IN THE SUPREME COURT OF GIBRALTAR

Claim No. 2006 S No.126

BETWEEN:

MARIA PILAR SAN MIGUEL ALVARADO

Claimant

-and-

THE SECRETARY OF STATE FOR DEFENCE

Defendant

Mr John Restano and Miss Claire Pizzarello instructed by Hassans for the Claimant
Mr Martin Chamberlain and Mr James Montado instructed by Isolas for the Defendant

RULING

BUTLER J:

Brief background

1. The Claimant seeks damages in respect of personal injuries suffered by her on 28th June 2003 during the course of her employment in Gibraltar. She alleges negligence, breach of statutory duty and breach of contract by the Defendant (as the Crown in right of the United Kingdom), his servants or agents. In a nutshell, a metal object is alleged to have fallen from a shelf on to the Claimant. Her Particulars of Claim do not contain an allegation of breach of contract but if the claim proceeds she may seek permission to amend them to include that allegation.

2. The claim form was issued on 23rd June 2006. The Particulars of Claim are dated 18th October 2006, some six and a half years ago. The claim was stayed pending the outcome of an application to strike

out an unrelated claim in which the same point of jurisdiction or principle had been raised by the Defendant. The stay was lifted on 11th February 2011 and directions were given. Further directions were given on 5th April 2011 timetabling the matter to hearing of the issue of jurisdiction, which was eventually listed for hearing on 16th and 17th May 2012. That date was vacated on application by both parties leading to a hearing on 20th September 2012.

3. It is extremely unfortunate that this Claimant, through no fault of her own, is still awaiting the outcome of her claim, almost ten years after the accident. It is the first case in Gibraltar in which the legal issue arising has been contested at a hearing. The Defendant concedes that the Claimant has a right to bring proceedings against the Crown in right of the UK. The issue is whether she can do so in Gibraltar.

Whether the issue is properly to be decided at this stage

4. The legal arguments are complex and of particular importance. During submissions I raised the issue of whether it was appropriate for me to decide such issues on an application of this sort, once the Defendant had conceded that there was no issue of jurisdiction under CPR Part 11 (see below). The parties had attended. Directions had been given leading to full argument at that hearing. Very comprehensive "skeleton" arguments had been prepared and filed. They are clearly the result of intense and thorough research and reasoning on both sides. Everyone was prepared to argue the points and did so over the course of two days. Mr Chamberlain suggests that the opportunity should not be lost and that I have everything which there could be to enable me to decide the points: to reject the Defendant's application and then to give directions, no doubt leading to the same points being dealt with at a preliminary hearing, would be a waste of the parties' and the Court's time and finances. It would cause yet further delay, particularly for this poor Claimant, who has been waiting for so long, through no fault of her own, having the misfortune to be embroiled in a test case. After all, the facts of her own claim, on the face of it, are straightforward. It is a simple personal injuries case in which, if there is causative fault or breach of statutory or contractual duty, any reasonable casual observer would expect there to be a simple remedy.

5. Thus Mr Chamberlain urges me in the circumstances of this case to decide at least the main legal issue now. The parties have made full written and oral submissions. I have considered at length and in detail

those submissions and the very numerous judicial and academic authorities to which I have been referred. Even accepting the facts as the Claimant alleges them to be, says Mr Chamberlain, the Claimant has no case. It would cause further unnecessary delay to postpone a final decision on the main issue (namely whether Crown immunity gives the Defendant an unanswerable defence in Gibraltar in these circumstances). It is a pure question of law, argued on both sides fully and comprehensively.

6. The Defendant accepts that under CPR Part 3.4 the case must proceed unless the Defendant satisfies the court that the Claimant has no prospects of success: that there is no arguable case. In the circumstances of this case, however, he argues that the correct and pragmatic course is to decide the issue of law and then apply it in deciding whether the Claimant has any reasonable prospect of success.

7. It is a test case which I am told will affect other cases in Gibraltar and elsewhere. Such cases should not normally be determined in a vacuum and without the facts first being established. But it is not, says Mr Chamberlain, necessary to establish any facts in this case, because the legal issue is discrete and, in any event, the Defendant is content for it to be assumed that the Claimant's factual allegations are correct. Other cases have been stayed pending resolution of this issue in this case, which, it is suggested, is likely to be appealed (whichever decision is made).

8. With some hesitation, I find that this case is truly exceptional in terms of delay and legal technicality and in its potential effect on other cases. Its outcome, I am told, is awaited and expected. I accept Mr Chamberlains' invitation to assume that the facts are as the Claimant has claimed. It is he who has urged me to bring clarity to the situation now. Counsel have confirmed that on the purely legal issues they have no further submissions and have presented their cases as fully as if those issues were argued at a final hearing. On balance, I find that the balance of justice requires that they be resolved and clarified now in order that all cases affected can be concluded expeditiously.

9. Mr Restano, for the Claimant, says that (since the argument of lack of jurisdiction is not pursued) the Defendant's application should be dismissed on the simple basis that the Claimant's case is clearly arguable. He has, nevertheless, presented the Claimant's case and argued it in full before suggesting that I should not decide the issue at this stage. Had I been able to read the case in advance and been told that no jurisdictional issue arose, it is possible that I would have taken

the view then that the Defendant's application is not appropriate. It was set down for full hearing and all expected it to be heard and that the important legal issue involved should be determined.

10. He says that there is other disclosure which is required before I could properly strike the Claim out as disclosing no reasonable cause of action, pursuant to CPR r. 3.4 (2) (a). He also wishes to amend the Particulars of Claim to add alleged breach of contract.

11. It is settled law that complex, new or test points of law should not normally be dealt with on an application to strike out under CPR r. 3.4 (2)(a). It is also right that the Claimant should be allowed to proceed if she may have a good cause following amendment of her pleaded claim. I could deal with the matter swiftly by simply rejecting the Defendant's application on that basis.

12. Counsel for both parties have, however, presented their respective submissions extremely fully, competently and helpfully. The case has been listed for me to consider those arguments and, having done so at length, and having read and considered fully the numerous authorities, both judicial and academic, and other materials placed before me, there would be no advantage to the parties in postponing a final ruling. I agree that the opportunity should not be lost.

13. I have born in mind the Court of Appeal's comments in *Farah v British Airways* (The Times, January 26, 2000) and similar comments in *Hughes v Colin Richards & Co* [2004] EWECA Civ, 266 but for the above reasons I regard this case as exceptional.

The "jurisdictional" legal issues

14. Mr Restano tells me that in previous such cases (and indeed in another claim which is continuing) the Defendant has taken a pragmatic view and has submitted to the jurisdiction of this court. Mr Chamberlain, on behalf of the Defendant, says that the Defendant's previous approach was based upon a misunderstanding of the law. The Defendant's concession in the extant case of *McWilliam* the Defendant conceded in April 2010 that this Court had jurisdiction to hear the claim for breach of statutory duty is now said to have been erroneous. For whatever reason, there is no doubt that there had been a change of approach by the Defendant. He has been criticised for inconsistency in his approach, both as between different cases and within individual cases. Those criticisms appear, on the face of it, to

have force but they do not affect materially the issues which I have now to decide.

15. The Defendant's case was initially presented pursuant to CPR Part 11 on the basis that the issue was jurisdictional (in the sense that this Court had no jurisdiction to hear the matter at all) and that there was no power in this court to accept a submission to the jurisdiction by the Defendant. That submission is no longer pursued.

16. During a recent directions hearing (after I had heard counsel's submissions in this case) in the case of *Walker v Secretary of State for Defence* (a claim brought against the Crown in right of the UK for personal injuries alleged to have been suffered by a cleaner during the course of her employment in Gibraltar by the Ministry of Defence) the Secretary of State indicated through different counsel that he would be arguing his case both on the basis that this court should strike out the claim pursuant to Civil Procedure Rules Part 11 (lack of jurisdiction to hear the claim) and on the basis of Part 3.4 (2) (a). As a result of the apparent inconsistency in approach in the two cases, I sought an explanation. In the end, it may be that there has been some confusion caused by use of the word "jurisdiction" in different spheres. I have no doubt that in the present case counsel for the Defendant made it clear that he was not pursuing his application under CPR Part 11. Of course he then submitted that the Claimant had no cause of action because of Crown Immunity (and that in that sense the Court had no jurisdiction). In the context of these cases, it may be thought there is little difference but in a matter in which use and interpretation of words forms a large part of the submissions, it is important to clarify under what provisions the applications are pursued. It is also important that the Secretary of State should take consistent approaches in the outstanding cases in which the same crucial issue has arisen. Not least, Mr Restano for the Claimant emphasised that the test which I should apply under CPR Part 3.4 is whether the Claimant had an arguable case. If there is an issue of whether the Court has jurisdiction under Part 11, the Court needs to resolve it as early as possible.

17. For reasons set out below, I find that Article 5 (3) of the European Judgments Regulation confers jurisdiction on this Court to hear a claim where it arises out of a harmful event which occurred in Gibraltar. Again, such a claim will clearly fail if no cause of action can be established (here, as a result of alleged Crown immunity).

18. I am satisfied that Mr Chamberlain's concession in this case was properly made. In substance the Defendant's application is, in my view, more properly and appropriately pursed under Part 3.4. Part 11 is not intended to deal with this kind of situation. The Defendant has now confirmed his intention to pursue the issue in this and other pending cases under CPR Part 3.4 (2)(a) and not under CPR Part 11.

Judicial and academic authorities/precedents

19. The volume of worldwide authority and precedent presented to me has been (inevitably and helpfully) voluminous. Though I have considered it all, I do not propose to analyse or attempt to précis the whole of it. It has been extremely competently analysed by counsel and presented in a clear and measured way. I shall concentrate first upon my crucial strands of reasoning and conclusions. For the sake of completeness, given the general importance of the matter, I shall then indicate some provisional views on further points raised during submissions and mention some of the more important judicial and academic authorities which I have found particularly helpful.

Common Law

20. It is instructive to examine the original rationale behind Crown immunity. First, a lord could not be sued in his own court. He may be bound by the same laws as others but they could not be enforced against him. Second, there was an irrebuttable presumption that the King could do no wrong. He could not, therefore, authorise a wrong committed by another. He was thus not liable for the acts of his servants or agents.

21. Few would argue that those principles are generally necessary or appropriate in a modern democratic society. The view generally taken around the world has been that state immunity is an historical anomaly which has no legitimate place as a general principle in modern democracies. I am bound to say that I can see no logical or practical reason to support a generally applicable doctrine of state immunity. It runs, in my opinion, totally contrary to modern ideas of justice and human rights.

22. Why did the rule survive until 1947 in England and Wales? First, in cases of breach of contract (but not tort) the problem was avoided in practice by the convention that the Attorney General would not refuse a fiat to enable the Crown to submit to proceedings through the

Petition of Right. In cases of tort, the practice developed of claimants relying upon the personal liability of individual crown servants, the Government voluntarily standing behind those servants and satisfying any judgment against them. The Government customarily assisted the Claimant in identifying an individual against whom a claim might be made and of submitting to arbitration. These devices were not always successful but did indicate the general view that reliance on Crown immunity was no longer generally acceptable or reasonable. Shortly before the 1947 UK Act came into force it was held in two cases (*Adams v. Naylor* [1946] AC 543 and *Royster v Cavey* [1947] KB 204) that such devices could not apply where the breached duty was that of the Crown rather than the individual identified. The courts in the UK had long pressed for legislation to rectify what they considered to be an entirely unsatisfactory situation.

23. Mr Restano relies on the fact that the Courts of Gibraltar derive their power from a constitutional instrument as a justification for not applying crown immunity here. He says also that the previously argued justification that the Crown cannot be vicariously liable for its servants' or agents' acts and that vicarious liability resulted from implied authority, is not valid. In *Majirowski v Guys & St Thomas NHS Trust* [2007] 1 AC 224, for example, Lord Nicholls said, *inter alia*:

> *"In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of "good practice" by their employees".*

He referred to policy reasons for supporting the common law principle of strict liability for another person's wrongs and said that:

> *"....for these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment".* Baroness Hale in that case confirmed clearly that *"Vicarious liability....does not depend upon the employer having done anything wrong or even having any legal duty imposed upon him. It merely requires that the enterprise pay for damage done by its employees in the course of their employment, a concept which now has a very broad meaning, and certainly embraces conduct which the employer was actively trying to deter and could have done nothing more to prevent.....".*

24. Consequently, says Mr Restano, the same principles apply to any tort and even to equitable obligations. The same reasoning constitutes the rationale for extending vicarious liability to acts not authorised by the employer (see, e.g., *Lister v Helsey Hall* [2002] AC 215).

The Current Statutory Position

25. Both the 1947 UK Act and the 1951 Gibraltar Act provided for a number of exceptions to the principle that the Crown could not be liable in tort. I do not need to set out those exceptions. They are wide-ranging and would certainly cover personal injury claims such as the Claimant's in this case.

26. But the 1947 UK Act does not authorise proceedings against the Crown concerning any alleged liability of it *"arising otherwise than in respect of His Majesty's Government in the United Kingdom..."*. Part III confers jurisdiction on the High Court and County Court but does not apply to the Crown *"except in right of his Majesty's Government in the United Kingdom...."*.

27. The 1951 Gibraltar Act contains corresponding provisions. Unlike the UK Act, however, it is described as an ordinance to *"declare"* the law relating to civil proceedings.

28. By section 2 (1) of the English Law (Application) Act, English common law and rules of equity shall be in force in Gibraltar *"so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require..."*.

29. There is no doubt that Crown immunity was regarded as a subsisting principle of Common Law in the UK prior to the passing of the 1947 UK Act (see, e.g., *Adams v Naylor* and *Royster v Cavey*, above). That Act provides for exceptions to that principle.

30. Equally clearly, the 1947 UK Act expressly does not itself authorise (or prohibit) proceedings against the Crown in relation to any alleged liability arising other than in respect of the UK Government and does not affect the law enforced in courts outside England and Scotland, or the procedure in such courts (ss. 40(2)(b) and 52; and see the decision of Schofield, CJ in this court in *Transport and General Workers Union v Ministry of Defence*, (2005-06) Gib LR46).

31. The statutory position in Gibraltar mirrors that in the UK: the 1951 Act does not authorise proceedings in Gibraltar against the Crown in right of the Government of the UK.

32. By virtue of section 39 of the Civil Jurisdiction and Judgments Act 1993(Gibraltar) ("the 1993 Gibraltar Act"), Council Regulation 44/2001 ("the Judgments Regulation") applies as between the UK and Gibraltar as though they were separate Member States of the EU. Art 5(3) of the Judgments Regulation enables a person domiciled in one Member State to be sued in tort in the courts of the place where the harmful event occurred. I repeat that this must be subject to there being a cause of action under the law of the State where the alleged wrong occurred (or under whatever is the applicable law to be applied in that state). The 1993 Gibraltar Act is headed:

> "*Ordinance to make further provision about the jurisdiction of courts and tribunals in Gibraltar and about the recognition and enforcement of judgments given in Gibraltar or elsewhere and to provide for the modification of associated legislation".* It does not, however, solve the issue of applicable law.

33. Mr Restano argues that the Defendant's case, if correct, leads to an "absurd and perverse" result: If the accident had occurred in La Linea, just across the border with Spain, the Claimant could have sued in Spain but, it having happened in Gibraltar, she must sue in England. Attractive though Mr Restano's submission may be, it does not, in my opinion, assist the Claimant's case in relation to interpretation of the legislation and the Judgments Regulation. The Regulation does not, in my judgment, purport to override substantive law and therefore to confer a right to sue in a particular Member State where the substantive law of that state (or whatever is the applicable law according to the principles of that state) provides no cause of action. If the accident had happened in Spain, the Regulation would enable the Claimant to bring an action in Spain but such action would only succeed to the extent that a cause of action under Spanish law were proved. The difference only arises if and to the extent that the doctrine of Crown or state Immunity does not apply under Spanish substantive law. I do not believe that the Regulation was intended to provide a greater right of action to a Claimant domiciled in one state to sue in the courts of another than he would have had if domiciled and resident in the state where the accident occurred.

34. The situation is all the more absurd, says Mr Restano, because if the Claimant had brought her case in the courts of England, those courts would have had to apply the substantive law of Gibraltar (the *lex fori)*. I accept that the *lex fori* would be applicable and that the effect would be to give the Defendant the defence (abolished in the UK) of Crown Immunity to the extent that it applies in Gibraltar. That

the result may seem absurd, given that in both jurisdictions Crown Immunity has been abolished by statute to the extent which I have explained, does not detract from the logic of Mr Restano's analysis, which I find to be correct in this respect. On the face of it, the applicable law in this case is that of Gibraltar, wherever the case be heard.

Does Crown immunity in these circumstances survive?

35. The real and only remaining issue, therefore, is whether the common law principle survives today, particularly in Gibraltar. The common law is a developing field and may alter to suit the needs of a changing society. It is the Courts' own creature and may therefore be extended or developed by the Courts to suit the needs and requirements of modern society. Any other view would, in my view, be illogical and contrary to the very *raison d'etre* of common law. If common law doctrines are created in order to advance the cause of right and justice as seen at the time of their creation, then it must follow that they may be extended, modified or abolished in appropriate circumstances if and when they are having the opposite effect according to the then prevailing norms and circumstances. The Court will always require cogent reasons for and will be cautious before altering long-standing principles of common law.

36. It follows that statutory intervention is not always necessary in order to bring about change. Statutory intervention can, however, reinforce and entrench common law principles, which would then be adopted as statutory provisions not subject to change by the courts.

37. I consider first whether, at the time of the 1951 Gibraltar Act, common law Crown Immunity still prevailed. The Act (as did the 1947 UK Act) listed exemptions from Crown immunity in relation to torts by the Crown's servants, breaches of statutory duty binding on the Crown and its subjects, breach of employer's duty owed at common law by the Crown to its servants, etc. It may be thought that there would have been no need for such legislation unless common law Crown Immunity still prevailed at that time. The 1951 Act, however, is described expressly as an Ordinance to *"declare"* the law relating to civil proceedings. There is no reason in principle or logic why a Statute should not declare (for the purposes of clarification and certainty) something which is or may be already the case. In this respect, the 1951 Gibraltar Act contrasts vividly (and, I presume, intentionally) with the 1947 UK Act, which is described in its

preamble as *"An Act to amend the law relating to the civil liabilities and rights of the Crown and to civil proceedings by and against the Crown....."* (my underlining).

38. The common law and rules of equity *" in force"* in England are applicable in Gibraltar, by virtue of the English Law (Application) Act, but only *"so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require".*

39. Is Crown immunity still in force in the UK? It seems clear to me that, in so far as it relates to the circumstances of this case, it is not. The case falls within the statutory list of exemptions in the 1947 Act (whether declaratory or not). It matters not whether the immunity has been abolished: it is no longer *"in force".* Importation or preservation of a common law principle in Gibraltar from England when it is no longer applicable (or *"in force"*) in England is not, I think, the likely intended consequence of the legislation in England or in Gibraltar. That is not to say that the 1947 Act itself abolished (or could abolish) the doctrine in Gibraltar.

40. Section 40 of the 1947 UK Act provides that:

> *"(2) Except as therein otherwise provided, nothing in this Act shall:-*
>
> *(b) authorise proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise than in respect of His Majesty's Government in the United Kingdom...., or affect proceedings against the Crown in respect of any such alleged liability as aforesaid; or*
>
> *(c) affect any proceedings by the Crown otherwise than in right of His Majesty's Government in the United Kingdom...."*.

In my judgment, Section 40 (b) does not affect the position in this case, since the alleged liability of the Crown does arise (if at all) *"in respect of"* His Majesty's Government in the United Kingdom. It matters not that the harmful act (or omission) relied upon took place in Gibraltar.

41. During submissions, in answer to my question, Mr Restano confirmed that he was not suggesting that there was a right to sue the Crown at common law in Gibraltar prior to the 1951 Act. He was suggesting that the common law has or should be developed to

recognise such a right now. I do find it helpful, however, to consider the UK position at that time. The common law position in Gibraltar prior to the 1947 Act pertained no doubt because it was the common law in England. A common law principle cannot exist contrary to statute. To the extent that the common law principle had disappeared in the UK, it seems to me that even if the principle was not automatically abolished in Gibraltar there was a strong argument that it should no longer apply. Perhaps it is recognition of that reasoning which led to the statement in the 1951 Act that it was an Act to declare the law, rather than to change it.

42. Assuming that Crown immunity did survive in Gibraltar following the 1947 UK Act, is it in the circumstances of this case any longer *"applicable to the circumstances of Gibraltar*?*"* In my judgment, it is not. Public policy does not require it; on the contrary, it militates against it. Modern society requires that the concept of vicarious liability be given wide effect. I accept and adopt the reasoning of Lord Nicholls and Baroness Hale in *Majrowski v Guys & St Thomas' NHS Trust* [2007] 1 AC 224 in this regard. It is fair and it is consistent with both the European Convention on Human Rights and Gibraltar's Constitution. Importantly, it does not depend upon the employer having done anything wrong – it simply requires that he (or it) should pay for or be responsible for damage done by his (or its) employees during the course of their employment. Since 1951 the courts have continued to extend the doctrine of vicarious liability (e.g. in *Lister v Helsey Hall, ante*).

43. My conclusion is reinforced by a number of judicial precedents outside this jurisdiction. In the judgment of Murphy, J in the Australian case of *Johnstone v The Commonwealth* (1979) 143 CLR 398, for instance, he concluded that Crown immunity no longer applied at common law in Australia: *"The maintenance of legal conceptions appropriate to the feudal system is increasingly inappropriate in a modern democratic society. Today, governments are involved in undertakings and activities in respect of which there is no rational and just basis for treating them as immune from suit..."*. He drew from other commonwealth precedents, including *Muskopf v Corning Hospital District* (1961) 55 Cal 2d 211; 11 Cal R 89; 359 P 2d 457, at p 460, in which Traynor, CJ observed: *"The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia"*. Murphy, J concluded that Governmental immunity *"founded on feudal notions is quite out of touch with modern Australian conditions....."*. In my view, it is equally out touch with requirements of modern Gibraltarian

society, certainly in the circumstances of this case. It can no longer be supported by the maxim that the monarch can do no wrong, since the modern law of vicarious liability is not based on fault of the employer.

44. Nor does the principle that the Crown cannot be sued in its own courts now support the maxim. It is clearly established that the Crown (contrary to what was once thought) is divisible. I accept the submission of Mr Restano that there is no logical or principled reason why, then, the Crown in right of one country should enjoy a general immunity in the courts of another. In this case, there is no modern reason for the Crown in right of the UK to enjoy a general immunity in Gibraltar, under Gibraltarian law.

45. In *Transport and General Workers Union v Ministry of Defence* (above) Schofield, CJ accepted (it having been conceded) that the Claimant had a right of action in Gibraltar against the Crown in right of the UK, since the Act relied upon was binding on the Crown in right of the UK. In the present case, the Claimant relies also on alleged breach of statutory duty. Mr Chamberlain's submission inevitably rests upon Schofield, CJ's decision, and the concession made in his case, having been incorrect. That decision is of persuasive effect in this case and I find it to have been correctly decided.

46. Even before the 1947 UK Act, the unacceptability of Crown Immunity as a principle to be applied generally was recognised by the Crown's willingness to submit to proceedings through the Petition of Right (the required fiat of the Attorney-General was granted as a matter of course in proper cases). This practical measure was limited to contract claims and there were limitations with regard to enforcement. As I have observed, claims based upon tort were pursued against Crown Servants personally and the convention developed that the Crown would satisfy the liability of individual tortfeasors. Again, there were limitations to this device which it is unnecessary for me to list in this judgment.

47. It is accepted by Mr Chamberlain that Claimants in Gibraltar have at least since 1947 had a right of action in negligence and breach of statutory duty against the Crown in right of the UK. That right was previously pursued in the UK. The issue now is whether there is any justification for immunity to remain in order to prevent these claims being adjudicated upon in Gibraltar. The 1993 Gibraltar Act. Together with the Judgments Regulation, allows the claim

procedurally to be brought in Gibraltar, provided that the Claimant has a good cause of action under Gibraltar law.

48. It is also notable that there was no attempt during submissions to offer any justification on its merits for the application of Crown Immunity in the circumstances of this case, save as follows: If Crown immunity is properly regarded as a procedural bar in this case, Mr Chamberlain submits that it is nevertheless justified as serving a legitimate aim. It is part of an interlocking system, reflecting the principle of distinct governments of the Crown and providing that claims against the Crown in right of the government of a British overseas territory may be brought in the courts of that territory only. Its purpose is to ensure that the government of one territory is not subject to the jurisdiction of another. I accept that that is the effect of Crown Immunity. A simple statement of that fact does not, in my judgment, go far in current circumstances and in modern society as a legitimate aim or as justification for the principle. Nor is there anything before me to confirm Mr Chamberlain's assertion that this was the reasoning of the legislature. It is this point, however, which has caused me to hesitate most in this case. If Mr Chamberlain is correct that, there is a claim against the Crown in right of the United Kingdom in these circumstances, the issue of whether it can be enforced in Gibraltar or only in England is procedural in nature and subject to the Judgments Regulation. Mr Chamberlain's submissions were confined to the issue of whether the immunity still in fact exists and prevents the claim being pursued in Gibraltar.

49. It is, in my view, neither necessary nor justifiable for the common law to continue to support a maxim or principle or rule which has for so long been seen and recognised as unjust and unjustifiable. Since then, there have been further statutory developments which make recognition of the injustice of the maxim even more apparent.

50. Common law is an organic concept. It is neither fixed nor inflexible nor impenetrable, though at times it may have seemed so. In my judgment this Court has not only the power but the duty to ensure that judicial principles which have been developed in order to reflect public policy of the times do not endure when they are inconsistent with modern/ current thinking and circumstances. Nor should they endure if contrary to modern jurisprudence in relation to Human Rights or European law which is binding on Gibraltar and the UK. Even if not so binding, common law should reflect the real and widespread developments in thinking concerning such matters. This is not, as suggested by Mr Chamberlain, judicial legislation. It is

judicial recognition of the changes in circumstances since the common law maxim was first accepted. The common law has developed where appropriate in numerous landmark cases, well known to all students of English law, such as *Donoghue v Stephenson*, *Hedley- Byrne v Heller*, *High Trees*, etc. etc.

Health and Safety law

51. The Workplace (Health, Safety and Welfare) Regulations and Management of Health and Safety at Work Regulations (transposing respectively EC Council Directives 89/654/EEC and 89/391/EEC) are required in order to implement EEC Law.

52. Gibraltar health and safety law can only properly be interpreted in the light of EU law. Member states have some discretion in the manner and form of implementation of EC Directives but they must be given full and meaningful effect.

53. Art 31(1) of the Charter of Fundamental Rights of the EU protects the worker's right to working conditions which respect his/ her health, safety and dignity. The Charter also protects rights to (i) respect for a person's physical and mental integrity (ii) liberty and security of the person (iii) private life (iv) equality before the law and (v) an effective remedy. Any limitations on those rights must be proportionate, necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52 of the Charter).

54. I accept Mr Restano's submission that Crown immunity would render nugatory this Claimant's protection afforded by these provisions and that such immunity is inconsistent with that protection in the circumstances of this case. In this respect, European Law prevails (*Costa v ENEL* [1964] ECR 585) and this Court is required to ensure that the common law is disapplied or abrogated in order to ensure compliance with European law (see, e.g., *Marleasing* [1990] ECR 1-4135 and *Von Colsen* [1984] ECR 189). Even if I were wrong in finding such strict requirement, the European law relating to working conditions strongly supports my view that common law immunity should not apply in the circumstances of this case.

Miscellaneous

55. The above sets out the core reasons for my conclusions but it is right that I refer to some of the other points made by the parties and to some of the judicial and academic authorities which I have found helpful.

56. Mr Chamberlain submits that in the 1951 Act it was plainly intended that any right in Gibraltar to sue the Crown in tort should be confined to claims against the Crown in right of the government of Gibraltar. A problem with that submission is that if the Act is declaratory of law existing prior to the Act, then there existed no defence of Crown immunity in Gibraltar in tort prior to it, at least in relation to claims brought against the Government in right of the Government of Gibraltar. The likelihood, in my opinion, is that the Act was simply intended to clarify that narrow issue of the liability of the Crown in right of Gibraltar and that the position in relation to claims against the Crown in right of the UK was not intended to be dealt with at all.

57. But if the Crown in right of Gibraltar could not raise Crown immunity prior to the Act, how did that come about? However it came about, I can see no logic, principle or justice in a distinction between the Crown in right of the UK and in right of Gibraltar.

58. At first sight it may appear difficult to escape the conclusion from the title to the 1951 Act that it was intended to cover the whole law relating to the civil liabilities and rights of the Crown. But Section 29 sets out the exceptions to that intention. Mr Chamberlain says that if the Act is declaratory, then Section 29 also must be declaratory. It seems to me, however, that Section 29 can equally be taken as excluding the issue of the liability of the Crown in right of the UK from the Act altogether. Then one has to have regard to common law in considering that issue. I conclude that I should prefer the interpretation which is more consistent with fairness, logic, modern European law and the Gibraltar Constitution.

59. My conclusion is that the 1951 Act related only to the liability of the Crown in right of Gibraltar. It is likely that the legislature did not wish to tackle the issue of whether the Crown could be sued in Gibraltar in right of the UK, leaving that to be dealt with by the common law, which in turn depended on the common law of the UK, as adjusted to the circumstances of Gibraltar. So far is the 1947 UK Act is concerned, the intention was to leave the issue of liability of the

Crown in right of other jurisdictions to the laws of those countries and not to interfere with those laws. Had the two Crown Proceedings Acts been passed more or less simultaneously, there may have been more force in the Defendant's suggestion that they were intended to be reciprocal.

60. The Defendant says that existence of any right to sue the Crown in tort has, since 1947 in the UK and 1951 in Gibraltar, been governed by statute and the courts cannot now alter the scope of the right in any way. I confess that this submission has caused me to think very carefully before reaching the conclusions which I have reached. It would be entirely wrong for the courts to take a course contrary to the will of Parliament but if satisfied that the course would not have that effect and that a development in the common law is necessary, the courts should not shrink from such development. That principle has particular force, in my view, when, as here (in the circumstances of this case), the development is the removal of a common law doctrine which simply cannot be justified by the standards and ideals of modern society, does not satisfy a legitimate aim and is not proportionate. For the above reasons, I do not accept that the two statutes exclusively govern the right to sue the Crown. The 1947 Act relates only to the right to sue the Crown in the UK in right of the UK. The 1951 Act relates only to the right to sue the Crown in Gibraltar in right of Gibraltar. The right or otherwise to sue the Crown in Gibraltar in right of the UK is entirely separate and left to common law.

61. I observe that if Parliament had intended to entrench in Gibraltar the common law immunity of the Crown in right of the UK, it could have done so expressly and clearly. I do not consider, on balance, that section 29 has that effect. It would be to entrench a wholly unfair and unsupportable principle. It would apply then even if the UK Parliament decided that Crown immunity should be abolished altogether, unless and until the Gibraltar Parliament followed suit. A gap is thus left to be filled by common law.

62. Section 3 of the 1951 Gibraltar Act may be read as suggesting that claims against the Crown prior to that Act could only be enforced by grant of the Governor's fiat, by petition of right, and not as of right. But it does not so provide. Its words are straightforward. To my mind, it means what it says, namely that <u>if</u> any claim previously could only be enforced with the fiat of the Governor, then that is no longer necessary.

63. In *Regina v Chief Constable of the Royal Ulster Constabulary, Ex Parte Begley and in In re McKerr* [2004] 1 WLR 807, the House of Lords emphasised that the Courts cannot develop the common law in a way inconsistent with the intention of the legislature or contrary to its expressed will. In *In re McKerr*, Lord Steyn said at paragraph. 51:

> *"It must be sound principle for a supreme court to develop the law only when it has been demonstrated that the just disposal of cases compellingly requires it. Given that the right to life is comprehensively incorporated in our law by the 1998 Act, why is there now a need to create a parallel right to life under the common law?"*

In both cases their Lordships recognised that the arguments for developing the common law had considerable force. In the first, to do so would have been contrary to the expressed wish of Parliament; the second related to the law regarding inquests, which in Northern Ireland had generally been developed by Statute and in any event any common law development was unnecessary in the light of the Human Rights Act 1998.

64. In *Trawnick and Anr v Lennox and Anr* [1985] WLR 532, CA, an action was brought against the Ministry of Defence in relation to a nuisance emanating from a shooting range in the then British Sector of Berlin. The Court of Appeal held that the right to sue the Ministry of Defence depended on the 1947 UK Act. But in that case the Secretary of State had certified that any alleged liability of the Crown arose otherwise than in respect of Her Majesty's Government of the United Kingdom. Section 40 (2) (b) of the 1947 UK Act precluded the bringing of an action under the Act against the Ministry. The Court of Appeal held that the plaintiffs only had such right to sue the Attorney-General as anyone in their position and making the same kind of claim would have at common law. Apart from the Act, the Crown could not (in England and Wales) be sued in tort. Mr Chamberlain relies strongly on this decision in that, forty years after the UK 1947 Act, the common law immunity was held to survive.

65. My analysis of *Trawnick* is as follows:

(i) The claim was brought against the Crown in right of the UK.

(ii) It was brought in England.

(iii) The Secretary of State's certificate was conclusive. It had to be accepted that the alleged liability arose otherwise than in respect of Her Majesty's Government of the UK. I agree,

however, with the observation of Browne-Wilkinson, L.J. that it is far from clear how liability for the acts of the British Army could be said to arise from the acts of the Crown in respect of the Government of the UK. At p. 552D-E he said: *"...I am not satisfied that it has been demonstrated that the case is brought against the Crown otherwise than in right of the Government of the United Kingdom."* The Court, however, was bound by the certificate. There is no such certificate in the present case, which is not governed by the 1947 UK Act.

(iv) The Court of Appeal was clearly uncomfortable that its decision left an apparently meritorious Claimant with no remedy anywhere.

(v) The decision establishes that the common law survived the Act in cases where a Claimant could not bring proceedings under the Act. That, however, does not detract from the proposition that in circumstances where and to the extent that the Act does apply and gives a right of action against the Crown, the common law in England and Wales could not be inconsistent with that right and must have been abolished.

(vi) It is notable that it does not appear to have been argued in *Trawnick* that common law immunity no longer applied in the circumstances of that case. Lawton L.J. considered it*"trite law"* that the Crown could not be sued in tort (p. 548 C). Browne-Wilkinson L.J. wished to hold that the plaintiffs claim could be heard but did not feel able to do so. I note that at p. 551 H mention is made of the basis for Crown immunity: *"The Crown can only act by its servants or agents and, since the Crown can do no wrong, it cannot have authorised its servants or agents so to do. Hence, although the servant or agent was personally liable, the Crown could not be held vicariously liable for his acts".* The contrary was not argued. Instead, ingenious but predictably unsuccessful other arguments were mounted. Nevertheless, in *Matthews v Ministry of Defence* [2003] 1 AC 1163 Lord Hope said (at[54]) that there is no doubt that the 1947 Act was designed to make new law and that Crown immunity applied in cases of alleged tort prior to the Act.

(vii) At first instance Megarry V.-C. held (page 537C-D) that section 40(2) (b) of the UK 1947 Act "is concerned to exclude the liabilities of the Crown in right of its many other territories; the Act is to apply only to its liabilities in right of the United Kingdom....Furthermore, the draftsman....has demonstrated perfectly clearly that he is capable of making an explicit provision which otherwise expressly provides....". That accords with my interpretation of section 40(2) (b), which I have explained above.

(viii) Since *Trawnick*, there have been further important developments. The Human Rights Act, the incorporation of the European Convention on Human Rights, international judicial developments relating to state immunity and particularly the European Judgments Regulation. To find that common law still bars actions against the Crown in right of the Government of the UK in circumstances such as those in this case would, in my view, run entirely contrary to the spirit and intention of the Judgments Regulation. Mr Chamberlain concedes that there is a right of action against the Crown in right of the UK Government. The harmful event was in Gibraltar. The common law should not prevent application of, or run contrary to the spirit of, the Judgments Regulation, as confirmed by the Gibraltar Constitution. I accept that the procedural limb of the original justification for Crown immunity (that the Crown cannot be sued in its own courts) is displaced by Article 5(3).

Applicable law

66. The Claimant further relies upon the rules of conflict of laws, which apply since the Defendant is domiciled in the UK. He says that this court has discretion to apply English law (namely the 1947 UK Act) at least in relation to part of the claim, in order to preclude Crown immunity. Since "Rome II" did not come into force until 11th January 2009, common law principles on conflict apply in Gibraltar. The "double actionability" rule would normally require that it be shown that the facts of this case would give rise to a cause of action in both the forum of action and the place of the event. The case of *Chaplin v Boys* [1971] A.C. 356, however, confirms an exception to that rule, namely where the law of one country has the most significant relationship with the occurrence and the parties. Since the

Crown in right of the UK is responsible for Defence and Foreign affairs in Gibraltar and the Defendant is domiciled in the UK, the law of England and Wales has the most significant relationship with the occurrence and the parties and should be applied to displace any Crown immunity in Gibraltar and to do justice to the parties. In that way, says Mr Restano, the Claimant is entitled to rely, in Gibraltar, on the 1947 UK Act.

67. I need not dwell on this issue. I am satisfied that the Gibraltar is the country with the most significant relationship with the alleged harmful events. They occurred here. The Defendant's relevant operations are here. The Claimant lives here and her employment is here. She wishes to litigate here. A basis of her wish to litigate here is that she should not be put to the expense and inconvenience of litigation in another country.

The Claimant's Constitutional rights

68. Section 1 of the Constitution Order declares that there *"...shall continue to exist without discrimination by reason of any ground...in section 14(3)... (a) the right of the individual to.....the protection of the law.....; and (c) the right of the individual to protection for.....the privacy of his home and other property and from deprivation of property without adequate compensation"*.

69. Section 8 (8) is the Gibraltar expression of Article 6 of the ECHR:

> *"Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or authority, the case shall be given a fair hearing within a reasonable time."*

70. In Almeda *v Attorney General [2003] UKPC 81,* The Privy Council held that the provisions of the Constitution *"offer certain procedural guarantees"* but not *"any guarantee as to the substantive content of the law".* The lack of any cause of action for non-feasance in Gibraltar was *"a rule of the substantive law of Gibraltar",* not *"a rule barring her from enforcing a right to damages which she actually enjoys under the law".*

71. *Matthews* v *Ministry of Defence* [2003] UKHL 4 concerned Crown immunity in England. A Royal Navy mechanic claimed

damages for personal injuries allegedly caused by negligence and breach of statutory duty. But section 10 of the 1947 UK Act specifally exempted the Crown from liability in tort for injuries suffered by members of the armed forces where the relevant events occurred pre-1987. It was not concerned with common law. In deciding that the Claimant had not been deprived unjustifiably of his "civil right" to sue, the House of Lords held that "civil rights" in Article 6 of the ECHR was autonomous and not to be interpreted solely be reference to domestic law. The case was decided on its particular facts which do not apply in the present action. The important point, however, was that Article 6 (1) only applies to civil rights which can be argued to be recognised under domestic law. It does not guarantee any particular content for civil rights in any member state. The Court was clearly influenced by the existence of a no-fault scheme which benefitted the Claimant. Lord Hope of Craighead emphasised the deep-rooted nature of the doctrine of Crown immunity prior to the 1947 UK Act and I have borne this fact in mind in reaching my conclusions in this case. The main issue was whether the section 10 exemption from the statutory right to sue the Crown was substantive or simply procedural.

72. Mr Restano seeks to distinguish those cases on the basis that (a) common law Crown Immunity is a procedural principle (b) the present Claimant had a right of action in England and Wales, whereas in *Almeda* and *Matthews* the Claimants had no such right (Mr Chamberlain submits the words "any civil right or obligation" in the constitution must refer to such a right or obligation under Gibraltar law; the principle that the Crown can do no wrong is a rule of substantive law (see *Matthews)* and accordingly the Claimant has no civil right to recover damages in tort against the Crown, at least against the Crown in right of the UK) (c) in determining whether the principle that the Crown could do no wrong is substantive or procedural, the court should look at the practical realities and apply a generous and purposive (not technical) interpretation. The constitution requires a dynamic, evolving interpretation since it seeks to give effect to a living instrument which must be interpreted in the light of present day conditions and accommodates changing social attitudes (e.g. *Reyes v R* [2002] 2 A.C. 235 @ paragraph 26). Mr Restano argues that the notion that the Crown in right of the UK is immune from action in Gibraltar in relation to an accident in Gibraltar over which this court has jurisdiction under the Jurisdiction Regulation does not accord with a sensible Constitutional construction of sections 1(a) and 8(8) of the Constitution, especially in the light of the overriding Judgments Regulation. I find that there is nothing in

the submissions which I have heard or the authorities to which I have been referred to justify the difference in approach, in the circumstances of this case, with regard to the Crown in right of Gibraltar and the Crown in right of the UK. My decision is not a departure from *Almeda o*r *Matthews.* They do not, in my judgment, detract from the conclusions which I have reached in the circumstances of this case. True it is that the Privy Council in *Almeda* declined to revisit the common law rule that the Crown was not liable for negligent non-feasance and that, if that rule were going to be abolished, that should be done by legislation. Judges, it was held, were not able to assess all the implications of any change. The legislature would be able to balance the interests of victims, on the one hand, and of the government as the highway authority, on the other. The factors which have led to my conclusion in this case are entirely different and, in my judgment, far more forceful.

73. At 28.3 of the Defendant's supplementary "skeleton" argument it is submitted that "....an action against the Crown is barred *in limine*, so that even where the Crown consents to the proceedings, the court must decline jurisdiction (*Royster v Cavey* [1949] QB 204, per Scott, LJ @ p. 209). *Royster* concerned an employee's injury in a Ministry of Supply factory. The Claimant sued a nominated person. The Defendant was not the occupier, negligent or in breach of statutory duty. The Court of Appeal held that it had no jurisdiction to hear the appeal. To bring action against a nominated Defendant, the Defendant must owe a duty to the Claimant. An action for tort did not lie against the Crown. The practice of nominating a Defendant had grown up. The Court was bound by *Adams* v *Naylor*. Scott, L.J. described the failure of Parliament to legislate to remedy the situation as a "crying evil" and that it would be a "crying wrong" if it were not introduced soon. Comments were made about retrospective legislation to save such actions/ extend time. That case was decided in different times and particularly before the Judgments Regulation.

74. In *Fogarty v United Kingdom* (2002) 34 E.H.R.R. 12, the Claimant, who had been employed at the U.S. Embassy in London, wished to claim under the Sex Discrimination Act against the US Government, which invoked state immunity. That immunity was statutory (United Kingdom State Immunity Act 1978). It was held that this did not violate her Article 6 rights to access to a court and a fair hearing. It is to be noted that the Claimant had previously brought successful proceedings against the U.S. Government in relation to her employment, in which immunity was not invoked. It was not suggested that immunity could not be waived. State

immunity in that case was part of the statutory substantive law of the UK and Article 6 (1) does not guarantee any particular content for civil rights and obligations. State immunity did not result in the Claimant not having a substantive right under domestic law. An action against the State is not barred *in limine*. *"..if the defendant State does not choose to claim immunity, the action will proceed to a hearing and judgment, as occurred with the first discrimination action brought by the applicant. The Court is, <u>therefore</u>, satisfied that the grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar, preventing the applicant from bringing her claim before the Industrial tribunal."* (my emphasis).

75. The UK Government argued that if (as the Court found) there was any restriction to the right of access to court, it pursued a legitimate aim (accepted in that case by the Claimant), namely promoting respect for the independence and equality of other sovereign States in accordance with public international law, and that the restriction was proportionate (challenged by the Claimant).

> *"Any adjudication upon the fairness of the dismissal of an embassy employee or a decision whether or not to employ her would involve an investigation into the internal organisation of the embassy which would be an interference with the sovereign functions of the State.....it was appropriate to allow States a considerable margin of appreciation and the United Kingdom legislation fell within that margin.....Article 5 of the Basle Convention....showed that the drafters of that Convention wanted to exclude from its scope matters in the exercise of the functions of diplomatic missions, including recruitment for employment in embassies."* Later: *"The right of access to court is not....absolute, but may be subject to limitations.....Contracting States enjoy a margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim...."*.
>
> *"....sovereign immunity is a concept of international law....by virtue of which one State shall not be subject to the jurisdiction of another State.....the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty"*.

> *"Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."*
> *"...the proceedings....did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies may by their very nature involve sensitive and confidential issues, related, inter alia, to the diplomatic and organisational policy of a foreign State."*

76. I note that the Court was clearly influenced by the fact that the subject of the proceedings was recruitment, rather than a claim by an existing employee. I take the view that *Fogerty* is distinguishable on the basis that this case does not relate to an embassy employee and the policy considerations are different; that it does not involve access to sensitive foreign material; that the Claimant (says the Defendant) can sue in the UK, in which case the material would be available and cannot therefore be regarded as too sensitive; and this is a very straightforward personal injuries claim. Each case must be considered on its own particular facts. I observe that in this case there is no question of investigation of the internal management of an embassy or anything of that nature.

77. In his dissenting judgment, Judge Loucaides said:

> *"Even if the immunity invoked is considered as applicable to the facts of the present case....in so far as it is a blanket immunity which automatically blocks access to court, without any discretion for the court to examine the competing interests by reference to the facts of each case, including those relating to the claim itself, it is incompatible with the right of access to the court guaranteed by Article 6.....such an immunity should not be allowed to prevent access to court where, in the circumstances of any given case, it is outweighed by other public interest considerations." "....it has not been established that there is....a rule of customary international law in support of the State immunity invoked by the ....Government."*

78. As to Mr Chamberlain's suggestion that the system reciprocally protects the Government of Gibraltar from claims in the UK Courts, I find it difficult to envisage circumstances in which such claims are likely to arise. Gibraltar is a UK overseas territory, albeit with its own independent government presence of the UK Government's personnel

and forces is an integral part of the relationship. The converse does not apply.

79. Mr Chamberlain says that it is highly material that the Claimant can sue in England. He says that in such circumstances what he suggests is the legitimate aim of the immunity is proportionate. It seems to me that, assuming that the Claimant's ability to sue in England cuts both ways. It is difficult to see what prejudice there then is to the Defendant in the case being heard in Gibraltar, in accordance with the Judgments Regulation. There is no legitimate aim requiring that the Claimant should be barred by Crown immunity from bringing her claim; the issue is whether there is a legitimate aim in the requirement that she do so in England and, if so, whether that requirement is proportionate.

80. *Fogerty* has caused me to reflect carefully but ultimately I have concluded that concentration on that case risks missing the real point of this case, in which we are concerned with Gibraltar's common law and whether common law immunity is justifiable and should and does apply in this case. I recognise that it is a serious matter to decide that common law should be changed when it has for long operated as a reciprocal principle between the two countries but that cannot, in my view, be taken as justification for restraining this Court from developing the common law when it considers that justice so requires or for requiring this Court to perpetuate a doctrine which it considers no longer justifiable and consistent with modern day principles and circumstances.

81. The Claimant says that her right to "security of the person" under section 1 is violated if she cannot recover damages for personal injuries suffered owing to her employer's breaches of duty (*Law Society of South Africa v Minister for Transport* [2010] ZACC 25; *Law Society of South Africa case v Minister for Transport* [2010] ZACC 25). I was initially unimpressed by this submission but on further consideration do believe that it does lend even further support for the conclusion which I have reached. The *Law Society of South Africa* case concerned legislation which reduced the common law right to compensation for victims of motor accidents. It was held that a person's right to security of the person was severely compromised when he was injured or killed as a result of negligent driving. The limitation of the common law right to damages in such circumstances required specific justification. For reasons which I need not set out, it was held in that case that there was justification for the limitations, given their specific purpose, and no breach of the Constitution was

found. I find this case persuasive. In the assumed circumstances of this case, it does seem to me that the security of the Claimant's person was compromised. She suffered loss of vision in one eye as a result of her employer's breaches of duty (or the breaches of the employer's servants or agents). Common law immunity as a defence to her claim would deprive her of the protection of the law and, again on the assumed facts, would not be justifiable. Section 1 is not merely declaratory; it sets out enforceable rights (*Rent Tribunal v Aidasani* [2001-2] Gib LR 21). Whether or not I am strictly correct in this interpretation of the Constitution, I am satisfied that I should take Section 1 into account as a relevant statutory development in the law when considering whether Crown immunity is justified in the circumstances of this case.

82. I do not accept that the fact that Section 7(2) of the South Africa Constitution, unlike the Gibraltar Constitution, requires the state to "respect, protect, promote and fulfil" the rights established by it detracts from the Claimant's arguments in this case, even though those words formed a significant part of the Constitutional Court's reasoning. I reject the suggestion that to hold that Crown immunity no longer applies in the circumstances of this case would "seriously affect legal certainty and fundamentally alter the balance of power between the Gibraltar legislature and the Gibraltar courts". This is in no way judicial legislation or interference with the legislature, which could easily have expressly entrenched Crown immunity if it so wished. By leaving it to the common law as established by the courts, it has left the issue with the Court. It has left "ownership" of the doctrine with this Court.

83. I do not accept the submission that the Claimant's right to enjoyment of property has been breached. Nor do I accept that there has been a breach of Section 1(c) of the Constitution (protection from deprivation of property). In my view the Claimant's submissions with regard to those rights stretch the ordinary meaning of the words of the Constitution too far. It is true that the Claimant has been occasioned financial loss as a result of her injuries because she has incurred loss of earnings, expenses and costs but she was not deprived of her property by the actions of the Defendant or its servants or agents in any ordinary sense. She has incurred costs as do most litigants; she has suffered loss of earnings which she would have received and has had increased expenditure but these are matters for which she can be compensated, if appropriate, by way of damages and/ or a costs order in her claim in the ordinary way.

84. I have also considered Schofield, CJ's judgment in *"The TGWU Case"* see paragraph 30 above. In that case the Chief Justice found that a claim in tort could not be brought against the Crown in right of the UK in Gibraltar because the 1951 Act specifically precluded such a claim but it appears that the argument was abandoned during submissions, in that the Defendants acknowledged that a cause of action may arise against the Crown in right of the United Kingdom for breach of its statutory duties under sections 78A to 78K of the Employment Ordinance because by section 89 (1) of that Ordinance those sections are binding on the Crown. The Claimants had a right to sue, in Gibraltar, the Crown in right of the United Kingdom for breach of contract of employment. At paragraph 56, the Chief Justice said: *"I agree with the claimants that the common law applicable in Gibraltar is not frozen in time and there is a line of authorities, as cited by them, which permits the claimants to pursue the claim....."*. The case is not on all fours with the present case and the issue was not fully argued as it has been in this case. I have therefore considered the matter entirely afresh, though I entirely agree that the common law applicable in Gibraltar is not frozen.

85. I accept that the common law should not be developed contrary to the expressed will of Parliament and that this Court should develop the law only when it has been demonstrated that the just disposal of cases compellingly requires it.

86. I refer to the Australian case of *Johnstone v Commonwealth* [1979] HCA 13; (1979) 143 CLR 398. Murphy, J, in his judgment at paragraph 4, says:

> *"The maintenance of legal conceptions appropriate to the feudal system is increasingly inappropriate in a modern democratic society. Today, governments are involved in undertakings and activities in respect of which there is no rational and just basis for treating them as immune from suit. This is reflected in the trend in other common law jurisdictions to abandon governmental immunity as a common law principle"* He cites cases,including *Muskopf v Corning Hospital Dristrict* (1961) 55 Cal 2d 211) in which Traynor, J. said: *"The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia."* and: *"Governmental immunity....founded on feudal notions is quite out of touch with modern Australian conditions. In Australia, the federal courts are not the Sovereign's courts in the sense used in the United Kingdom.....the judicial power is not vested in the Queen, but in "a Federal Supreme Court of Australia.....Further, the Constitution treats the Commonwealth*

> *as an entity which may be sued in the High Court under s. 75(iii). In matters falling under other paragraphs of s. 75, the Commonwealth has no immunity".*

87. There is no equivalent of s. 75 (iii) in Gibraltar but that is simply an additional point. Gibraltar also has section 16(1) of the constitution, which, the Claimant says, in the absence of exclusion of the Crown, allows the Crown to be sued. I accept Mr Restano's submission that the fact that Gibraltar has the 1951 Act is no basis for distinguishing *Johnstone*.

88. In *Neiting v Blondell, Jr and Anr*. (306 Minn. 122; 235 N.W.2d 597; 1975 Minn. LEXIS 1226, October 1975) the Supreme Court of Minnesota abolished State immunity in Minnesota in relation to tort claims as from 1 August 1976, subject to appropriate legislative action. Justice MacLaughlin set out the facts and the history of the immunity. He held that the creation of a State Claims Commission providing for payment of insurance premiums on state-owned vehicles and the State's waiver of immunity in other areas, but retaining tort immunity, did not amount to a legislative decision to retain State Immunity in tort. It was therefore the court's duty and prerogative to determine whether it should adhere to its own rule of tort immunity for the State of Minnesota:

> *"The doctrine of state tort immunity is a creature of the judiciary and not the legislature, and what we have created, we may abolish.....*
> *The question of the fairness of the doctrine ....we have found wanting....in 1970" in 1970 the court declined to abolish state immunity in tort, saying that "if there is to be a change, it should come about by legislation which would be based upon findings warranting it and which would provide for procedures and limits of liability..."* The legislature failed to act during the ensuing 5 years *"to alleviate the hardships created by the...immunity....We have therefore elected to re-examine the question..."*
> *"The doctrine...is an exception to the fundamental concept of tort law that liability follows tortuous conduct and that individuals and corporations are responsible for the acts of their employees acting in the course of their employment. We are aware of no substantial reasons, and none have been called to our attention, which the continuation of this exception.....And we will certainly not retain the doctrine on the basis of stare decisis alone".*
> *"When a rule....has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.....The reasons*

> *for the creation of the....immunity are now obscure.....its continuation has stemmed from inertia.....".*

Following the lead of several other courts, it was held that the immunity should be abolished. Again, Traynor, J in Muskopf was quoted. He also quoted several other cases in which the judiciary had held that the immunity was *"plainly unjust".* It had been removed in some states legislatively and in others judicially.

> *"One of the paramount interests of the members of an organised and civilized society is that they be afforded protection against harm to their persons, properties, and characters. The logical extension of that interest is that, if harm is wrongfully inflicted upon an individual in such a society, he should have an opportunity to obtain a reasonable and adequate remedy.....If the state is properly to serve the public interest, it must strive, through its laws, to achieve the goals of protecting the people and of providing them with adequate remedies for injuries wrongfully inflicted upon them. So long as the state fails to do so, it will be functioning in conflict with the public interest and the public good."*
> *".....we have reluctantly decided to deny relief [in this case]. While it may appear unfair.....we feel that it would be more unjust to deny the State....the right to rely on a defence which was in existence at the time the underlying cause of action arose.....".*

Thus the abolition was made prospectively only. It has not been argued that I should take that view in this case, in which counsel, having referred this case to me, must have been aware of the point. I have nevertheless considered it and am of the clear view that no injustice would he occasioned to the Defendant in this case by finding that common law immunity should not provide a defence.

89. In *Muskopf et al v Corning Hospital District* (55 Cal.2d 211 (1961) Traynor, J said:

> "*…that it is for the Legislature.....to remove the existing....immunities. Two basic arguments....to deny the court's power: First, that by enacting various statutes affecting immunity the Legislature has determined that no further change is to be made by the court; and second, that by the force of stare decisis the rule has become so firmly entrenched that only the Legislature can change it. Neither argument is persuasive.*
> *The doctrine....was originally court made. The Legislature early adopted a statute allowing the state to "sue or be sued".....construed as providing only a waiver from suit and not a waiver of substantive immunity... continuous re-enactment*

> *indicates a clear legislative purpose to remove all procedural obstacles when the state is liable.*
> *The state has also enacted various statutes waiving substantive immunity in certain areas..... Defendant argues…by removing immunity in these areas the Legislature has retained it in all others.....not here faced with a situation in which the Legislature has adopted an established judicial interpretation by repeated re-enactment of a statute.....Nor...With a comprehensive legislative enactment designed to cover a field. What is before us is a series of sporadic statutes, each operating on a separate area of governmental immunity where its evil was felt most. "Defendant would have us say that because the Legislature has removed governmental immunity in these areas we are powerless to remove it in others. We read the statutes as meaning only what they say: that in the areas indicated....there shall be no governmental immunity. <u>They leave to the court whether it should adhere to its own rule of immunity in other areas</u>."* (my underlining).
> *Defendant also urges.... the rule has existed for so long that only the Legislature has the power to change it. The "rule" ....has not existed with the force that its repetition would imply. From its inception there has been constant judicial restriction, going hand in hand with accompanying legislative restriction."*
> *"In formulating "rules" and "exceptions" we are apt to forget that when there is negligence, the rule is liability, immunity is the exception. This court implemented that policy when it overruled the doctrine of charitable immunity.....that was also claimed to be so firmly imbedded that only the Legislature could change it."*

Four other Supreme Court judges agreed. McComb J pointed out that early precedent may even be read as allowing a petition of right against the king for the torts of his servants. I note that Schauer, J dissented vociferously from the majority.

90. In *The Commonwealth of Australia v Mewett* (191 CLR 471) Brennan, CJ, referring to section 75(iii) of the Constitution, recognised that a statute may bar a remedy without extinguishing a right of action. Gummow and Kirby, JJ said that a statutory bar does not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded. The cause has not been extinguished. Absent an appropriate plea, the matter of the statutory bar does not arise. This is so at least where the limitation period is not annexed by statute to a right which it creates so as to be of the essence of that right. Secondly, in the circumstances the defendant may be estopped from pleading the statutory bar or otherwise be deemed to have waived the right to do so.

At p. 541 they said:

> *"Liability" may be used in different senses and so lead to a confusion of ideas. A defendant may be said not to be liable because of an immunity from suit which the defendant is not prepared to waive. A defendant may deny liability by pleading facts which, if proved at trial answer the allegations by the plaintiff. In this Court, a defendant still may demur to a statement of claim. A defendant may suffer entry of judgment and yet be said to avoid "liability" because there is lacking any means, or any effective means, for recovery of the judgment debt thereby created."*

And at page 542:

> *"The question is whether Crown immunity as developed in English common law not only denied adjudication of claims against the Crown in tort and contract but went further and denied the very existence of the contract and any wrongful act or omission.....The authorities in which the petition of right was used in the common law courts for actions in contract proceeded on the footing that , independently of enforcement, the common law had operated to bring about a contract between the Executive and the citizen."*

The Court quoted from *Windsor and Annapolis Railway Co v The Queen and the Western Counties Railway Co*:

> *"Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown."*

Actions in tort were differently considered. The Court quoted Cockburn LCJ in *Feather v The Queen:*

> *"the petition of right....is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained.....Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign....but to injuries done by a subject by the authority of the Sovereign.....the King cannot authorise wrong.....a petition of right which complains of a tortuous act done by the*

> *Crown....discloses no matter of complaint which can entitle the petition to redress".*

But a servant of the Crown could be sued in respect of a tort done by him. Such an action in most cases would have the same effect as a petition of right, since, in a proper case, the Crown would become responsible for any damages awarded.
The Court quoted from Chitty on contracts:

> *"The splendour, rights and powers of the Crown were attached to it for the benefit of the people, and not for the private gratification of the sovereign."*
> It *"....concerns litigation by which an individual ....seeks redress for tortuous injury to private or individual rights by government action in administration of a law which the plaintiff assets was not authorised by the Constitution but upon which the defendant relies for justification of the alleged tortuous conduct. To deny such a claim on the footing that, in the absence of enabling legislation, the Crown can do no wrong and it cannot be sued in its own court would.....mean that the operation of the Constitution itself was crippled by doctrines devised in other circumstances and for a different system of government."*

It was held that s.75 (iii) of the Constitution submitted the Commonwealth to liability. "...if it were correct that s 75 was itself the source of delictual responsibility, it would appear to follow that this constitutional liability for tort... could not...be impaired by legislation".

The Crown immunity doctrine straddled the divide between substance and procedure. There is also the distinction between a liability which had already existed and one which did not "...the liability is created by the common law. In respect of that liability, the Constitution applies to deny any operation to what otherwise might be doctrines of Crown or executive immunity which might be pleaded in bar...."

91. In Sedley's "Ashes and Sparks" he said at p. 281:

> *"The deferential fiction that the Crown, at least in its executive capacity, can do no wrong appears to afflict only the English and the Welsh."*
> And at p. 283*: "...if one asks, as the Court of Session has now done and as Commonwealth courts have been doing for years, whether it is actually the case that the Crown in its executive capacity can do no wrong, the answer is plainly "No", and the whole of modern public law is in practice founded upon that answer.*

> *Once this corner is turned, the way is relatively clear: the Crown's courts, applying the law laid down by Parliament and by themselves, may in a proper case hold the crown, acting by its executive limb, to be in breach of the law without violating either the separation of powers or the status of the Crown. The status of the Crown, acknowledged by Magna Carta, the Bill of Rights, the Act of Settlement and a variety of other statutes, is that of an entity known to the law; and its horizontal division into legislative, judicial and executive functions permit ministers to be called to account politically by Parliament and legally by the courts. Once it is appreciated that these separate powers are not those of equal sovereignties within the state but that the executive, although enjoying great autonomy, is ultimately subordinated to the other two, the problem of incongruity in the Crown supposedly calling itself to account melts away.*
> *In its place one sees a constitutional monarchy whose functions are so distributed that although all are carried out in the name of the Crown, their relationship to one another is the relationship demanded by one of the most fundamental of all our unwritten constitutional principles – that government is to be conducted within the law."*

In *Royster v Cavey* [1946] KB 204 the plaintiff suffered an injury during his employment in a munitions factory occupied by the Ministry of Supply. The Defendant's name was supplied by the Ministry as the person to sue. It was held that as he was not the occupier of the factory and did not owe a duty to the Plaintiff the Court had no jurisdiction to continue the hearing. The Ministry could not be sued because an action for tort did not lie against the Crown. In the County Court the Plaintiff had lost on the facts. Scott, L J said: *"...it will be a crying wrong if that legislation is not introduced at an early date."* (i.e. the 1947 Act). In that case the Court anticipated legislation; it pointed out the crying need for it. It does show that despite this view having been taken by judges for many years they still had not abolished the rule: they continued it awaiting legislation because the fiction of the Crown nominating a Defendant had been accepted by all and by and large worked. There was no argument Crown immunity no longer existed.

92. In O'Neill's EU Law for UK Lawyers at 22.01 it is said:

> *"The existing common law relating to safety and health, as well as....the Factories Act 1961 and…Health and Safety at Work etc. Act 1974....can be properly understood, interpreted and applied in the UK only in the light of the relevant provisions of EU law." On the Commission's own estimation: Health & safety at work is now one of the most important and most highly*

> *developed aspects of EU policy on employment and social affairs..."*
> *"22.40: Thus UK safety and health regulation cannot be understood as standing on its own terms as ordinary domestic legislation; neither can it properly be explained by reference to the pre-existing cases and common law rules on safety and health, even where the new measures apparently use the same terms and phrases....as have already been the subject of authoritative interpretation by the national courts. The introduction of EU law into this area marks a break with the past."*

The protocol on the application of the charter of fundamental rights of the EU, Article 31, "Fair and Just Working Conditions", provides:

> *"1. Every worker has the right to working conditions which respect his or her health, safety and dignity."*

Article 47 establishes the:

> *"Right to an effective remedy and to a fair trial":"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.....Legal aid shall he made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*

93. The Claimant in the present case says that the suggestion that claims such as hers must be brought in England does not provide an effective or proportionate remedy. The possibility of cross-border situation such as this was never envisaged by the legislation and it is not aimed at that. More uncertainty is created by the lack of any guarantee that as a matter of law the English court would decide the same as would this Court.

94. So far as the constitutional provisions are concerned, it is common ground that the Constitution creates independent rights (see, e.g., *Rojas v Berllaque (Attorney General for Gibraltar intervening)* [2003] UKPC 76). In *Rojas* a distinction was made between an offending law which is or is not existing. Courts are required to interpret existing laws in a manner conformable with the Constitution ("shall be construed with such modifications ...as may be necessary to bring them into conformity with the Constitution"). The Attorney-General submitted that the legislature might choose to provide for

complete equality between men & women in the compilation of the jury lists or to provide for less than complete equality...Or it might decide to abolish jury trials and the Court should permit the legislature opportunity to consider how to respond to the Board's decision. The Board should not pre-empt the decision of the legislature. The Court held that it was *"...unable to accept these submissions.....far-reaching obligation on courts.....goes beyond the limits of construction of statutes as usually understood.....The court is enjoined, without any qualification, to construe the offending legislation with whatever modifications are necessary to bring it into conformity with the Constitution."* The Privy Council upheld the Chief Justice's ruling that the legislation was to be read by omitting part and adding part to make it Constitution compliant.
The Claimant in this case says this should be done if there is any violation of any of the Constitutional provisions. Bills of Rights are living instruments.

95. *Reyes v The Queen [2002] 2 AC 235* concerned the Belize constitution:

> *"A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence o read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society."*

96. Minister of Home Affairs and Anr v Fisher and Anr [1980] A.C. 319 related to the Bermuda Constitution. @ p. 328:

> *"These antecedents and the form of Chapter 1 itself, call for a generous interpretation avoiding....."the austerity of tabulated legalism," suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."*

97. In The Queen on the Application of Rodrigues v The Director for Education and Training [2007] Misc No 29. Dudley, J considered the right to education in Gibraltar. None was provided for in the Constitution. He held that the matter came within the right to private life. It was necessary to apply a generous and purposive interpretation of the Constitution.

Conclusions

98. I recognise that I have not analysed or referred to all of the authorities to which I have been referred and that I have not addressed every submission made. To do so would be likely to obscure the reasoning for my decision. Furthermore, on an application such as this I do not think it wise unnecessarily to decide complex points of principle which may have application far beyond the circumstances of this case.

99. I find that in the circumstances of this case the Defendant is not entitled to rely on the defence of Crown Immunity and that the Claimant is not barred by that doctrine from pursuing her claim.

100. So far as the Claimant's right to sue the Crown in contract is concerned, if the Claimant in the light of this judgment, pursues an application to amend her claim to include reliance on breach of contract, I shall consider it at that stage. I recognise that the petition of right could only proceed with the Crown's consent (*fiat justitiae*) and, on the face of it, Mr Restano's argument that the requirement for the Crown's fiat is a procedural vehicle.

Christopher Butler
Puisne Judge
25 March 2013