



**British Institute of
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Seminar Series on Private International Law

'Private International Law in the UK: Current Topics and Changing Landscapes'

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Herbert Smith

Substance and Procedure in the Law Applicable to Torts- Harding v Wealands and the Rome II Regulation

Conflict of laws - Torts - Assessment of Damages

21 November 2006, 17:30-19:30

Chair:

- **Mr Justice Lawrence Collins**

Speakers:

- **Dr Janeen Carruthers [University of Glasgow](#)**
 - **Charles Dougherty [2 Temple Gardens](#)**
 - **Dr George Panagopoulos [Richards Butler](#)**

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SEMINAR TRANSCRIPT

Introduction

Foreign scales of compensation in English courts?

In the law of damages, a deceptively simple distinction is drawn between categories of damages (substantive) and the quantification of damages (procedural). Despite this simple distinction, the boundaries between procedural and substantive issues in damages claims can be blurred.

The seminar of 21 November featured an in-depth discussion of the recent HL decision in *Harding v. Wealands* illustrating the deceptive nature of the substance/procedure distinction in the law of damages. The seminar further provided a detailed outlook at the relevant rules under the prospective European Rome II Regulation on the law applicable to non-contractual obligations which is set to be adopted by the European Parliament by December.

This seminar is part of the British Institute's seminar series on private international law which will run throughout the Autumn of 2006 and well into 2007 entitled:

Private International Law in the UK: Current Topics and Changing Landscapes

- The Future of Private International Law in England and Wales – 24 October 2006
- *Substance and Procedure in the Law Applicable to Torts: Harding v Wealands and the Rome II Regulation – 21 November 2006*
- Civil Remedies for Torture in UK Courts: Jones v Saudi Arabia – 18 December 2006
- Non-justiciability: Reappraisal of Buttes Gas in the Light of recent Decisions – 15 January 2007
- Intellectual Property Problems: Jurisdiction in IP Disputes – 22 January 2007
- The Future of International Patent Litigation in Europe – 22 January 2007
- Resolving Family Conflicts in the EU: The Changing Landscape – February 2007
- The Road to Rome: Update on the Law Applicable to Contractual Obligations – March 2007

Mr Justice Lawrence Collins

It is my very great pleasure to chair this session on basically *Harding v Wealands*; I see a number of people who had some involvement in it here.

We have got three very well qualified speakers this evening, the order in which they will speak for about 20 minutes each is as follows: Charles Dougherty of 2 Temple Gardens who was, I think on the losing side in the case and is at the bar and I understand in a number of cases in this area will speak first and will discuss the decision and the facts. George Panagapoulous, who's the author of a very well known and very fine book on restitution and Private International law and is with Richards Butler in Athens, will speak on the wider aspects. Finally there will be Janeen Carruthers who is a reader in the conflict of laws in the University of Glasgow and is the co-author of a huge tome recently published on Scottish Private International law will deal with treatment of substance and procedure in the context of the new Rome II proposed regulation. We will start with Charles.

Charles Dougherty – 2 Temple Gardens

Thank you very much. I am going to start by looking at the facts, then move on to consider the judgments in the Court of Appeal and in the House of Lords before finishing off with some observations from a practitioner's perspective.

Before I go through the facts, however, it may be useful just to highlight some of the relevant provisions of the Private International Law (Misc Provisions) Act 1995. Part 3 of the Act introduced new choice of law rule for tort. Section 9(1) sets out the law, for choosing the law, for issues relating to the tort, and Section 9(4) indicates that the applicable law should be used to determine the issues arising in a claim including in particular whether an actionable tort or delict has occurred. Section 10 abolished the old common law rule of double actionability, both the general rule under (a) and (b) - the flexible exception. In relation to Section 14 two points are worth highlighting: 14(2) makes clear that nothing in Part 3 should affect any rules of law including rules of private international law except those abolished by Part 10, i.e. the abolition of the rule of double actionability, and Section 14(3)(b) provides that the act does not affect any rules in relation to questions of procedure in any proceedings to be determined otherwise in accordance with the law of the forum. In addition it is worth mentioning Section 11 and Section 12. Section 11 provides that the general rule for choosing the applicable law is that the applicable law is the law of the place where the events constituting the tort occurred - in the case of a personal injury: where the injury occurred. But Section 12 allows for an exception to that rule if it can be shown that it is substantially more appropriate for another law to apply to the case or to a specific issue.

Turning to the facts:

Tanya Wealands and Giles Harding first met in March 2001 at a wedding in Australia. Mr Harding, who is British, had always lived and worked in England; Miss Wealands was Australian and always lived and worked in New South Wales. Their relationship blossomed and three months after meeting Miss Wealands gave up her job in Australia to move in with Mr Harding in London.

She obtained a two year working visa and started work and they quickly formed what the judge described as 'a settled relationship'.

In January 2002 Miss Wealands returned to New South Wales for her father's sixtieth birthday. She intended to stay six weeks and Mr Harding joined her a bit later and the plan was that they would have a holiday together in Australia before returning back to England. A few days after Mr Harding arrived in New South Wales Miss Wealands and Mr Harding were driving in her Suzuki Jeep on a dirt track road near Huskisson in New South Wales. In the back were her sister and brother-in-law. It was a car that she bought before moving to England and she was driving on her New South Wales driving licence and with her New South Wales insurance. The dirt track was wet and muddy and it was scarred with potholes and for some unknown reason Miss Wealands lost control of her vehicle and it rolled over onto the roof. Miss Wealands and her sister and brother-in-law were unharmed. Unfortunately, Mr Harding suffered devastating injuries and was rendered tetraplegic by the accident.

After the accident whilst still in New South Wales, Miss Wealands and Mr Harding decided to marry. They both returned to England together in March. Sadly, the relationship broke down and Miss Wealands subsequently returned to New South Wales.

Initially Mr Harding appointed Australian solicitors to deal with the claim and submitted a claim form under the relevant legislation-MACA. I will refer to that in a minute. But he was presumably advised that he would be better off bringing his claim in England and he subsequently appointed English solicitors and they issued proceedings on his behalf in England. The claim form was issued shortly before Miss Wealands returned to Australia so she was served as of right. Miss Wealands applied for a stay of proceedings on the grounds of *forum non conveniens*, but this application was unsuccessful. Miss Wealands accepted responsibility for the accident, the only issue in the claim was quantum.

The question in Harding really boiled down to whether damages should be assessed in accordance with English law or the New South Wales law. And this made a big difference because the New South Wales legislature had passed an act called the Motor Accidents Compensation Act, the stated aim of which was to keep insurance premiums affordable and one of the ways this was achieved was by limiting and capping various heads of damage, for example - the limits on gratuitous care, loss of earnings. The two particular ones one perhaps could note was there was a cap on general damages of about £125,000, significantly lower than the equivalent English award for tetraplegia, and there was a discount rate fixed at 5% in respect of future losses. Now the effect of a high 5% rate as opposed to a 2.5% rate in England is to significantly reduce damages for future losses when assessing what the present value of future loss is. The effect was to reduce the claimant's claim by about 30% and on the claimant's case that meant about a reduction of one and a half million pounds.

Whether the damages should be assessed in accordance with MACA really boiled down to two questions: First, whether the rules in MACA were substantive or procedural – there was no dispute between the parties that that all matters of procedure had to be dealt with by the law of the forum. The question was really how widely the question of procedure, the question of substance, should be defined. Miss Wealands essentially had to show that the rules in MACA were rules of substance and not procedure and secondly if the rules in MACA - the Motor Insurance Compensation Act - were substantive Miss Wealands also had to show that the applicable law was the law of New South Wales, and not that of England.

At first instance in front of Mr Justice Elias the judge held that the applicable law was that of England and that in any event all questions of assessment were a matter of procedure, i.e. Miss Wealands failed on both accounts, and Mr Harding succeeded on both. The matter came to the Court of Appeal with Lord Justice Waller, Lady Justice Arden and Sir William Aldous. Again Wealands to succeed on her point had to succeed on both aspects, both in respect of substance and procedure and on the applicable law. The Court of Appeal considered first the question of applicable law and the claimant relied in particular on the fact that he and the defendant had been in a settled relationship in England, all be it for six or seven or eight months, before the holiday in Australia, and that he would be suffering his ongoing losses in England, and therefore it was substantially more appropriate to apply the law of England as opposed to the general, the law applicable under the general rule - the law of New South Wales where the accident occurred. This was the argument that found favour with Mr Justice Elias at first instance, but it was unanimously rejected by the Court of Appeal. Lord Justice Waller emphasised that displacing the general rule of Section 11 is a high hurdle and something which he had already pointed out in his earlier decision of *Roerig v Valiant Trawlers* it had to be shown that it was substantially more appropriate for this law to apply. In this case, given that Miss Wealands was returning to her home state, the Court of Appeal would find it very difficult to say that it would be substantially more appropriate not to apply the law of the home state, but rather the law of England, although the point was re-argued in the House of Lords. In the light of the House of Lord's decision in the case of substance and procedure, they did not give a ruling on the question of applicable law.

On the question of substance and procedure the Court of Appeal was not unanimous. The majority essentially looked at the question of the distinction between substance and procedure from first principles. Lady Justice Arden rejected the idea that you could derive from *Boys v. Chaplin* a bright line between heads and damages on the one hand, and assessment of loss on the other. Assessment of loss being procedural and heads of damage being substantive- something called the damages principle. She pointed out, correctly in my view, that the House of Lords in *Boys v Chaplin* had not had to decide the question of what was really meant by heads of damage and what was really meant by assessment of damage. Accordingly she thought that the prism of heads of damage and assessment of damage was incorrect and she pointed out that the application of a cap on damages could not really be described as either a head of damage or an assessment of damages,

because a cap is a mechanical exercise and does not involve any evaluation and so it was not really within either category.

So what approach should be adopted? Well, what she put forward was that the question of substance and procedure had to be answered in its context and the context was the 1995 act. Her interpretation of the 1995 act was that there was a general principle giving effect to the applicable law and that therefore the law of the forum should be treated as the exception and only referred to if there was some compelling or imperative reason to refer to it.

Sir William Aldous approached it more directly as a matter of language and considered that procedure should be given its natural meaning. Again he pointed out that in his view *Boys v Chaplin* did not answer the crucial question of whether restrictions on the amount of damages were procedural or substantive. Both Lady Justice Arden and Sir William Alders were persuaded by the reasoning of the High Court of Australia in *Pfeiffer v Rogerson* in 2000, and in particular the conclusion that laws that bear on the existence, extent and enforceability of remedies, rights and obligations should be characterised as substantive and not procedural rules. Further, that procedural rules should be restricted to those that are directed to governing or regulating the mode of conduct of proceedings. Applying that test they concluded that all the restrictions on the Motor Accident Compensation Act had the effect of limiting or restricting damages and as such were matters of substance which should be applied.

Lord Justice Waller dissented. He adhered to the view that he previously expressed in *Roerig*. In his view, once you establish heads of damages, all other questions which relate to damages are procedural and in this regard he was persuaded by the earlier High court of Australia decision of the majority in *Stevens v Head*.

Pippa Rogerson in the Cambridge Law Journal described the decision in the Court of Appeal as one which was undoubtedly right as the principle solution to a complex problem, but which few law students would have felt emboldened to put forward. Unfortunately the House of Lords disagreed with the Court of Appeal's decision. They unanimously rejected the majority's reasoning in the Court of Appeal.

The leading speeches were delivered by Lords Hoffmann and Rodger. The House of Lords accepted that the term 'procedure', might be ambiguous out of its context. In the context of the 1995 act however, they held the question of procedure had a meaning fixed by the reference to the use of the word procedure before the 1995 act, in its use in Private International law, before the 1995 act

Lord Hoffmann's speech in particular considered and went through some of the older cases and indeed the pre-double actionability cases i.e. the cases before *Philips v Eyre* in 1870 and cases such as *Huber v Steiner*, *Don v Lippmann*. From these earlier cases Lord Hoffmann derived what he regarded as an entrenched principle of private international law - that all

matters of remedy were for the courts of the forum. Lord Hoffmann held that this was the distinction that was being made in *Boys v Chaplin*, and he held that whereas rules as to heads of damage go to the question of actionability of the tort, liability of the tort, any rules as to assessment or the amount of damages relate solely to the question of remedy. Therefore, applying the undoubted logic, he concluded that since the 1995 Act only abolished the rule of double actionability it did not abolish this old rule of private international law - Section 14(2) says it does not affect any other rule of private international law. Lord Hoffmann therefore concluded that there remained a rule of private international law that all matters relating to the remedy, including the amount of damages, were exclusively for the law of the forum.

The House of lords also rejected the submission that an updated construction should be taken to the 1995 Act to reflect for example the development in the Common Law in Australia in for example *Pfeiffer* and the approach taken in other jurisdictions and this was even though the 1995 act itself had not sought to define what procedure was, but had left it to the common law. Lord Hoffmann's view was that the quantification of damages proved a matter of procedure in 1995 and when the Act was passed and would continue to be so treated until there was a legislative intervention. As Lord Hoffmann said:

"The question is not what the law should be but what parliament thought it was in 1995".

An exchange with the then Lord Chancellor was also relied upon which took place during the debate of the bill in which Lord Mackay referred to the distinction between heads of damage and the assessment of damage and saying this would continue after the passing of the act; interestingly, he did not mention anything about caps on damages in that exchange. However, given the views of the majority as to the interpretation of procedure, the majority of the lords did not consider it necessary to have assistance on the principle in *Pepper v Hart* for the purposes of interpreting the meaning of procedure.

Significantly, Lord Hoffmann also concluded that contrary to the view of the consultees to the Law Commission working paper and the Law Commission Report, and to the editors of Dicey and Morris, statutory caps in tort as opposed to contract were procedural. In his view the old nineteenth century shipping case of *Cope v Doherty*, when you properly analysed it, was a case where the limitation statute had been held to operate as if it were a contractual term limiting damages. It was therefore not an authority for the proposition that caps were substantive in tort and a reference to *Cope v Doherty* in Dicey in the context of tort claims was too widely put. His view was therefore that statutory caps on damages in tort were not substantive.

In summary the position is very straightforward. The position is that all issues in relation to the quantum of damages including the question of any caps are governed by the law of the forum.

I will just finish off with some quick observations. It is clearly a welcome decision for claimants. English awards of damages, in personal injury claims

are some of the most generous in the world. Even within Europe, English awards are often many times higher than those in other jurisdictions. I know from having spoken to some foreign insurers that some are perhaps less than happy with the decision. But the position is now settled, at least until Rome II comes into force. I know Janeen is going to talk about that later.

One of the difficulties with the decision is that it does encourage forum shopping something which Lord Roger appeared to recognise in his speech. A claimant is clearly going to sue where he or she is likely to recover more and this choice is always going to be at the expense of the defendant. I think this is a particular problem in the absence of a doctrine of *forum non conveniens* in Brussels-Lugano regime cases, especially after *Owusu*. A combination of *Owusu* and *Harding* very much put the claimant in the driving seat. Just to take an example, if you have a Spanish pedestrian or motorist, he is run into by an English tourist. He has the right to either sue the English tourist in Spain, where the harmful event occurred or in the place of the domicile of the defendant. In both cases the law applicable to the accident will be Spanish law. If he sues in England, it is now clear that he is entitled to obtain a substantially higher award, because he will be applying English law to damages. Whereas, if he sues in Spain he will be under Spanish tariffs and will be obtaining a Spanish assessment of damages.

Thank you.

Chair: Mr Justice Lawrence Collins

Thank you very much Charles. Before I hand over to George, I will just say that I am emboldened by the presence of Dame Mary Arden in the audience to say that I am rather surprised myself at the decision which I regard as somewhat formalistic at that a cap on damages is procedural.-George.

Dr George Panagopoulos – Richards Butler

Good evening. I will be looking at the substance and procedure distinction in respect of international torts following the *Harding v Wealands* decision.

But, before doing so, I think it will be helpful if we backtrack and look at the substance and procedure distinction particularly as it had developed until the *Harding v Wealands* decision. The basic principle which we are all aware of is that matters of procedure are governed by the *lex fori* and matters of substance are governed by the *lex causae*. This is a principle which exists in most systems of Private International Law whether Common Law or Civilian. However the real question is where we draw the line. And the substance and procedure-rule is one of the rules that determine how much of the *lex causae* we will apply. Historically, the Common Law gave the widest possible meaning to the term 'procedure'. Indeed Dicey wrote in one of the older editions, that:

“English lawyers gave the widest possible extension to the meaning of the term procedure.”

And Lord Wilberforce in fact described the substance and procedure rule:

“As a tool which in skilful hands can be powerful and effective”.

The operation of this rule is one of the techniques that has been said to avoid the operation of the *lex causae* and, thus, one of the reasons for criticism of a wide definition of procedure. What are these criticisms? First, it is said that it has the undesirable consequence of frustrating the operation of choice of law rules. Thus, it can circumvent the operation of a foreign rule of law that would otherwise be applicable. The latest edition of Dicey and Morris in fact comments that this attitude has fallen into disfavour precisely because it tends to frustrate the purposes of the choice of law rules. Secondly, as Charles just raised, it is said to encourage forum shopping and by commencing litigation in England, a litigant could avoid the operation of a foreign rule of law. It would be fair to say that over recent years there has been a move towards restricting the meaning of procedure and the courts have been more prepared to apply the full ambit of the *lex causae*. One example of this is in the area of limitations and I refer to the Foreign Limitation Periods Act of 1984. The traditional common law position was that if a limitation extinguished the right it was substantive whereas if it prevented the commencement of an action it would be construed as procedural. The act changed that and the limitation rules of the *lex causae* apply to actions before the English courts irrespective of their former wording, and an English limitation period does not apply unless it is the *lex causae*. What is interesting is that that position was judicially overruled in Canada and in Australia, which, in my view, reflects a more general tendency in Common Law jurisdictions to characterise limitation rules and time bars in a uniform manner and as substantive.

Now, until the eve of the *Harding v Wealands* decision the preferred view, in my submission, is that throughout the common law world, ‘procedure’ was defined as follows:

“The essence of what is procedural may be found in those rules which are directed to governing or regulating the mode of conduct of court proceedings.”

And this is the dictum of Chief Justice Mason in the *McKain v Miller* decision. Similarly, a definition of substance that had been put forward is that:

“ matters that affect the existence of state or enforceability of the rights or duties of the parties to an action are matters that on their face appear to be concerned with issues of substance”

This is the dictum from the Australian High Court decision of *Pfeiffer v Rogerson*. And it should be noted that these are definitions that were adopted by the Court of appeal in *Harding and Wealands* and until the eve of the House of Lords decision it would have been a fair description of the position

So coming to the crux of my presentation, why did the House of Lords decide as they did? Well I think it’s due to a number of factors and the first of these is what I would describe as the human factor, or the justice of the case. This, , is

an important consideration that should not, in my view be understated. This is something that we lawyers sometimes forget to focus on but when we started studying law, some of us commenced such studies on an assumption that it was all about justice and equity. The claimant in the case was severely injured and now a tetraplegic. There is therefore, I think, a natural tendency to try and compensate someone for this and avoid laws that would limit what may be perceived as reasonable compensation. As Charles raised in his presentation a different and stricter approach may have been taken if we were talking about two commercial entities and in the field of contracts. The House of Lords did not have difficulty in recognising the operation of a statutory limit in the field of contract as substantive. The House of Lords commented that:

“the statute operates as if it imposed a contractual term limiting the damages recoverable”

The House of Lords did not have difficulty recognising the operation of a statutory limit in the field of contract as substantive. It was accepted that statutory limitations on damages that are deemed to be incorporated into a contract of carriage are substantive and the House of Lords followed the New South Wales decision of *Allan Panozza v Allied Interstate*. This also may be taken as a suggestion that the substance and procedure distinction is possibly different when the *lex causae* is arrived at through the operation of the tort choice of law rules under the 1995 Act as opposed to for example the contract choice of law rule.

The second reason is what I would call a ‘black letter law approach’. The House of Lords, it may be said, took a very strict approach in interpreting the Act and the words of the Act. And, the House of Lords took this approach rather than one that may be said to be creative or, with respect, jurisprudentially progressive.

Characteristically Lord Hoffmann stated:

“The question is not what the law should be but what parliament thought it was in 1995 “

This is, with the greatest respect, quite a disappointing revelation. The decision provides a detailed analysis of the law before the 1995 Act, the double actionability rule and an analysis of what *Boys v Chaplin* decided. The decision of the House of Lords is one that focuses on statutory interpretation rather than an analysis of principle as one may have expected from a supreme appellate body such as the House of Lords.

The third reason why it may be said that the House of Lords decided as they did is that it is far too complex or impractical in such circumstances to apply the *lex causae*’s rules.

Lord Woolf characteristically said in referring to the relevant provisions of the New South Wales legislation:

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“The code is clearly one that has provisions which it would be very difficult if not impossible to apply in proceedings of tort in this country. Even though they may be capable of being applied in other parts of Australia”

And Lord Woolf continues:

“The greater part of the code is clearly procedural and those parts that could arguably be regarded as substantive should be treated as procedural”.

Now my question here is as follows: How complex or difficult is it really for an English court to apply provisions of a statute that are in English and are drafted in a form that an English court is not unfamiliar with. In any event, foreign law is a question of evidence and, presumably, expert evidence would be produced to this effect.

The final reason is one of policy. It may be said that the decision of the House of Lords is ultimately one of policy to avoid the application of foreign scales of compensation, which ties in with the first factor: the justice of the case. Lord Rodger makes reference to the desire to exclude American scales of damages on the one hand, but on the other hand, in the particular instance, he states that:

“ it would be equally unacceptable if, say, United Kingdom courts had to award damages according to a statutory scale which, while adequate in another country because of the relatively low cost of services etc there, would be wholly inadequate in this country, having regard to the cost of the corresponding items here.

Thus, there is a conclusion reached that the New South Wales scales were inadequate and therefore their application should be avoided by characterising these as procedural.

What of course is not noted is to what extent it might be fair or appropriate that a defendant may be liable to pay damages pursuant to the scales of a foreign court; . in this case, the courts of the United Kingdom, and beyond what would be required in the place of the tort and the place where the defendant ordinarily conducts his or her affairs. In fact, this point was actually considered and dismissed by Lord Rodger who at the end of his speech states:

“I recognise that this means that the defendant’s insurers may have to meet a higher claim for damages than would be the case if the provisions of MACA applied”.

So the application of the *Harding v Wealands* decision: how are we to apply this and what are the general consequences? It may be said that *Harding v Wealands* stand for the proposition that a statutory cap should be classified as procedural: It forms part of the assessment of damages. A wider interpretation

may be to say that remedies generally should be classified as procedural, and there is of course a comment by Lord Woolf that even the substantive provisions or, what may have been recognised as the substantive provisions in MACA (the Motor Accident Compensation Act of New South Wales) should be considered procedural. However, it seems to me that the decision of *Harding v Wealands* is limited to the question of statutory caps. My submission is that there is a clear distinction between the question of whether a head of damages was recoverable and the quantification of damages; and a statutory cap falls within the latter category. However, this may be at times an artificial distinction or a complicated distinction that may create certain problems or questions in the future.

I refer to the limitation of actions and say memories of limitation of actions, that the distinction that we might be asked to look at may reintroduce the sort of distinctions and problems that used to exist within the field of limitation of actions. Traditionally, when characterising a limitation provision a distinction was drawn depending on the wording and the nature of the limitation. As will be recalled, if the limitation rule was one that extinguished the actual right to bring a claim it was characterised as substantive. Whereas, on the other hand, where the rule merely prevented the commencement of proceedings or was worded in such a fashion, it was characterised as procedural. Therefore, depending on how a limitation had been worded, the limitation of either *lex causae* or *lex fori* could apply. Accordingly, I propose to highlight some examples of statutory provisions again from Australia, which may show some of the difficulties in light of the *Harding v Wealands* decision.

In Victoria, which is a state south of New South Wales, there has been great statutory reform in the fields of torts. An example of this is the Wrongs and Other Acts (Public Liability Insurance Reform) Act which, *inter alia*, reforms the field of occupier's liability. Now under this Act, damages for pain and suffering in respect of occupier's liability is capped at a sum of 371,383 dollars. Which seems to be an arbitrary figure but there we are! Following *Hardings v Wealands*, I think, it would be fair to say that this could be categorised as procedural. But damages for past and future economic loss are capped at three times the amount of average weekly earnings. Now this does not introduce a cap with a specific monetary ceiling and it may be said that it introduces a principle that nobody should be liable for more than three times the state average weekly earnings, whatever they may be at the relevant time. This is a principle rather than a cap and is therefore a substantive provision. On the other hand it may be said that it's just a cap; a statutory cap in another form. So, question marks over that!

One of the other interesting provisions in this Act is that it provides that in determining the occupier's liability for any injury sustained by an entrant the Courts must now consider the entrant's level of intoxication and whether the entrant was engaged in any illegal activity at the time. This may be said to be a provision that lays down a principle and is substantive and ultimately affects the quantum of damages. But it does not provide something in the narrow form of a statutory cap. There are question marks as to how something like that may be characterised.

Moving onto an Act more at point: The Transport Accident Act of Victoria. Let us suppose for a moment that the accident as occurred in the *Harding v Wealands* decision had occurred in the state of Victoria. This is a far more complex scheme than the MACA of New South Wales. First of all, the Act has a no-fault compensation scheme, and it may be said that that is a substantive provision. The Act also excludes recovery of damages at Common Law in respect of medical and life expenses, domestic services and pecuniary loss for the first 18 months. Again, this maybe said to be a substantive provision in that it excludes particular heads of damage. But the *quid pro quo* for all this is that compensation is determined pursuant to a very detailed schedule and table. Would this be characterised as procedural? It would seem following *Harding v Wealands* it probably would. The question would then be, if we are to characterise this as procedural, we run into the problem of the fact that the whole mechanism of the Act is that it is part of a no-fault compensation scheme and it may seem inappropriate to, on the one hand, exclude certain provisions and, on the other hand, to allow other provisions. If we were to characterise the first, the no-fault compensation scheme, as substantive but the schedule as procedural and go on to award damages in accordance with the *lex fori* we are applying a hybrid law - One that is foreign and contrary to both the *lex causae* and the *lex fori*. We are in effectively creating something new.

Going on with the Transport Accident Act of Victoria. When we come to the period beyond 18 months, losses are only recoverable if the injury is what is defined as a serious injury or impairment of greater than 30%. This would probably be characterised as substantive as it goes to the substantive issue in terms of liability. But then we have statutory caps which, following *Harding v Wealands*, would be characterised as procedural. Unlike the New South Wales Act, the statutory caps in this instance are not part of a no-fault compensation scheme, which is the *quid quo pro* of not having to show negligence as one would have to do under the common law rules. To then award damages in accordance with the *lex fori* would be to create, as I have noted before, a new legal system that combines elements of the *lex fori* and the *lex causae* and, in my submission, we would end up with a result that would probably not be achieved in either jurisdiction.

Moving on with the Transport Accident Act, just to make things a little more interesting,. the difficulty continues because subsection 20 of the relevant provisions provides that:

“For the avoidance of doubt it is hereby declared that all provisions in this section contain matters of substantive law and are not procedural in nature”.

This was inserted in 1994 following the *Stevens v Head* decision. What is an English court to do?

That brings us to the issue of characterisation. Who is to characterise the foreign rule as substantive or procedural? The preferred view is that characterisation is done in accordance with the liberal *lex fori*, which implies

that in the case of English Courts it is for English law to characterise the relevant rule. However, in *Harding and Wealands*, the House of Lords actually looked at how the High Court of Australia had characterised the relevant provisions of the Motor Vehicle Accidents Compensation Act. This may be said to be characterisation in accordance with the *lex causae*. If we are to follow that approach, a provision like subsection 20 of Section 93 of the Transport Accident Act of Victoria would be the guiding principle as to how we should categorise those provisions.

Finally, moving onto foreign torts or wrongs. By foreign torts I mean those that may constitute torts or wrongs under the *lex loci delicti* but may not be recognised as constituting torts under the rules of English domestic law. Subsection 2 of section 9 of the Private International Law Miscellaneous Provisions Act 1995 provides that:

“The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum.”

So, the understanding that many of us have following the introduction of this provision is that wrongs or torts that may not be recognised as a cause of action as a matter of English domestic law, may be classed as a tort for the purposes of the 1995 Act. How can the court in such circumstances award remedies when faced with a foreign tort that it is not familiar with without looking at the *lex causae*? Indeed Dicey and Morris recognise this problem and state in the latest edition:

“One possible solution would be to model the English assessment on that which it obtains in the foreign applicable law, though, in effect, this would be to permit the applicable law to determine the question of quantification, and, may, in any event, be a method which is not always possible in particular cases.

This would suggest that the quantification may be a matter for the *lex causae* and not for the *lex fori*, particularly when we are talking about a tort which is unknown to the domestic law of the *lex fori*. However, this would always be subject to the principle in *Phrantzes v Argenti*. The court would always be limited following the principle of that case to the remedies known to it.

Thank you. That concludes my presentation.

Chair: Mr Justice Lawrence Collins:

Thank you George I also was surprised that the House of Lords adopted the Australian characterisation and I would like to hear later from Charles or from Michael on whether that question - the question as to which court characterises the issue - was in fact argued. Janeen.

Dr Janeen Carruthers – Glasgow University

Thank you. Good evening ladies and gentlemen.

Achieving agreement on the current, not yet final version of Rome II has been a long and complex task. Achieving agreement on the current (not yet final) version of Rome II has been a long and complex process. There has been a series of proposals, and modified proposals, through:

- Commission Proposal (22 July 2003) (presented pursuant to Article 250(2) of the EC Treaty – co-decision procedure);
- Opinions thereon, including EESC Opinion (2/3 June 2004) and House of Lords, EU Committee, 8th Report (Session 2003-04);
- European Parliament Report on the Commission Proposal (*Rapporteur* Diana Wallis MEP), adopted in Committee by the Committee on Legal Affairs (27 June 2005), and in plenary, at first reading (6 July 2005);
- Modified Commission Proposal (21 February 2006);
- Political agreement reached in Council of the EU in April 2006 (under the Austrian presidency);
- JHA Council-Approved version, incorporating the recitals discussed during the meeting of the Committee on Civil Law Matters on 5 May 2006 (19 May 2006);
- Common Position adopted by the Council of the European Union (by QMV) (25 September 2006); and
- Communication from the Commission to the European Parliament concerning the Common Position of the Council (27 September 2006).

The primary focus of consultees and commentators, naturally, has been the various incarnations of the general choice of law rules proposed for tort and delict, and for unjust enrichment, as well as the series of tort-specific rules, and the introduction of party freedom of choice of law. There has been less concern regarding what might be called the supporting or secondary provisions; with their apparent familiarity of wording, the eye tends to skip over such provisions. This evening, however, with *Harding v Wealands* as our backdrop, I want to take a closer look at some of these provisions, in particular the provisions which are likely to bear upon UK lawyers' understanding of the distinction between substance and procedure, and its operation in cases of tort and delict.

I want to take as my starting point the text currently on the table, namely the Common Position adopted by the Council in late September this year. The Common Position follows largely the same line as the Commission's modified proposal (February 2006), and, in the view of the Council, it 'creates a balanced system of conflict-of-law rules in the field of non-contractual obligations and achieves the desired uniformity of rules of applicable law'. You can be your own judge ...

The provision upon which I want to focus this evening is that entitled 'Scope of the law applicable', in this version, numbered *Article 15*. It reads:

“The law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.”

Article 15 defines the scope of the applicable law (as determined by application of the preceding Articles of the Regulation), or, to put it another way, ‘it lists the questions to be settled by that law’ (Commission Explanatory Memorandum). The manner of drafting of Article 15 gives the *lex causae* an *expansive* scope of application, conferring upon it a very wide function (wider certainly than under existing UK choice of law rules). That law, rather than the law of the forum, will determine the various matters listed in paragraphs (a) – (h). The Commission’s justification for this expansive approach is certainty.

It is helpful for practitioners, in particular, to see expressly listed the matters which fall within the ambit of the governing law in tort. Matters of characterization otherwise would tend to become a significant issue, and a major source of misunderstandings. As we soon shall see, listed in Article 15, are matters that an English court otherwise might characterize as procedural

The Commission’s Explanatory Memorandum on the original Proposal states that the approach presently taken in the various Member States is not uniform: while certain questions, such as the conditions for liability, generally are governed by the applicable law in tort, others, such as limitation periods, the burden of proof, the measure of damages etc, may fall to be treated by the *lex fori*. So inconsistency of treatment across the EU warrants, apparently, this setting straight.

Paragraph (a)

By paragraph (a), ‘the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them’ shall be governed by the applicable law in tort.

Paragraph (a) originally referred to the ‘conditions’ rather than the ‘basis’ of liability, but a change of wording was proposed by the European Parliament’s Legal Affairs Committee, to bring the English version into line with the other

language versions (Amendment 39). The expression '[basis or] conditions ... of liability' is intended to refer to *intrinsic* factors of liability, including issues such as: nature of liability (strict or fault-based); the definition of fault (including the question whether an omission can constitute a fault); the causal link between the event giving rise to the damage and the damage; the persons potentially liable; etc. 'Extent of liability', on the other hand, is intended to refer to the limitations laid down by law on liability, including the maximum extent of that liability and the contribution to be made by each of the persons liable for the damage which is to be compensated for.

Two points can be made here. First, in relation to 'extent of liability', are we getting perilously close to the area of quantification of damages, traditionally the province of the forum? (about which, more momentarily). Article 15(a) could be construed as covering not only what was referred to, traditionally in Scots law, as *remoteness of injury* (the *existence* of liability – now spoken of in the language of existence of a duty of care), but also what was referred to as *remoteness of damages* (the *extent* of liability).

Secondly, the phrase 'including the determination of persons who may be held liable for acts performed by them' is ambiguous. The matter of determination of persons liable in (a) arguably covers the same thing – vicarious liability – as (g) liability for the acts of another person. This duplication is not particularly problematic insofar as the applicable law is the same under both paragraphs, but it is sloppy draftmanship. Probably what is meant in (a) is, rather, whether an *incapax* person (whether by reason of non-age, or mental incapacity etc) may be held liable for his/her potentially tortious acts and omissions. In order to avoid potential conflicts of characterization, it might have been sensible expressly to include in paragraph (a) the matter of tortious capacity. Otherwise, it would be possible to seek to characterize tortious capacity as a matter for the choice of law rules on capacity, and thus generally to be governed by the law of the putative wrongdoer's personal law, be that his/her domicile, habitual residence or nationality. Perhaps there should be a place here for application of the personal law of the alleged wrongdoer. Express inclusion of the issue of tortious capacity was something which was recommended by the Hamburg Group for Private International Law, but not acted upon by the drafters.

Paragraph (b)

This paragraph is unchanged from the original Commission version. 'The grounds for exemption from liability, any limitation of liability and any division of liability' are governed by the applicable law in tort. These, it is said, are *extrinsic* factors of liability. The grounds for release from liability could include *force majeure*; necessity; third-party fault and fault by the victim, in the way of contributory negligence or voluntary assumption of risk. Contributory negligence possibly deserves an express mention in paragraph (b), for it, normally, is the most important reason for a division of liability. Contributory negligence in our law is a partial defence, leading to 'division' of liability, but if '*volenti non fit iniuria*', as under Scots law, is a complete defence, then 'division' is an inappropriate term; but probably such a defence would fall

under 'exemption from liability' and would be subject, still, to the applicable law in tort.

Paragraph (b) also would include, for example, the inadmissibility of actions between spouses, and the exclusion of the perpetrator's liability in relation to certain categories of persons.

Such matters would be within the scope of the applicable law, and not the *lex fori* or any other law.

Again, there is possible overlap or duplication in drafting, for the question of division of liability between or among joint tortfeasors in (b) arguably covers the same thing as multiple liability in Article 20.

Article 20 (Multiple liability)

Article 20 of the Common Position (ex-Article 15 of the Commission Proposal, which in turn was identical to Article 13 of the Rome Convention) provides that: 'If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.'

How does Article 20 sit with Article 15(b)? Article 15(b) presumably concerns the *allocation* of liability and Article 20 the question of *recovery* among the debtors in the obligation.

By English conflict of laws thinking, the non-contractual right of one tortfeasor to obtain contribution from another tortfeasor has been treated not as a matter of tort, but as one of restitution. Since the proposed Regulation deals with *all* types of non-contractual obligation, the wording of Articles 15(b) and 20 – referring only generically to the *lex causae* under the Regulation, rather than specifically to the law applicable to the tort or enrichment – will leave to the forum the power to characterize the matter of the right to obtain contribution from one of several debtors as pertaining to tort or enrichment.

Paragraph (c)

As far as *Harding* is concerned, the most contentious aspect of Article 15 is paragraph (c). This provision has undergone a subtle change of wording over its various incarnations. Currently, it refers to 'the existence, the nature and the assessment of damage or the remedy claimed', and provides that these are matters for the applicable law in tort.

The original Commission proposal referred to 'the existence and kinds of injury or damage for which compensation may be due'. The Explanatory Memorandum gives only the briefest of commentary, saying the provision is to determine the damage for which compensation may be due, such as personal injury, damage to property, moral damage and environmental damage, and

financial loss or loss of an opportunity. The change in wording was proposed by the European Parliament: 'the existence, the nature and the assessment of damages or the redress sought.' (Amendment 40), and although the Council claims to have accepted that, the actual wording of the Common Position differs very slightly.

Paragraph (e) of the Commission Proposal, which referred to the applicable law in tort 'the assessment of the damage in so far as prescribed by law' does not appear as a separate provision in the Common Position. Rather, paragraphs (c) and (e) of the original Commission Proposal have been collapsed into a single paragraph, (c), of the Common Position. The wording originally preferred by the Commission, in its preliminary draft Proposal, was the 'the measure of damages in so far as prescribed by law'. Instead of referring to the 'measure of damages', an equally Delphic phrase, 'assessment of damage', has been preferred. What the drafters' intention seems to be is that if the applicable law provides rules for the assessment of damages, the forum must apply them.

Rather irritatingly, instead of incorporating the exact wording of the then Proposal (Article 11(e)), the Commission's Explanatory Memorandum (p 24) adopts the wording of the equivalent provision in the *Preliminary Draft Proposal* (ex-Article 9.5): the Memorandum refers not to the Commission wording ('assessment of the damage'), but rather to the old wording ('measure of damages'). In any event, neither phrase is adequately explained.

The House of Lords, EU Committee, 8th Report (Session 2003-04), entitled, *The Rome II Regulation*, in its outline description of Article 11 (scope) of the Commission Proposal, remarked that, '... the applicable law ... will govern the availability and quantum of damages ...' (para 37). Thus the Committee's interpretation was that the term 'assessment' includes 'quantification'. This would indicate that the English approach to quantification of damages in tort will apply *only* if English is the law which governs substantive liability. This is the *volte-face* for English courts, as can be seen from earlier discussion tonight of *Harding*.

If (as seems to be the Council's opinion) by 'assessment of the damage' is meant quantification, then Article 15(c) (ex-Article 11(e)) represents a marked change to the classic English and Scottish rule. Presently, the English and Scots choice of law rule relating to damages in tort and delict is partly substantive and partly procedural. As is well known, the applicable law in tort determines what heads of damages are available; as a general guide, any rule which indicates the type of loss for which damages are payable is a rule of substance, referable to the applicable law in tort. The monetary assessment/quantification of damages, and the mode of calculation (eg by judge or jury), are governed by the *lex fori*, since these are deemed to be aspects of procedure. No English or Scottish case appears to have applied the principles of a foreign applicable law to quantification.

It is well known that the distinction between substance and procedure in damages is not always as clear-cut as we would like to believe. However, the

distinction between liability and quantification may be rendered meaningless (for the purposes of choice of law concerning awards of damages under Rome II) if *all* such matters are to be referred, in any event, to the *same* law, namely, the applicable law in tort.

The longstanding two-pronged approach to damages awards, which exists both at common law and in terms of section 14(3)(b) of the 1995 Act, looks likely to be ousted by Rome II. Of course the two-pronged approach is not without defect: in quantifying novel claims, for example, how can the forum quantify a head of loss which is awarded under the *lex causae*, but which the *lex fori* does not know or recognise? The problem did not generally arise at common law because of the requirement of double actionability according to the *lex loci delicti* and the *lex fori* (eg *Naftalin v London, Midland and Scottish Railway Co* 1933 SLT 31; *Mitchell v McCulloch* 1976 SLT 2), but that is not true of operation of the 1995 Act. If, as pointed out in Dicey, Morris & Collins, one were to model the English quantification on that which would obtain in the foreign applicable law, this would be to permit, in effect, the applicable law to determine the question of quantification.

The underlying policy issue here is a most interesting one, whether, as a matter of principle, so far as practicable, the assessment of damages *should* be carried out in accordance with the law applicable to the tort, and not the *lex fori*. Traditionally, UK courts have accorded little respect to this principle. From the *foreign* perspective, certainly in Scots, and I think in English, law, there are rules concerning the assessment of damages (and even on the standard of care), which are so vague (relying possibly on conceptions of fairness and reasonableness) that a *foreign* court could have little confidence in its ability to apply them accurately. But if it is the aim of the Proposal to achieve uniformity, foreseeability of outcome and the proper functioning of the internal market, then there is a strong case for arguing that the quantification *should* depend on the applicable law, rather than on the law of the particular forum in which the claim happens to be brought.

There is certainly something to be said for applying the foreign law, and having regard to the foreign remedy if its application would be consistent with the procedural possibilities available in the forum. We may encounter trouble, however, where its application would be inconsistent with the procedural possibilities of the forum (eg where the *lex causae* prefers payment of interim or provisional damages, or damages in instalments, but the *lex fori* has no such procedural device/mechanism). Article 15 does not, apparently, offer us an escape route from this problem.

The Common Position, which has excised any mention of the so-called 'non-compensatory damages' rule, a proposed provision which raised blood pressure in the UK and elsewhere, leaves in place, as would be expected, a standard public policy clause (Article 26):

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum.'

The Communication from the Commission to the Parliament (27.9.06) concerning the Common Position makes clear that there is no disagreement that the standard public policy clause offers sufficient guarantee and protection against, for example, potential negative effects of awards of extreme punitive damages [or, conversely, of insufficient awards]. Public policy is always used sparingly, especially in the new world of EU Regulations, but if it is likely to be used at all, it may be in relation to Article 15(c) (especially against the background of the principle of universal application).

Returning to Article 15 (scope of applicable law):

Paragraph (d)

Over the course of the drafts, paragraph (d) has undergone some verbal rearrangement, but the changes are more style than substance (!), largely to bring the English text into line with the French. Thus, 'within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation' are subject to the *lex causae*.

This is intended to refer to *forms* of compensation, such as the question whether the damage can be repaired by payment of damages, and ways of preventing or halting the damage, such as an interlocutory injunction, though without actually obliging the court to order measures that are unknown in its own procedural law. This caveat (which does not operate in relation to 15 (c)) ensures that the forum cannot be required to order measures that are unknown in its procedural law; and because of Article 15(c), it no longer will be put into the position of being asked to quantify a head of loss unknown in its substantive law.

[*Paragraphs (e), (f) and (g)*: Discussion omitted due to time constraints.]

Paragraph (h)

Lastly, paragraph (h) of the Common Position, corresponding to paragraph (i) of the Commission Proposal, with one or two stylistic changes, provides that 'the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation' shall be referred to the applicable law under the Regulation. In line with the existing UK provisions, as contained, for England, in the Foreign Limitation Periods Act 1984, the law designated will govern the loss of a right following failure to exercise it, on the conditions set by that law – it is irrelevant whether such provisions are deemed substantive or procedural under the *lex causae*. Article 15(h) is a sibling of Article 10(1)(d) of the Rome Convention.

Boilerplate law-making

You will see that, in listing the questions to be settled by the applicable law under the Regulation, Article 15 broadly takes over Article 10 (*Scope of the applicable law*) of the 1980 Rome Convention, with a few changes of detail. Thus, the model for Article 15 might be said to be Rome I. As with Article 10 of Rome I, the list of matters included in Article 15 is not exhaustive, indicated by the words 'in particular'. Article 15 of Rome II could be said to be inspired also by Article 8 of each of the 1971 Hague Convention on the law applicable to traffic accidents, and the 1973 Hague Convention on the law applicable to products liability (neither of which the UK has signed). Neither of these Conventions uses the imprecise term 'assessment of damages', but under each instrument, the applicable law appears to govern the matter of quantification (for 'extent of damages'/'extent of compensation' would seem to include such matters).

Other relevant provisions

In the matter of substance and procedure, there are two other relevant provisions in Rome II: Articles 1 (Material scope), and 22 (Burden of proof).

Article 1 (Material scope)

Article 1.3 provides that the Regulation 'shall not apply to evidence and procedure, without prejudice to Articles 21 [Formal validity] and 22 [Burden of proof]'. Curiously, there is no reference here to Article 15, even though certain of the matters there listed (first among them being the issue of assessment/quantification of damages) could be classified as pertaining to procedure. Alternatively, if it is to be taken, by EU determination, that all of the matters listed in Article 15, by definition, are to be treated now as substantive rather than procedural in nature, then that is significant. What about cases falling outside the scope of the Regulation – will quantification of damages be treated in such cases, by analogy with Rome II reasoning, as also a matter of substance governed by the applicable law in tort?

It would be an optimist who would suggest that since quantification of damages is characterized (in English and Scots law) as a matter of procedure, then, by virtue of Article 1.3, the Regulation does not apply to the topic, meaning, in turn, that the issue of quantification cannot be deemed to fall within the list of matters in Article 15 to be governed by the applicable law in tort – ie who would suggest that quantification continues to be treated as a matter for the *lex fori*. Such an argument would not fit, I think, with the intentions of the Commission.

[Article 22 (Burden of proof): Discussion omitted due to time constraints]

[Proof of foreign law (European Parliament proposals): Discussion omitted due to time constraints]

Conclusions

Article 15 does not eliminate the difficult interface between the applicable law and the law of the forum, between substance and procedure – indeed, it makes no reference to substance and procedure, as such. But by expanding the territory over which the *lex causae* explicitly governs, Rome II will reduce the significance of the shadowy borderland between substance and procedure. In the UK, where hitherto the main problem – demonstrated in *Harding* – has been to determine whether a particular question concerning damages falls under the banner of substance or of procedure (whether it pertains to liability or to quantification), the same damages problem in future (if, as is expected, Rome II eventually comes to pass) will not arise (at least as regards cases falling within the Regulation) – for irrespective of the forum's characterization of the issue as substantive or procedural, by reason of the liberal wording of Article 15, the issue, in any event, should be determined by the *lex causae*, and not the *lex fori*.

What next with Rome II?

The legislative process for the Rome II instrument is one of co-decision, in terms of Article 251 of the EC Treaty. According to the co-decision timetable,

the next stage in the process (the Commission having accepted the Common Position), is the European Parliament's Second Reading, for Parliament to take action on the basis of the Council's Common Position: technically the Common Position could be adopted, rejected, or amended by absolute majority. In the latter case, the amended text would be forwarded to the Council and Commission. If (following its Second Reading) the Council were to reject the amended Common Position, Conciliation procedure would be set in motion, bringing together in Conciliation Committee members of the Council, an equal number of representatives of the European Parliament, and the Commissioner responsible (the Commission playing a mediating role), with the objective of producing a compromise 'joint text'.

The European Parliament's Second Reading has been fixed for 12 December 2006, and so this, ladies and gentleman, is the date to watch.

Thank you.

Chair: Mr Justice Lawrence Collins

Thank you. Before I open the floor to questions or comments I just wanted to add that it seems to me that one important issue here is the impact on insurance and insurers, because in the real world these cases will only arise where the defendant is insured. It ought to be possible for the claimants or the claimant's insurers to negotiate with the proposed defendant's insurers without reference to where the action is ultimately to be brought as that adds yet a further element of uncertainty. And so, if there is a cap on damages, it seems to me that the negotiations ought to start from the basis that there is a cap on damages and not: "well, if I sue here it won't apply, and if I sue there it will apply".

C Dougherty

There is a difficulty following on from that, which is that often in personal injury cases people would have insured themselves in accordance with the local law. So if you take a road traffic accident like the facts of *Hulse v Chambers*, where there was a road traffic accident in Greece-a hire car. He had insurance which was sufficient under the European Directive- minimum is 350, 000 euros'. It rendered his son tetraplegic. The action was brought in England and of course the 350.000 Euro limit was woefully inadequate for the claim. So you can end up with the defendant being in the position where he has insured himself, insured himself in accordance with local law but finding that he does not have the protection that he is expecting.

Discussion

Lady Justice Arden: I would just like to start the discussion by thanking the panel. I would like to start the ball rolling: four out of five of the members of the appellate committee agreed not simply with Lord Hoffmann with Lord Roger and if you look at his speech he's not saying that any cap on damages is a matter of procedure. He goes onto say, "I look at MACA and I interpret that as a direction for courts in New South Wales to award only restrictive damages". If we go back to George's example, a different result might arise because the English court might be able to say that the foreign rule as interpreted by the English Courts proposes a cap as a matter of substance. In fact, this has already occurred in Australia, that is, Australian courts have had to consider whether people who've had accidents in New Zealand can recover in Australian courts. What they say is it's a matter of substance. So I just wonder, what's happening here?

Response: Well, I think I might just add the purpose of highlighting the Transport Accident Act in Victoria and of course, New Zealand is different example than this, is as I said in my presentation it would be artificial to then start slicing off different provisions and characterise some as substantive and some as procedural and I think, as you've rightly pointed out, one in those circumstances, must look at it as a global group of rules and to separate and distinguish in such circumstances would possibly create an artificial result.

Comment: Michael McParland: The question of no-fault liability under the double action ability rule- 1929 – if you were trying those two Canadian cases back-to-back, and they say that if you've got a no-fault liability system and your casting a claim under that provision, that would be exactly the same position under the 1995 – Why? Two reasons: that is what the Working Paper in 1984 analysed and said would be the position and secondly, that is what *Harding and Wealands* said now. Because *Harding* stands for two important things: the rules of choice of law deal with whether you would need to bring claim for damages or not. The assessment, measure or quantification used in *Harding* was a matter of damages. If you can't bring a claim for damages in the state where the injury occurs, you can't bring a claim. The most important thing, above all else is that sections 11 and 12 of the Act which create the rules for the new COL (general and rule of displacement) do not apply to matters of procedure in Section 14, so all the cases since 1995 are wrong because the Act does not apply to questions of procedure such as damages so it simply does not arise.

Comment: Dr George Panagopoulos: It may have come across that I was suggesting that the House of Lords got it wrong; I wasn't. I was trying to show that there are underlying policy concerns which also go on to the point that in one of the Lordship's speeches it is highlighted that it is undesirable on the one hand to import American scales of compensation and at the same time it is also undesirable to import scales of compensation which may be inadequate in England. I think that is a policy decision and as a result of that a very strict interpretation of the Act was taken. What should also be noted though is that one may have come to the same result by another avenue: by

saying that these issues are issues of substance but we ultimately apply English law through Section 12 of the Act on the basis that English law was substantially more appropriate to apply to those issues.

J. Carruthers: On that particular point, the 1995 Act is more flexible than would be Rome II because the 95 Act in S 12 takes an issue by issue approach. The current drafting of Article 4 which is the general choice of law rule in torts in Rome II does not allow such an approach. The whole focus is on the law applicable to the non-contractual obligation. You couldn't use Article 4 to displace application of the *lex causae* in favour of the *lex fori*, that's another device which is foreclosed to try and get the *lex fori* applied to quantification.

C. Dougherty: It's interesting, the Law Commission originally was against *dépeçage* because you get a mix and match. That is particularly difficult in cases where the applicable law provides for strict liability but the price of that is restricted compensation. As soon as you get to the question of assessment, that is purely a matter of English law so it's a win-win situation for the claimant. They get restricted liability and unrestricted levels of damages.

Justice Collins: Although the House of Lords obviously felt sympathy for the claimant, there was no real policy reason for applying English law: the accident was in Australia and New South Wales law was not contrary to English public policy and obviously cases do often get decided on who's the good guy and who's the bad guy, but there was no compelling reason in this case. **Audience**: But it's *Boys* and *Chaplin* all over again. **Justice Collins**: yes, but the English relationship had nothing to do with the accident in Australia.

Audience: that's why he was *there* (laughter). He was there as best man in a wedding and a romance ensued.

Was the question of characterisation of English law applied to the question of whether you apply English or foreign law? Yes, I think it was accepted that it was a matter of English law (forum law). Dicey and Morris say it should be characterised according to English law but in an international sense.

C. Dougherty: I think it's well established that the process of characterisation in international cases isn't necessarily the same as in purely national cases.

Audience: From the perspective of Australia, I might be wrong but it seems to me like this is the extra-territorial application of English law via the mechanism of substance to Australia. I'm thinking of a comparison with Services Directive proposal which two weeks ago was approved which now leaves all matters of choice of law to the choice of law rules in the EU and doesn't contain its own. The effect was people more or less could travel with their own tort law in their rucksacks because a classic example is of course the Polish plumbers – the effect of this case is that if someone voluntarily

travels to Australia and something happens there, if he sues in England, does he travel with his English law of damages?

J. Carruthers: The question of road traffic accidents is one of the most contentious topics in relation to Rome II and I attended a conference for this earlier in the year when Diana Wallis, MEP (Rome II *Rapporteur*, European Parliament, Legal Affairs Committee) was explaining the following situation: imagine a bus of tourists going through the Mont Blanc tunnel – people of different domiciles and nationalities and damages was an issue. The Parliament was very much of the view that the people ought to carry their own personal law with them. Now it's no coincidence that the subject of road accidents has not been awarded a tort-specific rule in the current Common Position but that will be the subject of review four years from the coming into force of the Regulation.

Comment relating to the potential problems caused by the decision in *Harding* and how there might have been a better way for the House of Lords to come to the same result.

C. Dougherty: I had lunch with a group of insurers the other day and they mentioned a case which perhaps illustrates the dangers of *Harding* and combined with *Owusu* – if you combine the two, you take an inter-family accident where the father is driving and seriously injures his family, it is now in the interest of the family to move to England, acquire sufficient domicile for the father in England to be sued, and for the proceedings to be brought against the father in England with the insurer in the background. This is not fanciful if you start thinking about the huge differences in damages especially for catastrophic injuries. The extent to which this will happen, we will see, but one would say to any family group in this situation that they'd be well-advised to move to England because the English court has to accept jurisdiction and it will apply English assessment of damages even if the tort itself is governed by the law of the place where the accident occurred.

Audience: Could I ask a question about Article 5? When in the great case of *Bier*, the Dutch flower growers suffered damages because water was polluted – when they were given the choice of either suing where the harmful event occurred or where they suffered damage, and they chose to sue in Holland, does anyone on the panel think that choice of law may have influenced them and if so, how can anyone say that forum choice within the scheme of the Convention is in any way wrong, for whatever reason?

Response: Well, it's not wrong, it's accepted. Whether it's desirable is another matter?

Audience: well then why complain? Forum shopping is just a dirty word for what we're supposed to do.

Justice Collins: I used to say actually that forum shopping is extremely rare because on the whole, people tend to sue where they are rather than go

through a whole investigation of which is the most appropriate place in terms of result. Maybe things have changed now.

J. Carruthers: I should mention, there was a proposed amendment by the European Parliament concerning the road traffic accidents rather than the situation of personal injury actions which might give some indication: “except where otherwise provided in the Regulation for a valid choice of law agreement, the court seized shall apply its national rules relating to the quantification of damages unless the circumstances of the case warrant the application of another state’s rules.” That possibly bears the hallmark of an English *rapporteur*. The justification stated for this was that normally courts will apply their own rules, but in cases involving road accidents, courts may apply the law of another country. Not a very helpful explanation. I think there will be some objection from the European Parliament to the wording of the clause but if one looks at the provisions of Article 10 of the Rome I Convention and the Hague Convention on Road Accidents and the Convention on Products Liability, I think in these various instruments, assessment is by the *lex causae* so there is precedent for this at an international level. The UK has not signed these, but I think assessment by the *lex causae* will be accepted by all parties.

Comment: Jacob van de Velden: I think it’s also good to have a look at Article 15, first sentence where it says “shall govern in particular”. I think the aim of A15 is to have the scope of the *lex causae* as full as possible and not limit it.

Justice Collins: Going back to the insurance point, it was the British insurance industry which killed the US/UK proposed Treaty on Recognition and Enforcement of Judgments of more than 20 years ago and my impression is that the insurance industry has not reacted properly to any of these recent initiatives. That may be a wrong impression. I’d certainly welcome views on whether the insurance industry has had much impact on what is happening here in Europe and elsewhere in this area.

J. Carruthers: I think certainly if one looks at the Europa website and Justice and Home Affairs website where one can peruse the responses to the preliminary draft proposal on Rome II documentation, there are a number from insurance stakeholders so I think certainly the opportunity has been there but I don’t know to what extent the response has been collective, or negotiated to represent the industry as a whole, as opposed to token responses. I suspect it’s more the latter.

Justice Collins: Yes, because sympathy for claimants shouldn’t blind us to the fact that we’ll pay extra premiums in the end for it.

Comment: I think it’s worth remembering that the effect of both Article 15 and the decision in *Harding* may not be as significant as we think and for one reason which is that damages rules are often quite unsophisticated and much is left to the court to assess. So there is always the difficulty that if you were going to apply the applicable law of damages you have to identify an

applicable rule and in certain circumstances you would get to the situation where there would be no applicable rule, such as the traffic example or American jury awards which are based on juror assessment and can't be said to be a matter of law.

Justice Collins: Well, we've had a stimulating discussion and I'd like to pay tribute to the immense work all three of our panellists have obviously put into this. I hope you've enjoyed it as much as I have. Thank you.