England and Wales High Court (Queen's Bench Division) Decisions

Neutral Citation Number: [2014] EWHC 753 (QB)
Case No: HX12X01318

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
18/03/2014

B e f o r e :

MR JUSTICE STEWART

Between:

Lawrence Allen & others	**Claimant**
- and -	
Depuy International Limited	**Defendant**

Hugh Preston QC & Conor Dufficy (instructed by PLI Legal Services) for the Claimants
Charles Dougherty QC & Alexander Antelme (instructed by Kennedys Solicitors) for the Defendant
Hearing dates: 03 March 2014

HTML VERSION OF JUDGMENT

Mr Justice Stewart:

Introduction

1. The Claimants ("Cs") claim damages for personal injury. I trust they will not be offended if, rather than referring to them by name, I refer to them as C1, C2 etc. The Defendant ("D") is a company registered in England. It manufactured prosthetic hip implants in England.

2. None of the Cs, has, at any material time, been resident in England. C1, C2, and C4 had prosthetic hips implanted in New Zealand. C3's hip was implanted in Australia and C5 – C10 in South Africa.

3. As D is domiciled in England, Cs are entitled as of right to bring their claim here, whether or not England is otherwise the appropriate forum. The dispute before me concerns preliminary issues on the applicable law and, if English law applies to any claim, does the Consumer Protection Act 1987 apply?

4. The preliminary issues in full are set out in the order of Master Cook dated 1 November 2013 which states:

UPON HEARING Leading Counsel for the Claimants and Leading Counsel for the Defendant

AND UPON the parties having agreed that for the purposes of section 11(2)(a) of the Private International Law (Miscellaneous Provisions) Act 1995 only, the injury was sustained in each case in the country in which the Claimant was when he suffered the first alleged symptoms

IT IS ORDERED THAT:

1. *There shall be a preliminary issue trial in respect of each Claimant's claim, at which the following issues will be determined:*

(i) *Whether, for the purposes of Article 31 of the Rome II Regulation, the event giving rise to damage in each case occurred:*

(a) prior to 11 January 2009, or

(b) on a date to be determined, potentially on or after 11 January 2009.

(ii) *Insofar as it is determined in respect of any Claimant that the event giving rise to damage occurred potentially on or after 11 January 2009, the court shall give further directions for the determination in each case of the relevant date (whether at a further preliminary issue hearing or at trial).*

(iii) *In relation to each case where it is determined or agreed that the event giving rise to damage occurred prior to 11 January 2009, for the purposes of Article 31 of the Rome II Regulation, the law applicable to that claim pursuant to the Private International Law (Miscellaneous Provisions) Act 1995.*

(iv) *In the event that English law is found to apply to any of the Claimant's claims, whether the Consumer Protection Act 1987 applies to such claims…..*

5. Cs represent a cross section of a much larger group of a few hundred overseas residents from a wide variety of countries each implanted with D's hip implants. All the other claims have been stayed pending this ruling on preliminary issues in the 10 sample claims.

Relevant Statutory Material

6. The relevant statutory material comprises:

(i) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").

(ii) The Private International Law (Miscellaneous Provisions) Act 1995 ("The 1995 Act").

(iii) The Consumer Protection Act 1987 ("CPA") and relevant allied European material.

7. Appendix I to this judgment contains relevant extracts.

Does Rome II Potentially Apply to C2 – C10?

8. The question can be simply stated. It is this: Did the events giving rise to damage (EGRD) occur before 11 January 2009?[1] On Cs' case the EGRD for C2 – C10 occurred prior to 11 January 2009. On D's case the EGRD might have occurred on or after 11 January 2009.[2]

9. The outline facts, by reference to the critical date of 11 January 2009, are as follows:

(i) Pre 11 January 2009 – manufacture and despatch from the factory of the defective prostheses.[3]

(ii) Pre 11 January 2009 – date of all hip operations implanting the prostheses.

(iii) Not determinable (until after hearing detailed evidence) whether pre/post 11 January 2009 – adverse reaction to metal debris (ARMD). ARMD may occur at or within a short time of implantation. It may occur many years after. After it occurs, symptoms and signs generally develop quickly. The symptoms may be pain/functional deficit. The signs are radiological, consistent with fluid collection, inflammation and/or destruction of soft tissues and/or bone and loosening of the prostheses.

Cs' contention is that the EGRD is (i) or, failing that, (ii). D says that it is (iii).

10. Clearly manufacture without implantation could not cause injury. According to the medical evidence, implantation per se does not cause injury. Once a prosthesis is implanted it begins to wear and produce debris. Absent debris, no reaction would occur. However ARMD needs to occur so as to produce signs and symptoms. It appears that by no means all the prostheses go on to cause ARMD and, thereafter, symptoms.

11. Cs rely on a number of decisions which clarify the words "the court for the place where the harmful event occurred or may occur". These words are to be found in Article 5(3) of Regulation (EC) No. 44/2001 (Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) in matters relating to tort, delict or quasi-delict. That Regulation concerns the rules governing jurisdiction rather than applicable law. In that particular context, the European Court of Justice has recently determined that in a case where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured.[4] In the *Kainz* case, the court pointed out in paragraphs 19 – 28:

(i) The provisions of Regulation No. 44/2001 must be interpreted independently by reference to its scheme and purpose.

(ii) Although Recital 7 in the preamble to Rome II seeks to ensure consistency in the substantial scope and provisions of Rome II and Regulation No. 44/2001, that does not

mean that the provisions of 44/2001 must for that reason be interpreted in the light of the provisions of Rome II.

(iii) The objective of consistency cannot in any event lead to the provisions of Regulation No. 44/2001 being interpreted in a manner which is unconnected to the scheme and objectives pursued by it.

12. The first point is that there is a clear distinction between when "damage occurs" and the EGRD.[5]

D submits that the EGRD should be:

(a) when the process leading to the damage has occurred – i.e. the biological reaction leading to injury or

(b) if it is not possible to identify a relevant event other than the damage, then the date of damage.

In reality it may be very difficult to distinguish between (a) and (b), since once a reaction occurs it is common ground that symptoms and signs will generally, though not always, develop quickly. D says that this reflects the natural understanding of Cs' complaints i.e. the biological reaction leading to damage and injury that is the EGRD.[6]

13. I do not accept D's case. This is for the following reasons:

(i) It is not permissible in my judgment to equate, even as a long stop, the ERGD with the date of damage.

(ii) The fact that *Kainz* determines that the provisions of 44/2001 must not, for the reason of consistency, be interpreted in the light of Rome II, does not mean that the converse should not apply. There is good reason for Recital 7 to Rome II. It refers to consistency in the "substantial scope and provisions." I accept that Rome II should not be a slave to the objective of consistency and that this objective should not lead to Rome II being interpreted in a manner unconnected to the scheme and objectives which it pursues. However, the court should where possible give effect to Recital 7.

(iii) *Kainz*, and the other authorities on 44/2001, lead to the conclusion that the EGRD should be the manufacture and despatch from D's factory of the protheses. Is there any reason to have a different EGRD for Rome II?

(iv) D submits that Regulation 44/2001 is referring to place, not time, jurisdiction not to applicable law. Also, it is concerned with jurisdictional issues such as proximity of witnesses and gathering of evidence. It is not concerned with identifying a single point of time. This is correct, but does not of itself lead to Rome II being interpreted in a manner unconnected to the scheme and its objectives[7] if a consistent approach is adopted to EGRD in 44/2001 and Rome II.

(v) D also points out that Rome II applies to all non contractual obligations, not just tort/delict/quasi-delict.[8] Therefore the scope of Rome II and 44/2001 does not precisely match. Nevertheless, in tort/delict they do match. In those cases there is good reason for consistency of approach. The ERGD in, say, unjust enrichment may fall to be considered and dealt with on the facts of the case which presents, but that does not detract from

consistency of approach in the many cases where that is possible and appropriate, as here.

(vi) D submits that Rome II [Recital 31 and Article 14] permits choice of law, subject to protecting weaker parties by allowing choice only after the EGRD has occurred. Therefore, D says that protection is meaningless if a consumer can agree a different choice of law at a stage after the date of manufacture/distribution. However the protection is likely to be meaningless in many product liability cases unless the EGRD equates with injury,[9] a construction which is impermissible.

(vii) D further submits that the difficulty with choosing the date of manufacture/distribution is that there is no connection with the ultimate victim. D accepts that the date of implantation gives a link with the ultimate consumer.[10] However, D says that there is still not a sufficient causal link. D's argument is that it depends. If a consumer is implanted with something which, without more, will cause damage then that is the EGRD. However, if there is to be some other proximate event, then that is the EGRD.[11] Therefore D submits that the relevant question is would the event have given rise to the damage without more? Reliance is placed on the fact that not all the implants fail, and therefore the EGRD occurs only when the biological reaction occurs.

14. In my judgment, the EGRD should be the date of manufacture/distribution of the defective prostheses. If I am wrong about that, then EGRD should be the date of implantation. The latter date also substantially meets D's submissions set out in (vi) and (vii) as to Article 14/Recital 31, connection with the ultimate victim and the fact that nothing more is required for Cs to suffer injury. There is no other intervening or proximate cause. It is in my judgment irrelevant that not all prostheses will fail.

15. Further:

(a) Articles 31 and 32 are more apt to control events which give rise to damage, which events occur after 11 January 2009. They are less apt to control events which have already occurred and which give rise to damage. To control the EGRD prospectively, in the case of product liability of manufacturers, leads to the natural construction of the EGRD as being the date of manufacture/putting into circulation of the defective products. Failing that, the date is the date when the product was implanted into each individual Claimant.

(b) Any date other than manufacture/supply (or implantation) would present very substantial practical problems. It is desirable that there is, if at all possible, clarity as to the EGRD and therefore the application of Rome II. It is undesirable that it should depend upon an individual's reaction, so that in the present case C1 is governed by the 1995 Act, but C2 – C10 may/may not be governed by Rome II. The desirability of legal certainty referred to in Recitals (6), (14) and (16) to Rome II are important aims. D's position would lead to considerable further evidence in each case so as to determine whether Rome II applied. That is not just choosing the facts of these individual cases. It is an approach which will generally (though not necessarily always) give a clear answer in product liability claims.

The Applicable Law Under the 1995 Act

16. It is for D to plead and prove the applicability of foreign law in each case. For C1 – C4 D pleads that New Zealand law applies on all issues; for C5 – C10 D pleads that South African law applies on all issues.

17. These are personal injury cases where elements of the event constituting the tort occurred in different countries. Therefore the general rule is that the applicable law is the law of the country where the individual was when he sustained the injury.[12] However the general rule can be displaced pursuant to section 12 of the 1995 Act.[13]

18. There is no doubt that the general rule is not to be displaced easily.[14] As *Dicey and Morris*[15] says…"the party seeking to displace the law which applies under s11 must show a clear preponderance of factors declared relevant by s12(2) which point towards the law of the other country." That said, the Act does not require, as the original consultation paper had proposed, an insignificant connection with the prima facie applicable law before that law could be displaced.[16]

19. The court's approach is to:

    (i) Identify the applicable law under the general rule under section 11.

    (ii) Identify the issue for which it is suggested that the general rule under section 11 should not be applicable.

    (iii) Compare the significance of the factors which connect the tort with the country whose law would be applicable under the general rule and those which connect the tort with another country.[17]

20. I heard evidence from C2 and C3. I summarise that evidence and my findings in Appendix II to this judgment. In short, the applicable law under s11 for C2 is that of Fiji; for C3 that of New Zealand.

21. The courts in England have not previously had to consider the issue of the applicable law in a product liability claim under the 1995 Act. Nor have they considered disapplying the general rule under s11(2)(a), save in one case.[18]

22. By way of context I make the following points:

    (i) These claims are not section 11(1) cases, where all the events constituting the tort occurred in one country.

    (ii) They are section 11(2)(a) cases where elements of the tortious event occurred in different countries. Cs suggest that these cases are rare because the manufacture and the injury are geographically separate. However, it may well be said that they are paradigm s11(2)(a) personal injury cases.

    (iii) The acts or omissions of D upon which the claims are based, took place in England, where D is also registered and manufactured and distributed the prostheses. Subsequent distribution, implantation and the sustaining of damage took place abroad.

    (iv) Section 11(2)(a) cases give rise to a greater risk under the general rule of an applicable law that has a less substantial connection with the tort than could be the case under section 11(1) or 11(2)(c) cases. It is therefore suggested by Cs that the case for displacement may prove easier to establish in such cases.[19] Whilst I accept that there is some force in this point, the court has to recognise that the Act specifically chooses place of injury/place of damage for section 11(2)(a) and 11(2)(b) cases. Parliament could, had it so wished, applied the principle in section 11(2)(c) to all cases. It did not do so.

(v) C submitted that under the common law the English courts, in deciding in product liability cases where in substance did the wrong doing occur, usually identified place of the tort by reference to the place of D's acts or omissions which form the basis of the claim. They rely upon the wording of section 10 and section 14(2) of the 1995 Act in suggesting that the common law is of relevance. My doubts about this are reinforced and confirmed by the decision of the Court of Appeal in *Morin v Bonhams and Brooks Limited*.[20]

(vi) I do not accept that it is a relevant factor that this is a generic liability allegation, not just a one off. It is difficult to bring this within "the factors that may be taken into account as connecting a tort or delict with a country" under section 12(2). C said that it was "substantially more appropriate" for the applicable law to be English law[21]; however, I can only base what is "more appropriate" on the section 12(2) factors, of which this is not one, in my judgment. There is support for my decision in the Law Commission's Report[22] and also in the *Naraji* case[23].

(vii) It is agreed between the parties that in determining the question of applicable law under the 1995 Act, no regard should be had as to whether or not, if English law were to apply, the CPA would extend to damage suffered outside the UK/EEA.

C1, C3 – C10

23. I take these Claimants first since, for all but C3, there was no dispute as to the place of injury which was also the place the prostheses were implanted, and where each Claimant lives. For C1 and C4 that is New Zealand; for C5 – C10 that is South Africa. I have found that the injury occurred for C3 in New Zealand. Those countries provide the applicable law under the general rule pursuant to section 11(2)(a), since it is in those countries where each of these Cs was at the time injury was sustained.

24. Identifying the issues in respect of which it is suggested that the general rule under section 11 should not be applicable is, according to Cs' submissions: (i) issues of liability and quantum or, failing that, (ii) issues of liability only.

25. Step 3 is to compare the significance of the factors connecting the tort with New Zealand/South Africa and the significance of the factors connecting the tort with England so as to determine whether it is "substantially more appropriate for the applicable law …to be the law of" England.

26. What are the factors which connect the tort with England/New Zealand/South Africa?[24] They are these:

(i) The prostheses were designed and manufactured in England. Therefore all D's wrongful acts or omissions occurred in England, though it may be said that part of the wrong was marketing in New Zealand/South Africa.

(ii) Causation of damage took place in South Africa and New Zealand.

(iii) Damage itself was sustained in South Africa/New Zealand.

(i) – (iii) are factors which connect D's tort with a country.

(iv) D is resident in England.

(v) No C has ever lived or been domiciled in England at any relevant time. All have been

in New Zealand/South Africa at all material times.

(vi) Cs are all nationals of New Zealand/South Africa (C4 has dual nationality; he is also British but has lived in New Zealand at all relevant times since 2004, his operation being in 2005).[25]

(vii) There is no link between any of the Cs and D.[26]

Factors (iv) – (vii) are "factors relating to the parties".

(viii) The prostheses were marketed in New Zealand and South Africa.

(ix) All operations were done in New Zealand/South Africa, those being the countries where supply took place.

(viii) and (ix) are factors relating to "the circumstances…of those events"

(x) All symptoms have been sustained by these Cs outside England and all revision and other treatment has taken place outside England.

(x) constitutes factors relating to "consequences of those events".

(xi) As to the parties' expectations, it is agreed that there has to be an objective appraisal of these. Cs rely upon the safety alert document issued on 24 August 2010 by D's Leeds office, albeit distributed locally in New Zealand and South Africa. I do not regard this as of any real significance. I consider it unlikely that individual Cs living in New Zealand/South Africa, and who went to hospital there for their operations, would expect the applicable law to be that of the country of manufacture of the prosthesis. They are more likely to expect it to be the country where they underwent their operations. Also D's expectation would be to be sued according to the law where C underwent an implementation of their prosthesis and sustained injury. The latter fits with the general rule under section 11(2)(a).

(xi) is a factor which relates to the parties.

27. Looking first at all the factors relating to liability i.e. (i) – (ix) and (xi), they fall far short in my judgment of the threshold test for displacing the general rule. I have of course not evaluated them numerically. I have given full weight to the fact that D manufactured the prostheses in England and is resident in England. Nevertheless, looking at the factors under section 12(2) overall, I find that the applicable law in respect of liability is that of New Zealand/ South Africa i.e. according to the general rule. Factor (x) goes to quantum rather than liability. However it was neither party's case that I should consider displacing the applicable law for quantum only. Cs' case was that I should displace it for liability and quantum or, failing that liability only. In any event I see no good reason for declaring other than that the applicable law for liability and quantum should be according to the general rule in these cases.

28. As far as C3 is concerned, factors (i), (iv) – (vii) and (x) are the same as for the other Cs. The difference in his case is that the prosthesis was marketed in Australia and the implantation took place in Australia. His revision operation took place in New Zealand. In my judgment those factors are insufficient to displace the general rule that applicable law should be New Zealand in favour of either England (for which C3 contended) or Australia.

C2

29. The general rule under section 11(2)(a) yields the applicable law being that of Fiji. Both parties accept that it is open to the court to find that Fijian law should not be displaced. However C2 submits, for the same reasons as those given in respect of the other Cs that English law should displace Fijian law. D submits that New Zealand law should displace Fijian law. Of the factors referred to in relation to the other Cs;

    (i) C2's prosthesis was manufactured in England.

    (ii) Causation, in the sense of implantation, took place in New Zealand.

    (iii) Damage was first sustained in Fiji.

    (iv) D is resident in England.

    (v) C has never lived or been domiciled in England at any relevant time.

    (vi) C is a British citizen but has never resided in the UK.

    (vii) There is no link between the parties.

    (viii) Prostheses were marketed in New Zealand but not in Fiji.[27]

    (ix) The location of the supply, i.e. the implantation, took place in New Zealand.

    (x) All symptoms have taken place outside England. Most of the symptoms have happened in Fiji. However some symptoms, and in particular the revision operation, took place in New Zealand.

    (xi) C2's expectations as regards an operation which "went wrong" would probably have been that the law would be the place where he had his operation. D may also have expected to be sued according to New Zealand law where the prostheses were distributed, and where C2 had his operation, though of course injury first took place and was substantially suffered in Fiji.

    I have found C2's position a difficult one. I have had regard to the high threshold test. I am persuaded that the general rule should be displaced in favour of New Zealand law having regard to the factors set out above. If I am wrong about that I am of the view that the general rule should not be displaced and Fijian law is the applicable law.

The CPA: Territorial Scope

30. The final issue is as to whether if English law is the applicable law, the CPA extends to damage caused outside the UK/EEA.[28]

31. The following matters are relied upon by D:

    (i) In *King v Serious Fraud Office*[29] the House of Lords referred to "the well established canon of construction that requires clear language if an Act is to be given extra territorial effect." This mirrors the presumption referred to by Bennion.[30]

(ii) Article 100 of the Treaty of Rome was[31] the enabling power for the issuing of directives for the approximation of such provisions laid down by law etc in Member States as directly affect the functioning of the Common Market.

(iii) Consistently with this aim, Directive 85/374/EEC (The Directive)[32]:

> (a) Recites the necessity to approximate the laws of Member States concerning the liability of the producer for damage caused by defective products "because the existing divergences may distort competition and affect the movement of goods within the common market…" (Recital 1).
>
> (b) Refers in other recitals[33] to the protection of the consumer – the remit of which cannot be those outside the EU.
>
> (c) Recites that "liability should extend to importers of products into the Community…", but does not purport to cover exporters outside the EU.[34]

(iv) Further:

> (a) The Explanatory Memorandum to the Directive[35] compares the position of consumers between Member States, refers to the free movement of goods within the community and justifies the imposition of liability on importers so as to protect consumers – i.e. EU consumers (paras 1 and 10).
>
> (b) The Amending Directive[36] which expanded the Directive to cover primary agricultural products exempted under the original directive states: "whereas product safety and compensation for damage caused by defective products are social imperatives which must be met within the internal market…" (Recital 1).

(v) Therefore the whole focus of the Directive is the liability of producers etc for defective products within the Common Market causing damage to consumers within the EU.

(vi) The EC's Green Paper[37] is consistent with the above. In addition it states (para 2.1.2):-

> "In accordance with the principle of equality of treatment for products imported from non-member countries and put into free circulation in the Community, the legislation at stake applies *in toto* to imports. Products exported, on the other hand, are subject to the legislation of the country of distribution in which they may cause damage."[38]

(vii) The CPA goes no further than the Directive requires.[39] This is apparent from:

> (a) The wording of section 1(1): "this part shall have effect for the purpose of making such provision as is necessary in order to comply with the Product Liability Directive and shall be construed accordingly."
>
> (b) The three essential elements for liability in Article 4 of the Directive, i.e. damage, a defective product and a casual relationship between the defect and

the damage, are repeated in section 2(1) CPA.

32. There is nothing in the wording of the CPA that restricts its territorial operation. If the applicable law was English law, that does not necessarily assist in relation to the construction of a statute. There are employment law cases which have had to deal with this problem and to which I will return briefly later in this judgment. I accept that there is substantial force in the submissions which I have summarised in the preceding paragraph. For those reasons, and for the reasons following, I determine that, even if English law was the applicable law, the CPA would not apply to the present cases. Those further reasons are:

    (i) Notwithstanding Cs' argument that there is no reason why the EU should not have jurisdiction in relation to an EU manufactured product, I find it difficult to see how Article 115 TFEU could provide a basis for legislating to make EU producers liable to consumers outside the EU. As D submitted, there is no prospect of harmonising the rules in relation to consumers worldwide or to the protection to which those consumers are entitled.

    (ii) There is nothing in the language of the CPA or the Directive to suggest territorial effect beyond the UK/EU/EEA.

    (iii) The court has to be very cautious of transposing one area of law to another. I do not therefore place much, if any, reliance upon this point; nevertheless in *Hasan v Shell International Shipping Services (PTE) Limited and others*[40] Supperstone J (*obiter*) referred to the Bleuse principle and said "…there is no authority to which I have been referred where the Bleuse principle has been held to apply when the acts complained of occurred outside the European Union."

    (iv) D's primary case was that in order for the CPA to apply the damage has to occur within the UK or within the EEA. D accepted that there could be an argument that the essential requirement might also be marketing as well as damage. Cs were able to give examples as to apparent anomalies that this primary position could cause. In the circumstances of the present case I need to go no further than to say that it is insufficient that D is resident and manufactured the goods in the UK, even if English law was the applicable law. In my judgment wherever one draws the line, consumers who suffer damage outside the EEA and who have no connection with the EEA, and where marketing and supply of the defective product was outside the EEA are not within the scope of CPA. Where and how the line should be drawn in terms of the territorial scope in difficult cases will have to be determined upon the facts of those cases. There will often be difficulties with the territorial limits of any statute/directive.

Summary

33. I therefore answer the questions set by the preliminary issues as follows:

    (1) The 1995 Act and not Rome II applies to all ten Claimants' cases.

    (2) The applicable law for C1 – C4 is that of New Zealand and C5 – C10 that of South Africa.

    (3) If the applicable law was English law, no C would have the benefit of the provisions of the CPA.

Appendix I

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

Whereas:

……..

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought……

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [5] (Brussels I) and the instruments dealing with the law applicable to contractual obligations……

(14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an "escape clause" which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner……

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability……..

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice…….

CHAPTER I

SCOPE

Article 1

Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure

imperii).

2. The following shall be excluded from the scope of this Regulation:

(a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;

(b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;

(f) non-contractual obligations arising out of nuclear damage;

(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation……

CHAPTER II

TORTS/DELICTS

Article 4

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 5

Product liability

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

……

CHAPTER IV

FREEDOM OF CHOICE

Article 14

Freedom of choice

1. The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties…….

CHAPTER VII

FINAL PROVISIONS

……..

Article 31

Application in time

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

Article 32

Date of application

This Regulation shall apply from 11 January 2009……..

Private International Law (Miscellaneous Provisions) Act 1995

10 Abolition of certain common law rules.**E+W+S+N.I.**

The rules of the common law, in so far as they—

(a)require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort or delict is actionable; or

(b)allow (as an exception from the rules falling within paragraph (a) above) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising in the case in question,

are hereby abolished so far as they apply to any claim in tort or delict which is not excluded from the operation of this Part by section 13 below.

11

Choice of applicable law: the general rule.

(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant element or elements of those events occurred.

(3) In this section "personal injury" includes disease or any impairment of physical or mental condition.

12

Choice of applicable law: displacement of general rule.

1) If it appears, in all the circumstances, from a comparison of—

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events…..

14 Transitional provision and savings.**E+W+S+N.I.**

……

(2)Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.

Consumer Protection Act 1987

Part I
Product Liability

Purpose and construction of Part I.

1

(1)

This Part shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly……..

2 Liability for defective products.**E+W+S**

(1) Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage.

THE TREATY OF ROME

CHAPTER 3 APPROXIMATION OF LAWS

ARTICLE 100 The Council shall. acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market. The Assembly [European Parliament] and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.

COUNCIL DIRECTIVE

of 25 July 1985

on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

(85/374/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof……

(1)[41]

Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;

……

(4)

Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; whereas, for the same reason, liability should extend to importers of products into the Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified;

(5)

Whereas, in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them;

(6)

Whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

…….

(8)

Whereas the protection of the consumer requires that the liability of the producer remains unaffacted by acts or omissions of other persons having contributed to cause the damage; whereas, however, the

contributory negligence of the injured person may be taken into account to reduce or disallow such liability;

(9)

Whereas the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property; whereas the latter should nevertheless be limited to goods for private use or consumption and be subject to a deduction of a lower threshold of a fixed amount in order to avoid litigation in an excessive number of cases; whereas this Directive should not prejudice compensation for pain and suffering and other non-material damages payable, where appropriate, under the law applicable to the case;

……

(12)

Whereas, to achieve effective protection of consumers, no contractual derogation should be permitted as regards the liability of the producer in relation to the injured person;

(13)

Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible;

……

(15)

Whereas, since the exclusion of primary agricultural products and game from the scope of this Directive may be felt, in certain Member States, in view of what is expected for the protection of consumers, to restrict unduly such protection, it should be possible for a Member State to extend liability to such products;

……

(19)

Whereas it is particularly important in this respect that a re-examination be carried out of those parts of the Directive relating to the derogations open to the Member States, at the expiry of a period of sufficient length to gather practical experience on the effects of these derogations on the protection of consumers and on the functioning of the common market,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The producer shall be liable for damage caused by a defect in his product.

……..

Article 3

1. 'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.

3. Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.

Article 4

The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.

DIRECTIVE 1999/34/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 10 May 1999

amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective product…….

(1) Whereas product safety and compensation for damage caused by defective products are social imperatives which must be met within the internal market; whereas the Community has responded to those requirements by means of Directive 85/374/EEC(4) and Council Directive 92/59/EEC of 29 June 1992 on general product safety(5);

.....

Appendix II

C2 and C3: Where Was Injury Sustained?

A1. I must answer this question having regard to the recital to Master Cook's order of 1 November 2013 where the parties agreed that for the purposes of the 1995 Act "The injury was sustained in each case in the country in which the Claimant was when he suffered the first alleged symptoms."

C2

A2. C2 has made three statements. They are dated 26 March 2013, 8 January 2014 and 20 February 2014.

A3. Although a British citizen with no other nationality, he has never resided in the UK.

A4. C2 underwent the hip implant operation on 6 March 2007 in New Zealand. He said that after the

operation his condition initially improved rapidly and within about two weeks he was fully mobile and pain free. After the following six week period he then returned immediately to China. He continued:

> "6. By the end of 2007 I began to notice some pain returning to my hip, and when I sat down and then stood up again I found that it was difficult to walk for a while. I was concerned about this so I contacted Mr Heynen and was reassured that this was a normal post operative problem. After a little while the problem cleared up.
>
> 7. I returned to New Zealand for review in 2008 with Mr Heynen. By this point I had started to notice a noise/whistling sound coming from the hip which was starting to concern me slightly. I discussed this with Mr Heynen and he reassured me that this was a normal side effect. I would say that in general terms that the 2008 review meeting was very reassuring.
>
> 8. I remained reasonably fit and well until towards the end of 2009. In approximately January 2010, I became aware of a noticeable squeaking from the hip and I was also developing increasing pain. This marked the start of the injuries that I contend were attributable to the defective design of the hip implant. I was still living in China at the time.
>
> 9. On 7 January 2010 I then moved to Fiji to take up a new position as General Manager of Shangri-La's Fijian resort and spa, a five star luxury resort. Aside from this I had (and continued to have) no personal connection with Fiji."

A5. In his second statement C2 says:

> "3. In around 2007 when I was living a working in China, I was advised by my brother, who was a doctor living in New Zealand, to seek medical help in relation to long term hip problems. On the basis of his advice I travelled to New Zealand in 2007 to be seen by an orthopaedic surgeon called Mr Heynen. The reason for travelling to New Zealand for the operation was that I was living alone in China at the time but I had no family there, and I wanted to be able to stay with my brother whilst recuperating from the operation. Aside from this I had (and continued to have) no personal connection with New Zealand.
>
> 4……
>
> 5. I had to remain in New Zealand for a full six weeks following the operation before I was able to fly, and during this period I stayed with my brother. I then returned immediately to China. By the end of 2007, whilst still in China, I began to notice some pain returning to my hip and when I sat down and then stood up again I found that it was difficult to walk for a while. I also noticed a noise/whistling sound coming from my hip. At the time I was advised that this was normal. I returned to New Zealand for review in 2008 with Mr Heynen and then returned to China.
>
> 6. I remained reasonably fit and well until approximately 2010. In approximately January 2010, I became aware of a noticeable squeaking from the hip and I was also developing increasing pain…I was still living in China at the time.
>
> 7. Later in 2010 I moved to Fiji…"

A6. In oral evidence C2 said that the symptoms he began to feel towards the end of 2007 continued

throughout the whole of the period, in particular difficulty weight bearing when getting up/sitting down and whistling from the hip. He said that this got worse towards the end of 2009/beginning of 2010. He is still working in Fiji. He has spent all his life working in countries such as Hong Kong, the Philippines, China, the Seychelles and Thailand. He confirmed (and I accept) that his primary concern in having the operation in New Zealand was the post operative care, because his brother lived there.

A7. C2 said that the only person he had seen in relation to his hip is Mr Heynen. From the time he left New Zealand after the operation, he saw Mr Heynen only once, although he also spoke with him on the telephone.

A8. There is an important medical note in relation to C2 dated 26 April 2010. It is the only record on Mr Heynen's notes of any consultation with C2 after 19 April 2007, and preceding the hip replacement recall letter which led to an appointment with Mr Heynen on 12 April 2011. The 26 April 2010 note reads as follows:

> "Michael is now three years from his left hip replacement. Things have largely settled, but he still gets the odd twinge of pain and has been aware of the odd squeak in his hip. He denies any swelling, groin swelling or any major limitation associated with the hip. He continues to walk with an abductor lurch. There is no pain with resisted straight leg raising, no pain with resisted abduction or adduction and today he flexes to 100 degrees with 10 degrees abduction and 10 degrees external rotation. X-rays show no signs of peri-articular erosion, while fixed implants and no evidence of ongoing effusion.
>
> Reassured Michael that all is well with the hip, that the squeaking is not uncommon especially in that occurs when he flexes his hip and probably in a slightly unsafe way causing impingement and at this stage plan to review with a check x-ray in five years time."

A9. When faced with this note C2 maintained his recollection that his symptoms started in end 2007 then seemed to get better, and then got worse. He said that he believed he saw Mr Heynen in 2008 and his recollection was that in April 2010 he was not just suffering the odd twinge and odd squeak.

A10. My findings of that on the balance of probability are that the entry of 26 April 2010 is accurate. This finding in no way undermines C2's honesty. It is extremely difficult to recall onset of symptomotology. That said, the consequences of this are that, as at that date, C2 had not suffered the first alleged symptoms. On the face of the note, and on the basis of Mr Heynen's reassurance being in 2010 and not 2008, all was seemingly well as at that date. Symptomatology other than what might normally be expected as a consequence of hip replacement operation therefore occurred after that date and whilst C2 was in Fiji.

C3

A11. C3 has signed a witness statement dated 31 January 2013. He is and always has been a New Zealand citizen and has no other nationality. He moved to Australia in September 1998 and remained there until February 2007. He underwent his implant operation on 9 July 2004 in New South Wales.

A12. In his statement he says this:

> "5. After the operation I suffered from no major issues, though I did notice my left hip always felt tighter than the right. I thought that the issue was muscular. After a few years I noticed that the hip would feel as if the femoral head was loose in the socket. This began

> intermittently and then became more frequent. These symptoms began in 2006 whilst I was living in Australia, though I cannot recall precisely when in 2006 this was.
>
> 6….(my) return to New Zealand permanently (was) on 28 February 2007…
>
> 7. My symptoms continued after I moved back to New Zealand and became more frequent. As part of my new role I continued to travel internationally on a regular basis to the USA…, Australia…, Singapore… and Hong Kong…my symptoms continued throughout this time.
>
> 8. During the business trip to the USA in July 2009, I attended a Microsoft Partner conference which required a lot of walking around convention centres. I noticed that I had pain in my calf which spread up to my knee and thigh and ultimately resulted in my hip. I was referred to an orthopaedic surgeon, Mr Richard Nicol through my GP, who also referred me to chiropractor…"

A13. C3's GP records show that as at 7 July 2005 "hips going well, minimal pain." Throughout 2006 and up to the date when C3 left for New Zealand in February 2007 there is no mention of the hips or anything adverse in the hips. C3 said that had he been in pain or had any loss of mobility or if his gait had been affected he would have mentioned it to the GP. He had none of this prior to moving back to New Zealand other than that which he had had post operatively. The only other matter was that during 2006 and the year after he had a feeling of movement as if the femoral head had moved and a scrunchy feeling. He said he had no pain and it was an infrequent feeling. Due to its infrequency it did not cause him any significant concern. Both parties agreed that the question was whether this crossed the threshold into pain, suffering or loss of amenity. I do not find that it did.

A14. In the light of this evidence I find that the country in which C3 was when he suffered the first alleged symptoms was New Zealand.

Note 1 See Articles 31 and 32 of Rome II. [Back]

Note 2 It is common ground that C1's claim falls to be considered under the 1995 Act since, whatever the court's interpretation, the EGRD occurred pre 11 January 2009. [Back]

Note 3 For the purposes of this judgment I shall assume that the prostheses are defective even though this is in issue. It is the basis upon which the claim is brought. [Back]

Note 4 *Kainz v Pantherwerke AG* (C-45/13) [ECJ, 2014] at para 33. [Back]

Note 5 See Article 4(1) of Rome II. [Back]

Note 6 Although accepting that the remarks are clearly obiter and that Rome II expressly recognises a distinction between the damage and an event giving rise to the damage, D prays in aid Burton J's comments in *Alliance Bank JSC v Aqanta Corporation* [2011] EWHC 3281 (Comm) at paragraphs 37 – 38. I do not find that passage of assistance; especially as both parties agree that his conclusion is erroneous. [Back]

Note 7 One of which objectives is consistency of Rome II with 44/2001. [Back]

Note 8 Title, Articles 1 and 2(1) [Back]

Note 9 And indeed knowledge of injury which may be later [Back]

Note 10 And also may give some more meaning to Recital 31 and Article 14 [Back]

Note 11 Example given was if a defective electrical product is supplied with a defective fuse and sometime later an electrician overloads, the proximate event is the electrician's overload [Back]

Note 12 Section 11(2)(a). [Back]

Note 13 Section 12(1) If it appears, in all the circumstances, from a comparison of – The significance of the factors

which connect a tort or delict with the country whose law would be applicable under the general rule; and The significance of any factors which connect the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country. (2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events that constitute the tort or delict in question or to any of the circumstances or consequences of those events. [Back]

Note 14 *Roerig v Valiant Trawlers Limited* [2002] 1WLR 2304; *Harding v Wealands* [2005] 1 WLR 1539; *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327 particularly at paras 104 & 106, [2007] QB 621; *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm); [2013] EWCA Civ 275; *VTB Capital PLC v Nutritek International Corp* [2013] UKSC 5, [2013] 2AC 337. [Back]

Note 15 15th Ed. Para 35 – 148. [Back]

Note 16 See Law Com No.193 para 3 – 11. [Back]

Note 17 See the *Roerig* case. [Back]

Note 18 Cs rely to some extent on *Naraji v Shelbourne* [2011] EWHC 3298 (QB) where the court displaced the general rule in favour of Indiana law. However I do not find this of assistance given the particular circumstances of that case and the particular factors which Popplewell J took into account in para 164. [Back]

Note 19 There is support for this in Dicey and Morris 14th Edition para 35 – 097. [Back]

Note 20 [2003] EWCA Civ 1802; [2004] 1 Lloyds Law Report 702 at paragraphs 17 and 18; in any event the matter is not clear cut as is apparent from the case of *Castree v E.R. Squibb & Sons Ltd and Anr* [1980] 1 WLR 1248 where it appears that it was not the defective manufacture of the machine but the putting of the machine on the market with no warning as to the defects which was relevant. No warning as to defects was arguably of little if any importance. [Back]

Note 21 Section 12(1) [Back]

Note 22 Law Com. No.193 paragraph 3.53 [Back]

Note 23 At paragraph 157 [Back]

Note 24 I shall deal with C3 separately in paragraph 28 below. [Back]

Note 25 Nationality is a weak indicator but can to some extent be taken into account, see the *Roerig* case. [Back]

Note 26 I do not regard the fact that a recall notice was sent from Leeds and distributed in countries via local distributors to be of any weight in this context. [Back]

Note 27 So far as is known or certainly so far as is relevant to C2. [Back]

Note 28 Since no C is an EU/EEA citizen and no C sustained injury in the EU/EEA, I do not have to determine whether the CPA extends just to the UK or to the EEA. The Directive is an EU Directive but its operation is extended to the EEA. [Back]

Note 29 [2009] 1 WLR 718 at 725; [2009] UKHL 17 at para 32; though D accepts that this principle is slightly off the point when dealing with a statute based on an EU Directive. [Back]

Note 30 Bennion "Statutory Interpretation (6th Edition) section 102 and section 106. [Back]

Note 31 Now Article 115 of the Treaty on the Functioning of the European Union as amended. [Back]

Note 32 On the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective products. [Back]

Note 33 Recitals 4 – 6, 8, 9, 12, 13, 15, 19. [Back]

Note 34 Recital 4; Article 3(2) [Back]

Note 35 EC Directive on Liability for Defective Products, Explanatory Memorandum of September 1976; COM [1976] 372 final. This may be relevant to interpretation (like a preamble) (i) as a direct aid to construction (ii) as an aid for identifying the purpose of the provision – see Lasok: General Principle of EU Law at [90]. [Back]

Note 36 1999/34/EC [Back]

Note 37 Liability for Defective Products (1999); see page 2, para 2.1 [Back]

Note 38 The status of this document is an unofficial interpretation which may confirm or strengthen an interpretation arrived at by other means (*Lasok op. cit.* at [95]) [Back]

Note 39 In *A v National Blood Authority* [2001] 3 All ER, Burton J concentrated on the words of the Directive and not the CPA. See para 21. [Back]

Note 40 UKEAT/0242/13/SM [Back]

Note 41 The Recitals in this Directive are not numbered in the original. I have numbered them, for convenience, in the order they appear [Back]
