending upon whether the contract in question is for long-term sponsorship of a federation[24] or for the sponsorship of a specific sporting event, such as a local athletics meeting.

In some sponsorship cases special jurisdiction may be attributed to a forum on the basis that it is the place in which a tort has been committed. This is because the concept of "tort" embraces many kinds of misfeasance, including anti-trust violations[25] and cases of unfair competition[26] which might arise in the sports sponsorship context. In such cases special jurisdiction could be attributed to the place where the wrongful contact or decision was made or, equally, to the place where resulting harm occurred, for example, in the case of the German tort of interference with the right of personality[27], the place of residence of the person concerned.

Special jurisdiction arising from the activities of a "branch or agency" may be particularly relevant if a national sports association can be regarded as a branch or agency of its international federation. For this to be the case the association would have to have been

20 Article 5(1).

21 Article 5(3).

22 Article 5(5).

23 Einfuhrungsgesetz zum Burgerlichen Gesetzbuch (EGBGB).

24 E.g. sponsorship of the Basketball-Bundesliga.

25 Kropholler, *supra*, article 5, no.50; *Immenga* v. *Mestmaccker-Rehbinder*, 98 II, no.264.

26 BGH NJW 1988, 1466 (1467); Kropholler, *op. cit.*, article 5. no.50.

27 The Federal Supreme Court derives the right of personality from articles 1(1) and 2(1) of the Constitution (GG). See BGHZ 13, p. 334 *et seq.*

indefinitely established and would have to have its own management.[28] Furthermore, on the one hand, it would have to be equipped to do business with third parties directly at the "branch". On the other hand, however, it would have to be under the supervision and management of the "parent" undertaking.[29] It is interesting to note that national sports federations are bound by the instructions of their international federations since they have strictly to follow the criteria for nomination, and the conditions for participation, when selecting competitors for events promoted by the international federation. Nonetheless, the relationship between a national association and its international federation may well be regarded as contractual rather than as constituting the former as a branch or agency of the latter since they have separate legal personality and there is no element of ownership by the international federation of the national association.[30]

THE APPLICABLE LAW

German law

Assuming that the German courts have jurisdiction the next question to be determined is as to which national substantive law (*Sachstatut*) is to be applied in determining the case. This too depends upon national conflict of laws rules.

The "principle for conflicts concerning a company or other society" (*Gesellschaftsstatut*), which is crucial for the legal relationships of legal entities, covers questions of capacity and validity of statutes and bye-laws, review of decisions of organs of the company, and claims on members. Here, if the theory of domicile (*Sitztheorie*) were to apply, the case would be governed by the law of the State in which the company has its actual headquarters. If the theory of foundation were applied (*Grundungstheorie*) it would be governed by the law of the place of incorporation. Germany follows the domicile theory.[31]

According to the "principle for conflicts concerning the law of contract" (*Vertragsstatut*),[32] if a sponsorship contract deals with the use of advertising on real estate and sports areas and facilities, the governing law is that of the State in which the property is located. In other cases, the applicable law is generally the law of the State in which the sponsee has his usual residence. Nevertheless, if the sponsorship concerns a specific event, the law to be applied will be that of the State in which the event is to take place.

The "principle for conflicts concerning torts" (*Deliktsstatut*) is that the governing law is the law of the place of the tort. This encompasses both the place of the tortous act as well as the place where harm accrues (*Ubiquitatsgrundsatz*), which may be different. Consequently, in cases of violation of a sponsee's right of personality by a sponsorship contract or decision of an international sports federation more than one law may be applicable. The same applies if an international sports federation interferes with the rights of an owner of a sports venue or facility. Under German law, however, the place of a tortious act and the place of its harmful effect are of equal relevance. It is, therefore, for the plaintiff to choose which of the two systems of law is to be applied. If the plaintiff does not make a decision, the court will apply the law which is most favourable to the party which has suffered harm or loss.[33]

In addition, so far as infringements of competition law are concerned, the "law of the place

28 *Meeth v. Glacetal Sarl*, Case 23/78, [1978] E.C.R. 2133; Kropholler, *op. cit.*, article 5, no.75.

29 *De Bloos* v. *Bouyer*, Case 14/76, [1976] E.C.R. 1497; NJW 1977, 490 (491); Kroppholler, *ibid.*

30 In the *Krabbe* Case special jurisdication could not be applied on the branch/agency basis for the additional reason that the defendant, the International Amateur Athletic Federation, had its domicile in a State which was not party to the Conventions (Monaco).

31 BGHZ 78, p. 318 (334); see further the discussion in *Staudinger* v. *Grossfeld*, Internationales Gessellschaftsrecht no. 40-76.

32 In Germany, article 27 *et seq.* EGBGB.

33 BGH NJW 1964, S. 2012; 1981, S. 1606; left open by BGH WM 1989, S. 1049.

of commitment" (i.e. the place where the breach of the law took place) generally applies.[34] The place of commitment for these purposes is the place where the competitive interests of competitors collide.[35] Consequently, German law always applies when competition in Germany is affected by the sponsorship in question. The residential, administrative or business domicile of those concerned is irrelevant to the choice of law. Thus, since the competitive interests of actual or potential sponsors of an event collide at the place of the event in question the law of that place is applicable. The same applies so far as the competitive interests of athletes, teams and clubs are concerned who are potential participants in a proposed sponsored event.

When intangible rights are affected by sponsorship as, for example, in the case of protection of logos or mascots, the "principle of territory" applies, namely the theory that intangible rights are only effective within the territory of the State under whose law they are created. The effectiveness of such rights in another State is limited to the extent to which they are recognised by that other State, for example, on the basis of multilateral conventions. It follows, therefore, that the effectiveness of these rights depends upon the decision as to which State's law is applicable.

In anti-trust cases, under German conflicts rules, the "principle of effect" (*Auswirkungsprinzip*) applies[36] and overrides the general rules. The principle is that restraints of trade which were caused abroad but which produce perceptible effects on competition in Germany are subject to German law. Accordingly, irrespective of the domicile or place of incorporation of an international sports federation, any restraint of competition which is effective in Germany and which such a federation imposes by virtue of its monopoly position could lead to the application of German anti-trust law. A federation's rules or decisions, requiring that commercial activities can only be carried out with its consent, or centralising the management of advertising rights (such as by the UEFA Champions League) come under this principle.

APPLYING THE CONFLICTS OF LAW RULES TO DISPUTES RELATING TO SPORT SPONSORSHIP

As we have seen there is great scope for disputes to arise between international sports federations and national associations and athletes in the field of sponsorship. The question of the distribution of sponsorship revenue may become particularly controversial and this will now be investigated, from the point of view of German law. Three aspects, in particular, call for attention, namely (a) the question as to who is the owner of sponsorship rights; (b) the circumstances in which such rights can be transferred; and more specifically (c) the extent of legal protection of athletes' interests.

Relevant rights in terms of sponsorship – The conflict between the interests of athletes' and of international sports federations

On the one hand, athletes are the ones most affected by sport sponsorship business, whether as individuals or members of a team. On the other, an athlete's advertising value is linked to the marketing skill of the (international) sports federation. The aspects most closely linked to the athlete's personality are his name, his image, his voice, his performance, his sporting success, his comments and other forms of expression. In fact, German law does protect the right to use one's name.[37] The right to own one's image (in the sense of likeness) is also protected by the

[34] BGHZ 40,391 (394) (*Stahlexport*).

[35] BGHZ 35,329 (334) (*Kindersaugflaschen*); 40,391 (395) (*Stahlexport*); 113, 11 (15) (*Kauf im Ausland*); BGH NJW 1988, 644 (645).

[36] *Immenga* v. *Mestmacker* – Rehbinder 98 II no.30 *et seq.*

[37] Section 12 of the Civil Code (Burgerliches Gesetzbuch, "BGB").

German Constitution[38] and regulated by the Copyright of Works of Art Act.[39] Thus, section 23 of the latter provision provides that persons "of contemporary history", which would include popular athletes,[40] can prevent the use of their likeness in advertising.[41] The other aspects of the athlete's personality listed above are protected by articles 1(1) and 2(1) of the Constitution in conjunction with section 823(1) and 1004 of the Civil Code.[42] Thus, the right to make an autonomous decision about the use of aspects of one's own personality, and the right to determine for oneself whether and how to exploit them economically, are derived from articles 1(1) and 2(1) of the Constitution.[43] Furthermore, for professional athletes both rights are further protected by the special rule enshrined in article 12(1) of the Constitution concerning occupational liberty. This is justified because advertising possibilities are connected with the athlete's carrying out of his occupation just as much as his sporting performance itself.[44]

The scope of the right of personality under German law must be determined in every case by balancing the rights and interests of all parties affected.[45] Thus it is possible that freedom of the press, protected by article 5 of the Constitution,[46] and the public interest in information as well as the interests of an international sports federation may justify derogations from an athlete's right to make an autonomous decision about exploitation of aspects of his personality.

The right of an association to commercialise its activities (especially in promoting international championships) can be derived from the concept of the autonomy of associations. Furthermore, the right of international sports federations to administer their own affairs includes the right to determine their own method of financing.[47] Hence, all rights that are connected with the federation's sporting events and are capable of being commercialised are the rights of the promoting federation. Thus, the right to exploit the name of an event and to add a sponsor's name to the title (e.g. the "IBM – ATP – Tour") belong to the promoting body, whether international federation or national association.

It is apparent from the foregoing that under German law sports sponsorship raises the possibility of conflict between the numerous rights of the parties concerned. Indeed, if everybody insisted strictly upon his rights, the commercialisation of international sporting events would be more or less impossible, because of a mutual blockade. It is clear, therefore, that for economic reasons some of the participants transfer their rights to the others or, at least, concede the entitlement to exploit their rights.

Transfer or licensing of rights

As a general principle the rights of an athlete can indeed be transferred to international sports federations. It is also possible for athletes merely to licence their rights to the federation. This can be done on the basis of the articles of the federation's statutes as well as by bilateral contract. Moreover, the validity of the transfer or licence depends upon the principles developed for the review of the validity of the statutes of associations (*Inhaltskontrolle von Verbandsnormen*).[48]

38 Articles 1(1) and 2(1) of the Consitution (Grundgesetz, "GG").

39 Sections 22 and 23 of the Act (Kunsturhebergesetz, "KUG").

40 Siegried, "Die Fernschberichterstattung von Sportveranstaltungen" 1990, p.m.w. N; LG Moenchengladbach SpuRt 1994, 225.

41 BGH NJW 1961, 558 and NJW 1979, 2203 (2204 *et seq.*); LG Moenchengladbach SpuRt 1994, 225.

42 BGHZ 33, 20 (24,28).

43 Siegfried, *op. cit.*, p.27.

44 *Bruhm* v. *Mehlinger*, Rechtliche Getaltung des Sponsorship, Bd. II: Spezieller Teil 1992, p.12.

45 BGHZ 23, 72(80; 45, 296 (307).

46 Article 5(1) second sentence.

47 Grunsky, "Die Befugnis der Sportverbaende zur Regelung der Werbetaetigkeit durch die Mitgliedsvereine, in Grunsky (ed.), *Werbetaetigkeit und Sportvermarktung* (1985) p.14 *et seq.*

48 See further Vieweg, "Zur Inhaltskontrolle von Verbandsnormen" in Lessmann, Grossfeld & Vollmer (eds.) *Festschrift fur Rudolf Lukes* (1989) p.809 *et seq.*; and Vieweg, "Zur Bedeutung der Interessenabwaegung bei der gerichtlichen Kontrolle von Verbands-Zulassungsentscheidungen" in Fuehrungs-und Verwaltungsakademie Berlin des Deutschen Sportsbundes (ed.), *Verbandsrecht und Zulassungssperren* (1994) p.36 *et seq.*

According to these principles, one has to balance the parties' interests in a way that will produce an appropriate balance between the various constitutional rights involved. First, there is the interest of the federation in the commercial exploitation of its events in order to balance its budget for the event. Secondly, there is the athlete's right to self-determination concerning the commercial exploitation of his sporting performance. To an extent there is, of course, a correspondence of interest. The participating athlete has good practical reasons for being interested in the centralised marketing of aspects of his personality since not every athlete is able to find his own sponsor. Furthermore, non-centralised sponsorship of individual athletes might even lead to lower advertising value because of conflicts in competition. The consequence would be a loss of revenue.

The result of balancing the opposing interests of sports associations on the one hand, and athletes on the other, should be that neither the international sports federation nor the athlete is in such a strong position that they could supersede each other. This can only be achieved with the help of the principle of proportionality. According to that principle, the financial and decision-making participation of athletes is therefore decisive in commercialised and professional sports. Thus the validity of the articles of a sports association's statutes, or of its contractual clauses, depends upon ensuring an appropriate participation by the athletes in the revenue raised by sponsorship.

Legal protection for athletes

International sports federations, however, do not when contracting with sponsors generally provide for athletes to benefit financially from the sponsorship. How then can an athlete enforce his rights? One approach would be to challenge any interference with his right of personality, basing his action on the provisions considered above.[49] Another approach would be to bring a claim for damages for violation of contractual rights or duties of membership.[50] Finally, since the athlete has an obvious economic interest in participating in sponsorship revenue, he would have a claim under sections 743, 812(1) first sentence, second alternative and 818(2) of the Civil Code which provides for compensation. An athlete would be able to make his remedy particularly effective by seeking a garnishee order against the sponsor of the federation.[51]

[49] Section 823(1) and 1004 of the Civil Code, section 1 of the Unfair Competition Act (UWG), sections 26(2) and 35 of the Anti-trust Act (GWB) and possibly also article 86 EC combined with section 823(2) and 1004 of the Civil Code.

[50] Positive Forderungsverletzung, positive Mitgliedschaftsrechtsverletzung. The action might be brought under section 823(1) and 826 of the Civil Code, section 1 and 26(2) of the Unfair Competition Act, combined with section 35 of the Anti-trust Act; or under section 823(2) of the Civil Code combined with article 86 EC.

[51] Sections 829 and 835 of the Civil Procedure Act (Zivilprozessordnung, "ZPO").

NOTTINGHAM LAW JOURNAL

CASE NOTES

The address for submission of casenotes is given at the beginning of this issue.

GOOD FAITH PERFORMANCE IN EMPLOYMENT CONTRACTS

Clark v. *BET plc* [1997] I.R.L.R. 348, *Adin* v. *Sedco Forex International* [1997] I.R.L.R. 280, and *Malik* v. *BCCI* [1997] I.R.L.R. 462

Introduction

Traditional principles of contract law are ebbing before a flood tide bearing a more radicalised idea of the contract of employment. Some may identify in this innovation a reaction to the tradition of free market individualism expressed in the ideas of sanctity of contract, the search for agreement and the maxim *caveat emptor*. Parties to a contract may now be prevented from the pursuit of their selfish interests notwithstanding express terms of a contract which ostensibly appear to justify this. Express agreement may yield to obligations which are imposed by law. Amongst these significant developments is the importation of a duty binding each party to the employment contract to act in good faith,[1] a duty which appears to be very different from the long recognised duty of the employee to serve faithfully.[2] At present the precise nature of this new duty is elusive. Nevertheless, its importation poses difficult questions about how far the re-alignment of the employment relationship might extend. The authorities appear to establish the concept of an actionable abuse of a contractual right notwithstanding that the relevant conduct ostensibly falls within the express power conferred. But this only poses complex questions. Against what standard is such abuse to be measured? Is the good faith obligation merely a device to allow the court to enforce the contemplation of the parties at the time of contract? Is the proper focus the spirit rather than the letter of the bargain, thus departing from orthodox canons of construction? This note examines some recent decisions which have placed some reliance on the idea of good faith performance.

The nature of good faith performance

One recent application of the duty to act in good faith restricts the operation of contractual discretionary powers by identifying the fundamental purposes for which power was conferred. It confines the employer's decision-making so as to uphold those purposes. It may thus preclude reliance on the full scope of contractually expressed discretionary powers where to do so would be to the unreasonable detriment of the employee. This was so in the recent decision in *Clark* v. *BET plc*[3] where the issue concerned the quantum of damages to be awarded in an action for wrongful dismissal. Here, by his contract, a company chief executive had a right to have his

1 The literature on the good faith doctrine is immense. The following are offered as examples: Burrows, (1968) 31 M.L.R. 390; Summers, (1968) Virginia L. Rev. 195; Collins, [1992] M.L.R. 556; Burton, 94 L.Q.R. 369; and Farnsworth, (1987) Columb. L. Rev. 217.

2 The duty to serve faithfully is arguably a distinct obligation binding the employee, whereas the duty to act in good faith binds each party. For a discussion of the former see Smith & Wood, *Industrial Law* 6th ed. (Butterworths, 1996) p. 120 *et seq.*, but note that the learned authors refer to the duty of fidelity as the duty to serve in good faith.

3 [1997] I.R.L.R. 348.

salary reviewed annually and "increased by such amount *if any* as the board shall in its absolute discretion decide" (emphasis added). The contract further stated that, in reaching, its decision the board had to "consider" the remuneration policy of other companies. The director claimed that he was entitled (*inter alia*) to damages including the salary increases of 10.5% he should have received during his notice period.

According to orthodox contractual principles, it would have been open to the court to decide that the board enjoyed an absolute discretion limited only by the duty to "consider" other companies' practices. It might therefore have fulfilled its contract merely by directing its mind to those other pay awards, and their surrounding circumstances, and by resolving to award no pay increase (since a duty "to consider" is different from a duty to "adopt"). It would certainly have been under no obligation to exercise the express discretion to award a pay rise since the clause as drafted appeared to contemplate the possibility that no increase might be awarded. However, Timothy Walker J. held that under the express terms of the contract the director had a right to receive an annual increase in his salary; only the amount (if any) lay in the discretion of the board. The judgment continued to refine this by superimposing duties which suggest concepts that are more likely to apply in the field of administrative law. The board appeared to have an implied duty to exercise its discretion honestly and in accordance with objective principles, including the contractually relevant consideration of the pay structures of other companies and the profitability of BET. Controversially his Lordship added: "...if the board had capriciously or in bad faith exercised its discretion so as to determine the increase at nil...that would have been a breach of contract."[4] Subsequently, he stated that: "Nor should I assume that any discretion would have been exercised so as to give the least possible benefit to the plaintiff if such an assumption would on the facts have been realistic."[5]

The court eventually ventured into the controversial arena of wage setting by determining the actual pay increase the director might have received but for his dismissal.[6]

Good faith performance in *Clark* was evidently deployed to control the broad discretion the board exercised under the express terms of the contract.[7] The obligation to perform in good faith precluded contractual performance in the manner most favourable to the employer where this prejudiced the employee notwithstanding that the contract *ex facie* might have justified this. Performance according to the letter of the contract could thus constitute a breach of it. It seems therefore that good faith performance is not exclusively concerned with the construction of the express words of the bargain. The question must then be asked; what alternative, higher, standard prevails?

Two radically different possibilities are suggested. The first is that primacy is given to the contractual contemplation of the parties. This might be a comparatively uncontroversial innovation since by its search for presumed intention it is merely a different expression of freedom and sanctity of contract. However, as attractive as this limited development may be to some, the courts may find themselves inevitably drawn towards a very different and more objective standard.[8] This might be so because of the evidential difficulty which must be

4 *Ibid* at 349.

5 *Ibid.*

6 Contrast *Re Richmond Gate Property Co. Ltd.* [1965] 1 W.L.R. 335.

7 It must not be forgotten, however, that the court had to identify the amount which the plaintiff would have received during his notice period. By comparing the plaintiff's case with that of other employees the court examined how the discretion would have actually been exercised. At one level of reasoning, this is not to interfere with a discretion but to honour it. This is a different case from that in which a court would be invited to *overturn* the exercise of an employer's discretion to award (or not to award) a pay increase. However, as Timothy Walker J. emphasised *obiter* (see above text at note 4) the courts appear to enjoy a power to do so. This is already established where the employer's actions disadvantage an individual employee in a manner which is capricious or perverse: *Gardner* v. *Beresford* [1978] I.R.L.R. 63; *Pepper & Hope* v. *Daish* [1980] I.R.L.R. 13.

8 In *Malik* v. *BCCI* [1997] I.R.L.R. 462, which is examined further below, their Lordships held that trust and confidence may be breached even though the actual confidence of the employee in his employer is not, in fact, undermined. This means that a repudiatory breach of contract results from the breach itself and not the employee's perception of the employer's conduct.

encountered in searching for the presumed intention of the parties at the time of contract. The absence of clear evidence on this issue would invite the court to substitute some judicially identified idea of reasonableness for any presumed agreement thereby exposing the fiction of the search for agreement.[9] Similarly, who is to say that parties with divergent interests share a common expectation as to the *future* exercise of contractual discretionary powers?

If this analysis is correct, the smuggling of some perception of good industrial practice into the contract of employment under the shadowy cloak of good faith may become an inevitable response to the uncertain and almost inevitable fiction of contractual expectation. This development towards juridifying standards of good industrial practice has already been presaged by the range of conduct which has been held capable of breaching the contract of employment.[10] Good faith may accelerate this growth and generate a new commitment to industrial justice.

Good faith and trust and confidence

Some decisions are expressly founded on a duty to perform in good faith;[11] in others the duty is less distinctly articulated, and may appear to be intertwined with the more familiar duty binding each party to do nothing to destroy the mutual relationship of trust and confidence, which itself derives from a change in legal culture.[12] This was so in the case of *Adin* v. *Sedco Forex International*[13] where Lord Coulsfield in the Court of Session, Outer House formulated one of the issues in the case as follows; "whether the general obligation, often referred to as the obligation of trust and confidence *or of good faith,* ....was implied in this contract...." (emphasis added).[14] Some decisions which rely on the duty to maintain trust and confidence, without express reference to a duty to perform in good faith, are nevertheless consistent with the emerging duty. Similarly, decisions which controversially expand the duty to co-operate may also exemplify one aspect of good faith performance. This is particularly so where the breach comprises conduct undertaken with an intention to injure the employer's business.[15]

Similarly, the failure of the employer to take reasonable steps to safeguard an employee from harm threatened by third parties has been confirmed as a breach of trust and confidence.[16] This duty is also consistent with the idea of good faith performance, which can require one contracting party to have regard to the interests of the other. Good faith may also require one contracting party to allow the other to perform their part. It has been held that a repudiatory breach occurs where an employee who has received a warning on capability grounds is given

9 Already the courts insist on the possession of reasonable grounds to justify the exercise of a contractually reserved discretion: *White* v. *Reflecting Roadstuds Ltd.* [1991] I.R.L.R. 331; *McLory* v. *Post Office* [1993] I.R.L.R. 159. Further, the employer must have reasonable grounds on which to hold any opinion which would deny the employee a benefit: *Mihlenstedt* v. *Barclays Bank* [1989] I.R.L.R. 522.

10 Examples include *BAC* v. *Austin* [1978] I.R.L.R. 322; *Wigan B.C.* v. *Davies* [1979] I.C.R. 411; *Walker* v. *Northumberland County Council* [1995] I.R.L.R. 35.

11 E.g., *Clark* v. *BET plc* (*op.cit.* n.3); *Kramer* v. *South Bedfordshire Community Health Care Trust* [1995] I.C.R. 1066; *Imperial Group Pension Ltd.* v. *Imperial Tobacco Ltd.* [1991] I.R.L.R. 66; *Mihlenstedt* v. *Barclays Bank* [1989] I.R.L.R. 522.

12 Lord Steyn in *Malik* v. *BCCI* (*op.cit.* n.8, at 468) thought that the development of this latter duty was made possible by a change in legal culture which had imposed far greater duties on employers. Lord Slynn of Hadley in *Spring* v. *Guardian Assurance plc* [1994] I.R.L.R. 460 at 474 stated that the implied duty has expanded so as to require employers "to take care of the physical, financial and even psychological welfare of the employee". In *Malik* Lord Steyn summed up the duty as one designed to strike a balance between an employer's need to manage the business effectively and the employee's interest in not being unfairly and improperly exploited (at 468). On the implied term generally, see Smith & Wood, *Industrial Law* (*op.cit.* n.2 p.97 *et seq.*).

13 [1997] I.R.L.R. 280.

14 *Ibid* at 283. See also *Imperial Group Pension Ltd.* v. *Imperial Tobacco Ltd.* [1991] I.R.L.R. 66.

15 *British Telecommunications plc v. Ticehurst* [1992] I.R.L.R. 219; *Secretary of State* v. *ASLEF No.2* [1972] 2 All E.R. 949 and see further n.16 *infra* on the nature of the duty identified in *Barque Quilpue* v. *Brown* [1904] 2 K.B. 264.

16 *Donovan* v. *Invicta Airways* [1970] 1 Lloyds Rep. 486, *Smith* v. *Croft Inns Ltd.* [1996] I.R.L.R. 84, and *Burton* v. *De Vere Hotels Ltd* [1997] I.C.R. 1 concern the implied duty to maintain trust and confidence in this context. How far good faith requires one party to have regard to the interests of another is unclear. The courts have stated that there is a duty implied by law requiring each party not to do anything to prevent the other party performing the contract or to delay him in performing it: see *Barque Quilpue* v. *Brown* [1904] 2 K.B. 264, 271. In the United States there may be a more positive duty to co-operate in the other's performance (see Summers (1968) Virginia L. Rev. at p. 196) which might normally preclude the unwarranted exposure of the other party to the risk of harm.

no support from the employer in endeavouring to improve.[17] This is so because without support the opportunity to improve is without value. Hitherto tribunals have derived this result from the trust and confidence principle; in other jurisdictions it could be explained as an application of the doctrine of good faith performance. The ideological foundation of many of these decisions establishes a unitary model of employment which identifies a common interest between employer and employee in the success of the commercial venture, the achievement of which depends upon mutual co-operation and support. It is, however, too early to suggest that this model informs all aspects of the employment relationship.[18] It will fall to future developments to identify how far the co-operative model can extend.

Malik v. BCCI[19] which is a decision of major importance endorsing and extending the co-operative model, indicates that this process is already in train. Here the House of Lords held that there is a duty binding the employer not to conduct the business so as to destroy trust and confidence in a manner that would inhibit the employee's future employment prospects. Lord Nicholls emphasised that "...the purpose of the trust and confidence implied term is to facilitate the proper functioning of the contract."[20] He continued, "...the purpose of the trust and confidence term is to preserve the employment relationship and to enable that relationship to prosper and continue..."[21] As indicated below, these formulations illustrate the potential synergy between the implied duties of trust and confidence and good faith.

The facts of the case were that Malik and another were employees of a bank alleged to have been corrupt and dishonest. Their employments were terminated by reason of redundancy when the bank went into liquidation. Neither employee was guilty of any wrongdoing but, because their names were linked to such a business, their good standing in the financial services sector was destroyed so that it had not been possible for them to work in financial services since their dismissals. They sought and obtained damages for injury to reputation reflecting their loss of earnings.

The House of Lords held that if the employer's conduct was a breach of the duty to maintain trust and confidence which prejudicially affected an employee's future employment prospects so as to give rise to continuing financial loss, and it was reasonably foreseeable that such loss was a serious possibility damages would, in principle, be recoverable if injury to reputation (and so future employment prospects) could be established in evidence as a consequence of the breach.

Their Lordships rejected the bank's submission that the employees were unaware of the bank's wrongdoing during their employment so that the employees' confidence in their employer could not have been undermined. This argument postulated a subjective standard which their Lordships held was inappropriate. As Lord Nicholls observed:

> the objective standard provides the answer to the [respondent's] submission that unless the employee's confidence is actually undermined there is no breach. A breach occurs where the proscribed conduct takes place: here, by operating a dishonest and corrupt business. Proof of a subjective loss of confidence is not an essential element of the breach.[22]

[17] *Associated Tyre Specialists (Eastern) Ltd.* v. *P. A. Waterhouse* [1976] I.R.L.R. 386. See *supra* n. 15 on the duty to co-operate in the performance of the contract by the other party. In *M'Intyre* v. *Belcher* (1863) 14 C.B. (N.S.) 654 at 664 Willes J. observed: "[i]f I grant a man all the apples growing on a certain tree, and I cut down the tree, I am guilty of a breach". This suggests that to offer an employee an opportunity to improve, followed by conduct rendering that opportunity valueless could comprise a breach of the implied duty of good faith.

[18] This is so because there remain many examples of a conflictual model, for example, the absence of a duty to increase a worker's wages to preserve its real value against inflation: *Murco* v. *Forge* [1987] I.R.L.R. 50.

[19] *Op.cit.* n.8.

[20] *Ibid* at 464.

[21] *Ibid* at 465.

[22] *Ibid* at 464.

Their Lordships also rejected the submission that the dishonest conduct complained of had to be aimed at the employees individually and not at third party clients.

This decision will allow claims for damages where it is reasonably foreseeable that employment prospects will be harmed (and are actually harmed) as a result of the employer's breach of trust and confidence, even if the dismissal occurs principally for other reasons (such as, in this case, redundancy). How many cases will now arise depends on the developing scope of the implied term.

The *Malik* decision, although ostensibly founded on the duty to maintain trust and confidence, might also be explicable in terms of good faith performance. This is especially so if good faith essentially requires minimum moral or ethical standards in the manner in which the parties deal with each other. According to this view obligations transcend the duty to perform a promise to a broader ethical conception of contractual behaviour.[23] Fundamentally, the decision endorses the co-operative model of employment upon which the emerging doctrine of good faith rests, and it significantly continues the process of juridifying good industrial standards.

These decisions suggest a willingness on the parts of the courts to experiment by importing the continental doctrine of good faith performance. Values other than those which require adherence to the literal terms of a bargain inform many of the decisions reached on the basis of good faith, notwithstanding the value in upholding a bargain freely struck.

Some commentators will object that the courts are ill-suited to the task of establishing standards of industrial justice by means of an expanded and radicalised conception of the implied term. Commercial certainty suffers where agreement is overridden by broader notions of good faith. Further, there are questions about how far this process can go. Will the courts in effect re-write contracts to redistribute windfall benefits or unexpected burdens? Will good faith extend to negotiations? How far will the employer have to have regard to the interests of the employee? Will modern employment theories which emphasise team working and "ownership" of the business venture inform the future shape of legal rights? How far, in essence, will the courts abandon a conflictual for a co-operative model of employment? Good faith may prove to be a formidable challenge.

BARRY HOUGH*

23 The historical development of good faith is considered in J. F. O' Connor, *Good Faith in International Law*, (Dartmouth, 1991), Chapter 2. Economic analysis of good faith may provide support for ethical standards in so far as it asserts that a fundamental purpose of the good faith requirement is that it reduces the risks involved in contracting.

* LL.B., LL.M., Associate Professor of Law, The Southampton Institute.

MURDER MOST SIMPLE?

R. v. *Woollin* [1998] 4 All E.R. 103 (H.L.) (Lords Browne-Wilkinson, Nolan, Steyn, Hoffmann and Hope)

The failure to distinguish between the substantive definition of intention, on the one hand, and evidence going to proof of the requisite intention, on the other, has been a running sore disfiguring the *mens rea* of murder for many years.[1] *R. v. Woollin* provides a classic example of such confusion. Nonetheless, it is submitted, with hope and relief, that the House of Lords in quashing the defendant's conviction for murder has effectively dispensed with much of the disreputable cant surrounding malice aforethought in recent years. Even so, the House's unanimous judgment displays elements of regrettably familiar confusion.

In *Woollin*, the defendant, in anger and frustration, violently shook his three-month old son and threw him across the room with considerable force towards his carrycot. As a result, the baby suffered fatal brain injuries when his head hit something hard. The prosecution accepted that the accused did not want to kill or cause serious injury to his son, but alleged that he did foresee that serious injury was virtually certain to result from his acts and that this would entitle the jury to infer that he intended serious harm making him guilty of murder. Thus it should have been clear that first and foremost the case was concerned with the substantive definition of 'intention' in the law of murder. Given that there appeared to be no allegation that the accused aimed to kill or cause grievous bodily harm, what state(s) of mind, if any, beyond aim or purpose would suffice to establish an intention to do grievous bodily harm, the *mens rea* of murder? The House of Lords understood that the case turned on this question. The Court of Appeal on the other hand treated the issue as entirely one of evidence governed by section 8 of the Criminal Justice Act 1967. Section 8(b) makes it mandatory for the jury to consider "all the evidence" when deciding if the accused intended a consequence and this must include the fact that the defendant foresaw that consequence even if only as probable, or as just possible, ("a substantial risk"). Before section 8 becomes relevant, however, the jury needs to know what states of mind *constitute* intention. Only if it includes a state of mind beyond aim or purpose is there any necessity for special rules about the relevance of foresight.

Initially the trial judge based his direction on the well-known dictum in *Nedrick*[2] that intention could only be inferred from the accused's foresight, if it was foresight of virtual certainty. Unfortunately, in a later passage, the judge made a seemingly fatal error in stating that "it would be open to" the jury to infer intention from a finding that the accused "appreciated when he threw the child that there was a substantial risk that he would cause serious injury to it". Surprisingly, the Court of Appeal[3] saw nothing wrong with the use of 'substantial risk' rather than the 'virtual certainty' required by *Nedrick;* despite the obvious potential for a jury to confuse simple awareness of substantial risk (i.e. simple subjective recklessness) with intention. 'Substantial risk' traditionally means 'significant' or 'more than minimal' risk and would not even necessitate that the serious harm be seen as probable, the minimum requirement laid down in *Hancock and Shankland.*[4] It is true that the Court did recognise that "the use of the phrase 'a virtual certainty' may be desirable" but it will rarely be essential. As Roch L.J. put it, "[i]t is only necessary where the evidence of intent is limited to the admitted actions of the accused and the consequences of those actions. It is not obligatory...in cases such as the present

1 See, generally, Professor E. Griew, "States of Mind, Presumptions and Inferences" in P. Smith (ed.) *Criminal Law* (Butterworths, 1986); R.A. Duff "The Politics of Intention: A Response to Norrie" [1990] Crim. L.R. 637; and A.W. Norrie "Intention: More Loose Talk" [1990] Crim. L.R. 642.

2 [1986] 1 W.L.R. 1025 (C.A.)

3 [1997] 1 Cr. App. R. 97.

4 [1986] A.C. 455 (H.L.).

where there is other evidence for the jury to consider".[5] Thus a new subtlety was invented - if the *only* evidence available as to the defendant's intent comprises what he actually did and the consequences which followed, then, but only then, nothing but the *Nedrick* direction would do. In practice, this would be unlikely to apply in the vast majority of cases where there is likely to be some additional evidence, even if it is only evidence as to the normality or otherwise of the accused's perceptions or intelligence, or of his statements whether given in evidence or to the police. The distinction was an unwarranted over-complication which would only compound the real cause of the difficulty - the courts' steadfast refusal to state clearly the precise meaning of intention compelling trial judges to leave juries in the dark. It is unhelpful to expound at length on what may or may not help to prove something (intention) without defining what it is that must be proved.

Happily, Lord Steyn, in giving the unanimous decision of the House of Lords, rejected the complication proposed by the Court of Appeal as unworkable in practice "and not based on any principled view regarding the mental element of murder". What if the alleged 'additional evidence' as to intent might be rejected by the jury? Does the trial judge have to direct the jury in the alternative? Furthermore it was not compelled by section 8(b) of the Criminal Justice Act 1967 presumably because in the House's eyes the issue was the substantive meaning of 'non-purpose' intention, to which section 8 has no relevance, rather than the simple evidential question of how to go about proving it.

The most welcome aspect of their Lordships' decision was the recognition that the time had come to settle the meaning of intention and the *mens rea* of murder, which its decisions from *D.P.P.* v. *Smith*[6] onwards had left in disarray. On a technical level, it must be said that the House's analysis of *Moloney,*[7] *Hancock and Shankland* and *Nedrick*, upon which its decision purported to be based, was partial and selective. Thus *Moloney* and *Nedrick* were taken to have *defined* intention as including foresight of death or serious injury respectively as being a "little short of overwhelming" probability or as being virtually certain.[8] *Nedrick* was said to be not inconsistent with *Hancock.* Licence with the previous case law would be a price worth paying for the prize of simplicity and clarity but was the prize grasped?

It is submitted that the practical effect of the House's judgment is to define 'intention' in the law of murder as extending beyond aim or purpose to include cases where the accused foresaw death or grievous bodily harm as virtually certain to result from his conduct. However, foresight of any lesser degree than virtual certainty will not suffice to *establish* intention.[9] Unfortunately the clarity of the principle enunciated is clouded by the House's exhortation that "trial judges ought to continue to use" the "tried-and-tested formula" of the *Nedrick* direction. What the House called "the critical direction" in *Nedrick* reads:

> Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated such was the case.[10]

5 [1997] 1 Cr. App. R. 97, at 107.

6 [1961] A.C. 290.

7 [1985] A.C. 905 (H.L.).

8 See also Lord Lane C.J.'s extra-judicial pronouncement at H.L. Deb. vol. 512, col. 480 (6 November 1989).

9 Of course, as noted above, if the jury is satisfied that the accused foresaw death or grievous bodily harm as probable or even just possible e.g. because he had admitted it in evidence, that must, according to s. 8(b) of the Criminal Justice Act 1967, be taken into account along with all other relevant evidence in deciding whether he (despite his probable denial) also purposed death or grievous bodily harm or foresaw either as virtually certain. In that respect the Court of Appeal in *Woollin* was correct.

10 *Per* Lord Lane C.J. [1986] 1 W.L.R. 1025, at 1028.

Deferring to the criticisms of Professors Glanville Williams[11] and Ashworth,[12] the House adopted this approach with one amendment. The words "to find" were to be substituted for "to infer". The change seems intended to convey that foresight of virtual certainty is more than just an evidential pointer, allowing a jury to infer some other state of mind constituting intention. It is itself a species of intention. This is certainly supported by the House's interpretations of *Moloney* and *Nedrick*. Earlier in his speech Lord Steyn noted that "in *Moloney* Lord Bridge said that if a person foresees the probability as little short of overwhelming, this 'will suffice *to establish* the necessary intent'"[13] and that "[t]he effect of the critical direction is that a result foreseen as virtually certain is an intended result".[14] Likewise, *Nedrick* "merely stated what state of mind (in the absence of a purpose to kill or cause serious harm) is sufficient for murder".[15]

Regrettably the new "critical direction" literally seems little more in accordance with these pronouncements than the old. Perhaps their Lordships were swayed by Professor Williams' questionable assertion that "the only thing wrong with the *Nedrick* direction is the use of 'infer'".[16] But, in truth, it does not greatly assist the jury to understand what intention means and seems logically to imply that it is different from foresight of virtual certainty. The direction is clear that, in non-purpose cases, the jury is not permitted to find intention unless it is sure that the accused's foresight reaches the level of virtual certainty. The corollary is that if the jury is sure that it does, then it is "entitled to find the necessary intention". This implies that the jury is also entitled *not* to find such intention if it so chooses. But if, as we are earlier told, foresight of virtual certainty is a species of intention, then a finding of foresight of virtual certainty is necessarily a finding of intention. It does not entitle a jury to find intention; it constitutes a finding of intention.

Another conspicuous anomaly with the "critical direction" is that it requires the prosecution to establish that death or grievous bodily harm was in fact virtually certain as well as that the accused realised it to be virtually certain. Since this is an issue of *mens rea*, if the defendant went ahead believing that death or grievous bodily harm was virtually certain, there seems no reason why intention should not be found guilty even though, as it turned out, he was mistaken in his view of the magnitude of the risk.

It is difficult to fathom the attraction of the 'critical direction' which seduced the House into falling into the evidence/definition confusion from which the law needed extricating. The result is a dilution of the clarity of its decision and further dilemma for hapless trial judges. However, it is suggested that the trial judge should make it clear that foresight of virtual certainty amounts to intention and to be sure of the former is to be sure of the latter.

Of course, even if this is accepted as the effect of the decision, it still leaves the jury the difficult task of drawing the line between murder and manslaughter. As Professor Sir John Smith[17] and others have remarked, the difference between 'virtually certain' and less than virtually certain is a question of degree incapable of precise definition and creates an easy potential for straying too far into the territory of recklessness. Careful instruction to juries would seem necessary to achieve a correct and consistent approach. There was, it is submitted, insufficient appreciation of that in *Woollin*, which emphasised the pre-eminence of the jury and failed to offer adequate guidance on the concept of virtual certainty. Lord Steyn equated *Nedrick*'s 'virtual certainty' with *Moloney*'s 'little short of overwhelming probability' and regarded it as

11 "Oblique Intention" (1987) 46 C.L.J. 417 and "The *Mens Rea* for Murder: Leave it Alone" (1989) 105 L.Q.R. 387.

12 A.J. Ashworth, *Principles of Criminal Law*, 2nd ed. (OUP, 1995) p.172.

13 [1998] 4 All E.R. 103, at 111g.

14 *Ibid*, at 110j.

15 *Ibid*, at 111e.

16 (1989) 105 L.Q.R. 387, at 387-388.

17 "A Note on "Intention" [1990] Crim. L.R. 85, 85-86.

"very similar to the threshold of being aware 'that it *will* occur in the ordinary course of events' in the Law Commission's draft Criminal Code". However, in relying so heavily on 'the critical direction', His Lordship did not appear to envisage that any explanation of "virtual certainty (barring some unforeseen intervention)" should be given to the jury. Although Lord Steyn may appreciate the point, cogently put by Norrie, "that 'virtual certainty' *is* a kind of certainty (the only kind in fact that ever exists) and not a kind of high probability or chance",[18] it is easy to imagine that some juries, without such explanation, would convict in cases of very high probability such as the arsonists in *Hyam* v. *D.P.P.*[19] and *Nedrick*, the bomber whose aim is economic dislocation, or the baby-shaker driven mad by continual crying. There would also be increased potential for conflicting verdicts in very similar fact situations. Lord Bridge in *Moloney* thought the arsonist in *Hyam* would undoubtedly satisfy his test of 'little short of overwhelming probability' which calls into question whether this is 'a kind of high probability' rather than 'a kind of certainty'.

Literally a test based on virtual certainty is extremely narrow and implies that death or serious injury is the only realistic outcome of the accused's conduct. This cannot be said of the arsonists nor of the bomber who gives a warning to the authorities. Death or serious injury is not more or less bound to happen and there is a significant chance that nobody will be hurt. Lord Steyn viewed with equanimity the exclusion of the terrorist whose bomb killed a bomb disposal expert on the basis of the availability of a life sentence for manslaughter. It remains to be seen to what extent, and at what point on the spectrum, trial judges will feel willing and able to withdraw the issue of murder from the jury on the ground that there is insufficient evidence of foresight of virtual certainty.

Once intention is extended beyond aim or purpose into foresight, such questions of degree are inevitable, but it is submitted that the House was correct to include foresight of virtual certainty (understood in the sense advocated above) but nothing more. There is a moral divide between the person who goes ahead knowing that death is bound to result and the person who believes that there is a realistic chance of avoiding death. The former's willingness to proceed realising the inevitability of death puts him in the same moral category as one who aimed to kill.

Despite its debatable and selective interpretation of previous cases and its unfortunate reliance on the *Nedrick* direction, the House's decision is a big step forward in achieving a simple and rational *mens rea* for murder. The practical result should be similar to the formulation in the draft Criminal Code and clause 14 of the Government's draft Offences Against the Person Bill.[20] The next step is to remove *mens rea* in relation to non-life-threatening grievous bodily harm from the equation!

Finally, it should be noted that Lord Steyn explicitly focused on the crime of murder, remarking that "it does not follow that 'intent' necessarily has precisely the same meaning in every context in the criminal law".[21] Despite this caveat, it seems likely that the initial assumption of future courts will be that *Woollin* applies to intention in other criminal law contexts (certainly in offences necessitating physical harm[22]) and they will need some convincing reason to depart from it.

RUSSELL HEATON *

18 A.W. Norrie, *Crime, Reason and History* (Weidenfeld & Nicolson, 1993) p.49.

19 [1975] A.C. 55 H.L.

20 But without the drawback pointed out by Professor Sir John Smith in "Offences Against the Person: The Home Office Consultation Paper" [1998] Crim. L.R. 317, at p. 318).

21 [1998] 4 All E.R. 103, at 108a.

22 Cf. Glanville Williams ([1987] 46 C.L.J. 417, 435-436).

* LL.B., Solicitor, Principal Lecturer in Law, The Nottingham Law School.

TRANSSEXUALS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Sheffield and Horsham v *The United Kingdom*
(31-32/1997/815-816/1018-1019) 30th July 1998

Introduction

This recent decision of the European Court of Human Rights ("ECHR") on the rights of transsexuals is of interest not as a point of departure from the Court's previous decisions but because it illustrates a change in attitude which will be difficult for the UK Government to ignore. Both the judgment and the separate opinions annexed thereto contain criticisms of the UK's lack of action in dealing with the thorny issue of the legal status of post-operative transsexuals. These criticisms may well encourage significant changes in the law.

The case concerned two transsexuals, both of whom had been registered male at birth but had successfully undergone sex re-assignment surgery and treatment. Both applicants alleged that the refusal of the UK to give legal recognition to their status as women following such surgery gave rise to violations of articles 8, 12 and 14 of the European Convention on Human Rights.

The Court held (by eighteen votes to two) that there had been no violation of article 12 and (unanimously) that there had been no violation of article 14. It also held that there had been no violation of article 8 (but in this case by a much closer majority of eleven votes to nine) and it is the discussion surrounding this point that is particularly interesting.

The legal position of transsexuals in this country is somewhat anomalous. The problems they face revolve around two main issues. The first is concerned with the judgment of Ormrod J. in *Corbett v. Corbett*[1] when he ruled that, for the purposes of ascertaining whether a valid marriage had taken place, sex is to be determined by an application of the chromosomal, gonadal and genital tests, ignoring any surgical intervention.[2] The effect of this judgment is that a transsexual remains of the sex with which he or she was born, even after a successful sex change operation. *Corbett* v. *Corbett* has been approved in other cases.[3] The consequence is that transsexuals cannot validly marry someone of the "opposite" sex, i.e. a person having the same sex as the transsexual had at birth.[4] One of the applicants in this case, Miss Horsham, claimed that she was forced to live in exile because she had a male partner whom she planned to marry in the Netherlands and that this marriage would not be recognised in the UK. Added to this is the fact that in the UK the Register of Births and Deaths cannot be altered to take account of gender reassignment surgery. The register is regarded as an historical document revealing historical facts and not current identity.[5] Transsexuals have been bringing these issues before the courts for many years, so far unsuccessfully.[6] Rather confusingly, however, it is the practice in the UK to allow transsexuals to change their name and gender on other official documents such as passports and driving licences (although when applying for insurance it is necessary for them to reveal their original gender).

The sorts of difficulties complained of by the applicants as a result of these anomalies included problems in applying for a visa to visit the United States; in applying for insurance; discrimination at work; and difficulties encountered while giving evidence in court proceedings.

1 [1970] 2 All E.R. 33.

2 *Ibid* at pp. 44-47.

3 See, for example, *R.* v. *Tan* [1983] Q.B. 1053.

4 But note the recent case of the transsexual, Liz Bellinger, who was married 20 years ago (at the time it was not necessary to produce a birth certificate in order to marry) and who has now "gone public", running the risk of prosecution (see *The Guardian*, 13th Oct 1998, page 9).

5 *R.* v. *Registrar General of Births Deaths and Marriages for England and Wales ex parte P and G* [1996] 2 F.L.R. 90.

6 See *Rees* v. *UK* (1987) 9 E.H.R.R. 56 and *Cossey* v. *UK* (1991) 13 E.H.R.R. 622.

Alleged violation of article 8 of the Convention
The basis of the applicants' complaint was that the UK's failure to recognise their new sex constituted an interference with their right to respect for their private lives and was therefore contrary to article 8 of the Convention, which states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The cases were referred to the ECHR as two separate cases by the European Commission of Human Rights, but the President of the ECHR subsequently decided that they should be heard together. The Commission had declared the applications admissible and expressed the opinion that there had been a violation of article 8 in both cases. In its view it was possible for the UK to find ways legally to recognise a post-operative transsexual's new gender without affecting the historical nature of the register of births and deaths (as is the case for adopted children).[7]

The applicants' arguments
The applicants argued that the UK's failure to recognise their new gender status had serious consequences for the way they conducted their lives, forcing them to publicly acknowledge that they belonged to a gender which they had renounced. This, it was said, was a matter of profound hurt and distress and an affront to their dignity. They also argued that the law's purely biological approach to gender was out of date and needed to be reviewed in the light of recent medical research which demonstrated that the sex of a person's brain is also considered one the decisive indices of his or her gender. They pointed out that it was possible to update the register of births and deaths to take into account the adoption of a child and so it should also be possible to amend it to take into account a change of gender. Finally, the applicants reminded the Court that it had stated in both the *Rees* and *Cossey* cases that the UK should keep the need for legal measures in this area under review having regard to scientific and societal developments. The UK, however, had not done this.

At first glance it may seem that the arguments in this case were very similar to, and added little to, the arguments in *Rees* and *Cossey*. However, a more careful examination of the arguments reveals that the complaint was much wider, referring not just to the inability to change the register of births and deaths but also covering much wider legal issues relating to an individual's whole status within a legal system.

The Government's response
Apart from restating the argument that the Register of Births and Deaths was an historical document, the Government also pleaded that a Contracting State enjoyed a wide margin of appreciation in respect of its positive obligations under article 8.[8] This was especially so

[7] The Commission further held that the complaints under articles 12 and 14 gave rise to no separate issues. A breach of article 13 had also been alleged (the right to an effective national remedy), but the Commission held that this had not been violated, and, in the event, this was not pursued before the Court.

[8] The doctrine of 'margin of appreciation' means that Contracting States are allowed a degree of discretion as to the means adopted to protect certain interests, which may nevertheless mean that rights under the Convention are infringed. See, generally, A. H. Robertson and J. G. Merrills, *Human Rights in Europe*, 3rd ed., (Manchester University Press, 1993).

since there was not a sufficiently broad consensus within the States Parties to the Convention on how to deal with the legal, ethical, scientific and social issues which arose from transsexualism. It rejected the notion that recent scientific findings were conclusive. Finally, it submitted that the applicants had not suffered any substantial practical detriment on a day to day basis that would suggest that the UK had exceeded its margin of appreciation.

The Court's judgment in relation to article 8

The Court concluded that since the *Cossey* judgment medical science had not settled conclusively the doubts concerning the causes of transsexualism and so the practice of accepting biological criteria alone could not be regarded as unreasonable. The Court was not satisfied that there was any common European approach to the problem and so decided to follow its decsions in *Rees* and *Cossey* and conclude that the UK could still rely on a margin of appreciation to defend its continuing refusal to recognise a new legal gender for the post-operative transsexual. This was despite the fact that a survey conducted by Liberty and presented to the Court showed that out of 37 States Parties surveyed, 23 permitted birth certificates to be changed and only 4 (including the UK) expressly prohibited any change. The Court added that the applicants' case histories did not establish that they had suffered a detriment of sufficient seriousness as to override the UK's margin of appreciation in this area.

On occasions in the past the Court has recognised that the margin of appreciation will not always protect States which fail to recognise a change of gender for legal purposes. In *B* v. *France*[9] the Court held that a refusal by France to change the birth certificate of a male to female transsexual did infringe article 8. However, that decision was based on significant differences in French and English law, including the legal requirement in France to carry an identity card and to show it on demand. The Court therefore felt that the effects of a refusal to change the applicant's sex were sufficiently serious to be considered incompatible with her right to respect for her private life and could not be justified by the State's margin of appreciation. In the cases now being considered, it was noted that the UK had endeavoured to some extent to minimise intrusive inquiries as to gender status by allowing transsexuals to be issued with driving licences, passports and other documents in their new names and gender and that the use of birth certificates as a means of identification was officially discouraged. This does not seem to be a particularly convincing argument because the discrepancy only makes the issue more confusing and distressing for the transsexual. It effectively means that the transsexual can claim to be one sex in some contexts but has to reveal his/her "true" sex in other contexts.

Despite concluding that there was no breach of article 8, the Court did stress the importance of reviewing the need for appropriate legal measures in this area and pointed out that despite similar comments in both *Rees* and *Cossey* the UK had not taken any steps to do so. It said that despite the inconclusive nature of scientific developments, there was an increased social acceptance of transsexualism and that this area therefore needed to be kept under review by States Parties.[10] In fact some of the judges went further than this in their criticism. In his concurring opinion Sir John Freeland J. stated that: "It has not been easy to weigh up the various factors and I acknowledge that continued inaction on the part of the respondent State, taken together with further developments elsewhere, could well tilt the balance in the other direction."[11] The joint (partly) dissenting opinion of Bernhardt, Thor Vilhjalmsson, Speilmann, Palm, Wildhaber, Makarczyk and Voicu JJ. went further:

> We are of the conviction that in the almost twelve years since the *Rees* case was decided important developments have occurred in this area. However, notwithstanding these changes and the

9 Judgment of 25 March 1992, Series A, No. 232-C; (1994) 16 E.H.R.R.

10 Paragraph 60 of the judgment.

11 Paragraph 3 of the opinion.

> above cautionary remarks, United Kingdom law has remained at a standstill. No review of the legal situation of transsexuals has taken place. In our opinion the fair balance that is inherent in the Convention tilts decisively in favour of protecting the transsexuals' right to privacy.[12]

Alleged violation of article 12

Article 12 of the Convention provides that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

As has already been seen, any marriage by a male-to-female transsexual to a man in the UK would be void. One of the applicants, Miss Horsham, intended to marry her male partner in the Netherlands, where the validity of such a marriage would be recognised. However, because of her doubts as to whether the UK would recognise such a marriage, she complained that she would have to live her married life in forced exile outside the UK. The Court (following its reasoning in *Rees* and *Cossey*) found that there was no violation of article 12. Article 12, it was said, refers to the traditional concept of marriage between persons of the opposite biological sex and was clearly intended to protect marriage as the basis of the family. Article 12 states that the exercise of the right shall be subject to the national laws of the States Parties, which must not restrict or reduce the right to such an extent so that the very essence of the right is impaired. The court stated that the laws of the UK did not have this effect,[13] although it is difficult to see how the essence of the right could be impaired any more than by an absolute ban on marriage.

Alleged violation of article 14

Article 14 provides that:

> The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The complaint concerning article 14 was made in conjunction with article 8 and was based on the contention that transsexuals alone were compelled to describe themselves in public by a gender which did not correspond to their external appearance. Because the law treated them as male, they were victims of sex discrimination having regard to the detriment which they, unlike men, suffered through having to disclose their pre-operative gender.

The court noted that not every difference in treatment would amount to a violation of this article. It was to be established that other persons in a similar situation enjoyed preferential treatment and that there was no reasonable or objective justification for this distinction.[14] The court had already concluded that the UK had not overstepped its margin of appreciation in relation to article 8 in that the situations in which the applicants may be required to disclose their original gender did not occur with a degree of frequency which could be said to impinge to a disproportionate extent on the right to respect for their private lives. Those considerations also justified the difference in treatment which the applicants experienced, irrespective of the reference group relied on. There was therefore no violation of article 14.

This decision does not sit easily with the decision of the European Court of Justice in *P* v. *S and Cornwall County Council*[15] which states that discrimination arising from gender re-

[12] Paragraphs 5 and 6 of the opinion.

[13] Paragraph 66 of the judgment.

[14] Paragraph 75 of the judgment.

[15] [1996] I.R.L.R. 347.

assignment constituted discrimination on grounds of sex, especially since one of the applicants, Miss Sheffield, a pilot, had been dismissed by her employer as a direct consequence of her gender re-assignment and had since found it impossible to find employment in the UK. Unfortunately, although *P* v. *S and Cornwall County Council* was noted in the judgment,[16] it was not commented on at all.

Conclusion

The tide of opinion amongst the judges of the ECHR seems to be changing. Following the criticisms of the UK contained in the judgment of the Court and some of the judges' opinions, the UK Government may well feel forced to consider the whole issue of the legal position of transsexuals. In fact, Judge Van Dijk's opinion contained the statement that at a late stage in the proceedings the Labour Government "indicated their willingness to seek a solution within the framework of a friendly settlement, thus making it clear that in their opinion also the problems on which previous Governments had relied during all those years were not insolvable [*sic*] ones."[17]

Finally, it does seem illogical that a state which not only allows surgical intervention in the case of transsexuals but sometimes even pays for it through the National Health Service, refuses to recognise the legal implications of that surgery.

ANNE DAVIES *

16 See paragraphs 33 and 34 of the judgment.

17 Paragraph 4 of the opinion.

* LL.B., Solicitor, Senior Lecturer in Law, The Nottingham Law School.

NOTTINGHAM LAW JOURNAL

BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue.

EC COMPETITION LAW

An Introductory Guide to EC Competition Law and Practice,
by VALENTINE KORAH, Oxford, Hart Publishing,
Sixth Edition, 1997, lxi and 367 pp., Paperback, £22.50,
ISBN 1-901362-27-2.

Valentine Korah is well known and respected among competition lawyers and the latest edition of her book will, no doubt, be a welcome addition to libraries in universities and law firms. The publication of the sixth edition of *An Introductory Guide to EC Competition Law and Practice* in less than twenty years reflects the rapid development of EC competition law. Indeed, a great merit of this book is that it is one of the most up-to-date texts on this area of law currently available.

No radical changes have been made since the fifth edition, although more material is included on exemptions under Article 85 EC[1] and the enforcement procedures under EC Regulation 17 of 1962.[2] In one part of the book, the approach of the Court of Justice is compared with that of the Commission. In previous editions, this was to the detriment of the Commission. However, the author's view of, at least some, recent developments is evident in the inclusion in this edition of a section criticising the standard and style of judgments in the Court of Justice.[3]

The title of this book is perhaps overly modest since, although it is appropriate for readers with no prior knowledge of the subject and does not attempt a completely comprehensive coverage of the subject (for example, discussion of the Merger Regulation[4] is relatively brief)[5], it is much more than an introductory guide. Not only does it cover the full spectrum of EC competition law including, for example, whole chapters on intellectual property, it also includes extensive analysis of case law. In addition, there are a number of features which make this book stand out among the plethora of texts on EC law and competition law now available.

First, it is appropriate both for those with some knowledge of the subject and those with none. This is partly due to the fact that the layout of the book is eminently user-friendly. The text is divided into several clearly labelled sections within each chapter. These sub-headings assist a reader in finding information, particularly where an answer to a specific question is required in a hurry. For example, in the chapter dealing with Article 85 EC, the sub-section "[w]hich may affect trade between Member States"[6] is further divided into sections such as "[c]ondition often fulfilled even if agreement confined to a single member state"[7] and "[t]he

1 V. Korah, *An Introductory Guide to E.C. Competition Law*, (Hart Publishing, 1997), at pp. 68-74.
2 *Ibid*, at pp. 125-151.
3 *Ibid*, at pp. 320-323.
4 Regulation (EEC) No 4064/89.
5 V. Korah, *An Introductory Guide to E.C. Competition Law*, (Hart Publishing, 1997), at pp. 263-276.
6 *Ibid*, at p. 55.
7 *Ibid*, at p. 58.

comparable provision in Article 86 is similarly construed".[8] These titles may often give a preliminary answer to the question in the mind of the reader and thus make the subsequent text more readily comprehensible.

Second, this book gives clear signposts for readers who wish to pursue their enquiries or studies further. For example, all chapters are comprehensively footnoted (something which is rare in introductory works). Further information derives from the extensive bibliographies accompanying each chapter. These refer to a variety of articles on the topic under consideration, including some of the most up-to-date works. These chapter bibliographies are supplemented by the main bibliography at the back of the book, which includes the author's personal comments on the materials listed. In some instances these comments are most useful (for example, one book is described as "[g]ood on the practice of the Commission, now rather old"); although in others they are superfluous (for example, the description "[e]conomic text by world famous economist").

Other positive features of this book include its appendices of relevant legislation and its glossary of terms. Although the appendices of relevant legislation are rather brief, their inclusion is unusual in an introductory work. They enable readers to familiarise themselves both with the approach and with the content of at least some elements of the relevant legislation. The glossary of legal and business terms, which has been expanded since the last edition, is also valuable; particularly as some of the entries contain cross references to the relevant text.

The key to the substantial merits of this book is to be found in the publisher's blurb on the back cover. The approach of the book is described thus: "[w]ritten originally as a guide for business people, it has long since outstripped that role". That the book was originally targeted at business people may account for the clarity of layout, as well as such features as the glossary of terms. It certainly explains the inclusion of a considerable amount of *practical* legal analysis. For example, the chapter entitled "Classes of Agreement Clearly Prohibited"[9] provides a useful summary of such agreements. This is of great practical value. Practicalities are often discussed in "business" rather than in "legal" language. For example, the list of "disadvantages in notifying the Commission" under Article 85 includes the fact that "[t]he Commission will start to ask questions and find skeletons in the cupboard".[10] Although this approach is of most obvious benefit to the business person or legal practitioner, it also enhances the book's overall readability and adds a vital dimension to what is essentially a business-oriented area of law.

The fact that the book is now also used as a standard academic work presumably accounts for the copious footnotes and the reference to a considerable volume of case law. However, in certain respects, the marriage of business guide and academic text is an uneasy one. For example, a discussion of the philosophy and economics underlying competition law reads as a rather curious introduction to a book with such a wealth of practical detail. Also, the text does not always contain detailed explanation of the cases to which reference is made. This is presumably because a business person with no legal training neither needs nor wants an in-depth analysis of each and every case. The result may be that the extent of legal reference deters the business person with a hundred and one other things to do while, on occasion, the lack of detail may infuriate the practitioner or academic.

One rather obvious point should also be made. As the title implies, this work covers EC competition law only. Thus, the equally important UK regime is ignored. While some academic courses make this distinction, many do not. For business people and practitioners, a book on EC competition law tells only half the story. However, the incorporation of UK competition law would have indisputably taken this book beyond the realms of the introductory (and,

8 *Ibid*, at p. 61.
9 *Ibid*, at pp. 170-191.
10 *Ibid*, at p. 166.

for that matter, the business-friendly) and turned it into a different kind of book altogether. (Perhaps the answer, if one dared to suggest it, is that the author should write a complementary introductory guide to UK competition law).[11] In the final analysis, it is a tribute to this book and its distinguished author that it manages to meet the demands of so many different kinds of reader to such a great extent in such a compact volume.

ELSPETH DEARDS *

EUROPEAN CIVIL LIBERTIES

European Civil Liberties and the European Convention on Human Rights: A Comparative Study, edited by CONOR A. GEARTY, The Hague, Martinus Nijhoff Publishers, 1997, xv and 420 pp., Hardback, £99.00, ISBN 90-411-0253-1.

This volume of essays is the culmination of a project conducted under the auspices of the Civil Liberties Research Unit at King's College, London. It consists of nine chapters written by different authors. Seven of the chapters are individual analyses of the status and impact of the European Convention in particular European states. These form the core of the book. The countries covered are the United Kingdom, the Netherlands, Germany, Ireland, Sweden, France and Italy.

Each of these chapters has the same fundamental structure. First, an overview of the constitutional arrangements and legal structure of each jurisdiction is given. Then the status of the Convention within the domestic legal systems is considered. The third part of each chapter is devoted to the decisions in which the particular country has been held to have violated the Convention and to the domestic responses to these decisions. This regularity of structure is valuable because it allows a reader to compare differences in approach between the jurisdictions.

However, despite its title, this volume is not truly a "*comparative* study". The editor himself acknowledges this in his introduction. He writes that the reader is left "to judge whether there are any overarching lessons to emerge..." from the various studies.[1] This is not surprising because the work's primary, and ground-breaking, aim is to gather together information which is capable of forming a basis for future scholarship. The fulfilment of this function alone is reason enough to welcome it. Nevertheless, it is one of the most stimulating features of the text that "overarching" themes and comparisons inevitably do arise.

This reviewer was struck by a number of such perspectives. First, the volume casts interesting light upon the common assumption that the United Kingdom stands isolated from the rest of Europe and that "over there" there is a consistent formal, if not always actual, acceptance of the significance of the European Convention. It is clear that this assumption is unwarranted.

[11] After the Competition Act 1998 has entered force UK competition law will, in any event, be closely modelled on the EC regime.

* LL.B., Solicitor, Senior Lecturer in Law, The Nottingham Law School.

[1] C. Gearty, ed., *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff, 1997), at p. xiv.

Constitutional arrangements vary widely within the seven States under consideration. This is particularly apparent in relation to the status granted to the Convention in domestic legal systems. A wide variety of compromises between legislative freedom, domestic constitutions and international standards have been arrived at. The particular constitutional arrangement represented by the Human Rights Act 1998 will not be out of place in this company. Indeed, in his full and stimulating chapter on the impact of the Convention in Sweden, Iain Cameron describes a persistent suspicion of legally enforceable "rights" which, if anything, seems stronger than the similar scepticism characteristic of this jurisdiction.[2]

A second, but related point which arises is that "countries connect with the Convention in a way that is peculiar to [their] own historical, political and legal context".[3] A country's law is part of its culture. It is not, therefore, surprising that adverse decisions against particular States arise recurrently in relation to particular provisions of the Convention. Eva Steiner, in her well-organised and revealing chapter, indicates that decisions against France have very frequently concerned procedure in criminal cases.[4] Leo Flynn, in a lucid and compelling chapter on Ireland, demonstrates that that country's violations of the Convention have most frequently derived from the particular, and constitutionally protected, idea of the family which has a deep hold in that country.[5] Sweden's violations seem often to originate from a tendency to value social interests over those of the individual.[6]

A further interesting common feature is that, in all the jurisdictions considered, the impact of the Convention has been relatively recent. Although approximately 50 years old, appreciation of its potential impact has only begun to develop in the last 20 or so years. Several of the chapters in this volume hint at an important reason for this – absence of practical familiarity with the Convention case law. For example, the chapters on Germany and Sweden reveal that no satisfactory translation of the Convention case law is available in those countries. Klerk and de Jonge, in their chapter on the Netherlands consider this issue in some detail. They attribute the eventual development of awareness of the Convention in Holland to, *inter alia*, the efforts of human rights pressure groups and university educators.[7] There are clearly important lessons to be learned if the Convention is to be a useful instrument in the protection of human rights in the numerous States which have recently joined the Convention system.

The two chapters of this book which do not cover individual States concentrate upon the protection of civil liberties within the European Union and within the Council of Europe itself. Both are interesting and very strongly argued. Ingrid Persaud's chapter on the European Union is particularly trenchant in its criticism of the Union's approach to human rights.[8] She analyses in detail the debates about whether or not the Union ought to become a party to the Convention system and sets out the Court of Justice's development of a doctrine of "fundamental rights". Her compelling conclusion is that, all too often, "fundamental rights" have been used as a cover for extending Union influence into the domestic legal systems of Member States.[9] Until the European Union protects the rights of individuals more thoroughly within its own jurisdiction, it seems unlikely to make more than a rhetorical contribution to the development of human rights in Europe.

In his chapter, "Civil Liberties in the Council of Europe: A Critical Survey", Adam

2 *Ibid*, at pp. 217-265.
3 *Ibid*, at p. xiv.
4 *Ibid*, at pp. 267-305.
5 *Ibid*, at pp. 177-215.
6 *Ibid*, at pp. 217-265.
7 *Ibid*, at pp. 116-117.
8 *Ibid*, at pp. 347-391.
9 *Ibid*, at p. 364.

Tomkins scrutinises the bodies by which the European Convention has been administered - the Council of Europe itself, its Committee of Ministers, the European Commission of Human Rights and the European Court of Human Rights.[10] The thrust of his argument is that these bodies all have structural features predisposing them to a relatively conservative approach to rights. One particularly rewarding and original section of the chapter is devoted to an exposure of the unsatisfactory role of the Committee of Ministers within the Convention system.[11] Ironically, however, the significance of that part of the chapter is now largely historical. As a result of Protocol 11, which came into effect on 1st November 1998, the Committee has lost its judicial role within the system. It is a mark of the speed with which recent changes have occurred that, when he wrote the chapter, Tomkins considered that the reforms required by Protocol 11 were "unlikely to come into force for many years".[12] The rapidity of development in this area means that a project such as that represented by this book needs to develop continuously.

The pace of recent change has also overwhelmed Conor Gearty's careful and thorough discussion of the impact of the Convention in the United Kingdom. This was written before the current Government set in motion the legislative process leading to the Human Rights Act 1998. Paradoxically, however, rather than rendering this volume redundant, that Act serves only to enhance its significance. When it comes into force, courts will be obliged to "take into account" Convention case law.[13] They will be required to consider not only applications against the United Kingdom at Strasbourg but also applications against all High Contracting Parties. It is apparent from this text that an understanding of the legal structure and context of the particular State Party involved in a case will be necessary for a proper understanding of the issues raised by such applications. *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* is likely to prove to be a very significant basis for the work which will be necessary in this area. However, future editions may also need to include chapters on Albania, Turkey and Russia.

JONATHAN GRIFFITHS *

[10] *Ibid*, at pp. 1-51.
[11] *Ibid*, at pp. 26-47.
[12] *Ibid*, at p. 1.
[13] Human Rights Act 1998, s. 2.

* B.A. (Oxon), M.A., Solicitor, Senior Lecturer, The Nottingham Law School.

TABLE OF CASES

TABLE OF STATUTES

UNITED KINGDOM

TABLE OF EC LEGISLATION

TREATIES

SECONDARY LEGISLATION

SUBJECT INDEX