distorted, and in some cases, ceases to require fault by raising the standard so high as to virtually impose strict liability.

Instead of forcing negligence to expand, strict liability for animals should instead be simplified and extended. Focusing on "dangerousness" and "normality" of animals is misplaced. It should be the potential harmful consequences, rather than any innate dangerous characteristic that should be at issue. A classic illustration is the case of *Fitzgerald v E.D. & A.D. Cooke Bourne (Farms) Ltd* [1964] 1 Q.B. 249, dealing with the common law strict liability rule. In that case, a playful filly pranced about a public footpath and injured the plaintiff. It was held that no strict liability could attach because the filly was merely naturally playful and not unnaturally vicious. This ignores the reality that, whatever its motives (if one can attribute motives to animals) the animal in question posed a real threat to the public. Animals are unpredictable and are always a potential threat, particularly in an urban environment.

It is unlikely that *Mirvahedy* will clarify this area of the law. The Animals Act was enacted without adequate consideration of the policy choices. The Goddard Committee in 1953 had recommended abolishing common law strict liability while the 1969 Law Commission retained it. The Bill lapsed upon a change of Government, and the legislation that was eventually enacted is neither here nor there. The division of opinion in the House, the opacity of the language in s.2(2)(b) and the innate flexibility of critical concepts of causation and "particularity of circumstances" mean that cases will continue to be governed as much by a canine's breed as an equine creed—horses for courses.

KUMARALINGAM AMIRTHALINGAM.*

MUST THERE BE UNIFORM STANDARDS FOR JURISDICTION WITHIN A FEDERATION?

WHEN a radio signal from a ground station in Virginia sent an orbiting satellite into overdrive, it triggered a chain of events that resulted in the first Supreme Court of Canada review of the federal requirements for judicial jurisdiction. The lead contractor in the manufacture of the satellite stopped making payments to Spar Aerospace, an Ontario-based company that had built the satellite's communications payload in its Québec facility. Spar sued the U.S.-based corporations who were involved in the manufacture and testing of the satellite. Spar sued in the Québec, where the courts might be more receptive to claims for pure economic loss than those in other possible fora. Spar asserted jurisdiction under the clause in Art.3148(3) of the Québec Civil Code that provides for jurisdiction in cases where "damage was suffered in Québec". Spar contended that the refusal

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to make these payments had damaged the reputation of its Québec facility. The defendants challenged jurisdiction and they sought a stay based on *forum non conveniens* under Art.3135 of the Québec Civil Code, which provides that "even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on application by a party, decline jurisdiction if it considers that the authorities of another jurisdiction are in a better position to decide". These motions were denied in *Spar Aerospace Ltd v American Mobile Satellite Corp* at first instance [1999] J.E. 99–2060 (SC); in the Court of Appeal [2000] R.J.Q. 1405; and in the Supreme Court of Canada (2002) S.C.C. 78.

In its judgment, the Supreme Court considered the scope of judicial jurisdiction for the first time since the court's leading decisions in the early 1990s in *Morguard Investments Ltd v De Savoye* [1990] 3 S.C.R. 1077 and in *Hunt v T&N Plc* [1993] 4 S.C.R. 289. In those judgments, the court had held that the law of judicial jurisdiction must conform to the requirements of the constitutional principles of order and fairness; that the standards for exercising jurisdiction and for recognising and enforcing judgments should be correlative; and that Canadian courts should recognise and enforce judgments even against non-consenting defendants served *ex juris* where there was a real and substantial connection between the matter and the forum.

Even though the *Spar* case involved foreign defendants, rather than defendants from other parts of Canada, the Québec Civil Code prescribes only one regime for both interprovincial and international cases, and, so far, the courts in the common law provinces have also applied a single regime; and the Supreme Court explicitly left for another day the need for distinct regimes, such as exist in European Member States by virtue of Art.4 of Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] O.J. L12/1. Accordingly, as in the *Morguard* decision, the issues in *Spar* were not framed as constitutional questions, but the constitutional implications are inevitable and far-reaching. Perhaps the most important of these questions is whether federalism requires the harmonisation of the limits of judicial jurisdiction of the courts of constituent legal systems. In view of the single regime in the Civil Code for both interprovincial and international cases, this question includes whether the Québec courts must have the same jurisdictional reach over persons served in Ontario as the Ontario courts have over persons served in Québec.

This question received attention initially in the 1993 decision of the Supreme Court in *Hunt.* In that decision, the Supreme Court held that although the *Morguard* case had not been argued in constitutional terms, "the constitutional considerations raised are just that. They are constitutional imperatives." By observing that these principles were "constitutional" the court clarified that it intended that the rulings it had made in

Morguard, a case that had involved connections only to two common law provinces, would also apply to Québec; and they would affect the interpretation of the Civil Code of Québec that was promulgated shortly thereafter.

In *Spar*, the court took the opportunity to clarify this point. It held that the constitutional principles in question—those of "order and fairness" —are binding on all Canadian courts, but the "real and substantial connection test", which the court had formulated in *Morguard* as a means of giving effect to these principles in jurisdictional determinations, is a common law doctrine. Thus, the real and substantial connection test is not to be imported into the interpretation of the Civil Code provisions for jurisdiction, nor is it a superadded criterion for determining whether to exercise jurisdiction based on those provisions. It is the common law counterpart to the Québec Civil Code provisions. Both are legal rules that give effect to the constitutional principles of order and fairness in jurisdictional determinations. Thus, the principles of order and fairness are the functional equivalents of the full faith and credit and due process requirements of the U.S. Constitution, and of Art.220 of the Treaty of Rome, and the real and substantial connection test and the Articles of the Québec Civil Code are the functional equivalents of the minimum contacts doctrine in the US and of the provisions for jurisdiction in Council Regulation 44/2001.

According to the Supreme Court of Canada, then, it is possible within a federal or regional system for constituent legal systems to apply different formulations of the jurisdictional tests. However, this begs the question whether, nevertheless, these formulations must be applied in a manner that would produce the same results so that the jurisdictional reach of the courts would be the same. The Supreme Court observed that a case that meets the various jurisdictional bases of Art.3148(3) of the Québec Civil Code would be likely to meet the real and substantial connection test, and that it was arguable that the test was subsumed under the provisions of the Article. In other words, cases in which "a fault was committed in Québec", "damage was suffered in Québec", "an injurious act occurred in Québec", or "one of the obligations arising from a contract was to be performed in Québec", were likely to be cases in which there was a real and substantial connection to Québec. However, the court did not clarify whether it was a constitutional imperative that the common law and the civil law formulations of the test be applied in a way that would produce the same result, or whether it was simply likely to be the case. By stating that the real and substantial connection test was not an additional criterion, the court suggested that any of the connections identified in the relevant Articles of the Code, such as those mentioned above, would suffice, even if the prescribed test was only technically met, or the connections were quite insubstantial.

With respect, although the common law formulation and the civil law formulation are different, they must operate to produce the same result, at least with respect to intra-federal matters. Apart from a margin of appreciation for the way in which any given court interprets the facts of the instant case, principled differences in jurisdictional rules within a federal or regional judgments enforcement regime can lead to gaps, to conflicts and to abuse. There is no obvious precedent for a federal or regional system that fosters differences in the jurisdictional rules applied by the courts of the constituent legal systems in the interests of federalism. Indeed, the jurisprudence of the United States Supreme Court (*e.g. International Shoe Co v State of Washington* 326 U.S. 310 (1945)), and the provisions mandating the European Court of Justice's regulation of the interpretation of the jurisdictional bases set out in Council Regulation 44/2001, both suggest that federal or regional relations necessarily require the harmonisation of the jurisdictional reach of the courts of the constituent legal systems. The "minimum contacts doctrine" applies in every American state and the Council Regulation 44/2001, [2000] O.J. L012/1 applies in every European Member State. Neither does there appear to be any reason to suggest that the particular nature of Canadian federalism warrants the establishment of such a precedent. The traditional common law rules, which provide for different standards to be applied in assuming jurisdiction from those that are applied to determine whether to recognise and enforce a judgment, were said to "fly in the face of the obvious intention of the Constitution to create a single country" (*Morguard* at p.1099). If the standards for exercising jurisdiction and for recognising and enforcing judgments must be correlative within a federation, it is hard to imagine how the standards for the exercise of jurisdiction could be permitted to vary from one province to another.

Still, there may be practical reasons to permit jurisdictional standards to be *expressed* differently in the common law provinces from the way they are expressed in the Québec Civil Code. For example, in the *Spar* case, jurisdiction was founded on the second clause of Art.3148(3)—"damage was suffered in Québec", which Canadian lawyers might confuse with the seemingly similar ground of jurisdiction in the Rules for Service Outside Ontario, rule 17.02(h) "damage sustained in" the province, even though the two grounds of jurisdiction are different. Art.3148(3) provides for jurisdiction in cases in which an injurious act committed outside the forum causes damage within the forum whereas rule 17.02(h) provides for jurisdiction in cases in which a person injured outside the forum arrives in the forum and suffers subsequently within the forum (*Muscutt v Courcelles* (2002) 219 D.L.R. 4th 577, Ont. CA). Even though the common law jurisprudence and the interpretation of the Civil Code provisions give effect to the same constitutional principles, they have evolved independently of one another. A Supreme Court edict requiring one to conform to

the other could produce more confusion than improvement in the law until the way in which the jurisdictional bases correspond to one another is better understood.

If the Supreme Court's observations in *Spar*—that cases that meet the jurisdictional requirements of the Civil Code probably have some real and substantial connection to the forum—are taken to suggest that there is a constitutional *requirement* that the common law doctrine and the interpretation of the Civil Code produce the same results, this could encourage the use of relevant precedents from both places. Counsel and courts in Québec might begin to refer to common law judgments and common lawyers in Canada might begin to refer to Québec judgments. Perhaps even text writers would do likewise. In time, this would enrich the Canadian jurisprudence considerably.

The worry is that this was not the Supreme Court's intention in *Spar.* Indications of this may be found in the court's analysis of the standards for *forum non conveniens* under Art.3135. *Forum non conveniens* was described in *Spar* as "an important counterweight to the broad basis for jurisdiction set out in Art.3148". And this must be so because, as the court held in *Hunt,* it is not necessary to "consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of *forum non conveniens* . . . Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness." If the determinations of jurisdiction *simpliciter* and *forum non conveniens* must work hand in hand to meet the constitutional requirements of the principles of order and fairness, then the standards for declining jurisdiction on the basis of *forum non conveniens* cannot be described as inherently broad or narrow. As a corrective to the standards of jurisdiction *simpliciter*, *forum non conveniens* must be as narrow or as broad as is required by the particular basis of jurisdiction *simpliciter.*

However, having said that "there is abundant support for the proposition that Art.3148 sets out a broad basis for jurisdiction", the court then couched much of the review of the *forum non conveniens* determination below in terms of "the exceptional nature of the doctrine as reflected in the wording of art. 3135 C.C.Q." To say that Art.3148 is inherently broad, and that Art.3135 is inherently narrow is to say that it is easy for a plaintiff to persuade a Québec court to assume jurisdiction over a defendant and that it is difficult for a defendant to persuade a Québec court to exercise its discretion to decline jurisdiction. This would suggest that the principles of order and fairness are not only differently *expressed* in the Civil Code of Québec from the way that they are expressed in the law of the common law provinces, but also that these principles set different standards for the exercise of jurisdiction by Québec courts from the standards that they set for the exercise of jurisdiction by common law courts in Canada.

If this is so, then the *Spar* decision arguably goes beyond refining the law of jurisdiction to accommodate the bi-jural nature of the Canadian federation—it appears to challenge the need for uniform jurisdictional standards for the courts in a federal system.

JANET WALKER.*

HIH LITIGATION

IN recent years the *HIH* litigation has touched upon a number of important principles relevant to the construction of contracts and which throw light on the nature of insurance and reinsurance. In date order the cases are: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] 1 Lloyd's Rep. 30 (Aikens J.); *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 1 Lloyd's Rep. 378 (David Steel J.); *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co, Independent Insurance Co Ltd* [2001] 2 Lloyd's Rep. 161, CA; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] 2 Lloyd's Rep. 483, CA; *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions, New Hampshire Insurance Company* [2002] Lloyd's Rep. I.R. 325 (Jules Sher Q.C.); *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions* [2002] EWCA 1253, [2002] 2 All E.R. (Comm.) 1053, CA and *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All E.R. (Comm.) 349. The litigation is complex and deals with insurance warranties, promissory estoppel, exclusion clauses (in particular where it is sought to exclude liability for the fraud of one's agent), extrinsic aids to the interpretation of contracts and, finally, incorporation by reference in reinsurance.

Warranty

The subject of *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co Ltd* ("*New Hampshire*") was "pecuniary loss indemnity" insurance, the aim of which is to provide collateral for investors in the risky business of making films. In this case it covered the risk that profits generated from certain films would not cover the sum insured. The sum insured was calculated by part reference to production costs (directly referable to the investors' exposure) and was structured as 100 per cent insurance by HIH with 80 per cent quota share reinsurance through lines written by New Hampshire, Axa and Independent, amongst others.

David Steel J. and the Court of Appeal were called upon to resolve legal issues arising from a considerable shortfall between the sum insured and profits and from the reinsurers' refusal to follow the insurer's satisfaction of claims. These were preliminary issues against uncertain facts: " . . . a

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