CURRENT DEVELOPMENTS

PRIVATE INTERNATIONAL LAW

Edited by Peter McEleavy

I. *Harding v Wealands*
II. Regression and Reform in the Law of Domicile

I. *HARDING v WEALANDS*

A. Introduction

In *Harding v Wealands*[1] the House of Lords had to consider the vexed question of where the dividing line between substance and procedure should lie in private international law. The specific issue before their Lordships was whether matters relating to the assessment of damages in tort should be treated as matters of substance, and thus be for the applicable law, or whether they should be treated as matters of procedure, and therefore be left for the law of the forum. The decision of the House of Lords has resolved this difficult question in favour of a procedural characterization. The result of the House of Lords' decision is that in all such cases, regardless of the foreign law element, the assessment of damages will be conducted in accordance with English (Northern Irish or Scottish) law, as the law of the forum. Nonetheless, some reservations do exist as to the justification for the decision and as to how likely it is to remain the last word on the subject.

In addition, the decision of the Court of Appeal remains of some importance in relation to the determination of the law applicable to a foreign tort. In the light of their decision on the difference between substance and procedure, the House of Lords found it unnecessary to interfere with the decision of the Court of Appeal in this regard.

B. Applicable Law—The Statutory Background

The Private International Law (Miscellaneous Provisions) Act 1995 ('the 1995 Act') abolished, by section 10, the common law conflict of laws rule of 'double actionability'. This was a rule that applied to tort claims brought in the United Kingdom. It prohibited courts in the United Kingdom from entertaining an action brought by a claimant in respect of an injurious act committed by a defendant abroad unless the injurious act was 'doubly actionable'—ie it was actionable under the law of the place where the act was done and it was (or would have been) actionable under the law of the forum had it been done within the jurisdiction.[2] If a claimant satisfied both

[1] [2006] UKHL 32; [2006] 3 WLR 83.

[2] *Phillips v Eyre* (1860) LR 6 QB 1; *Boys v Chaplin* [1971] AC 356; *Coupland v Arabian Gulf Oil* [1983] 1136; *Red Sea Insurance v Bouygues* [1995] 1 AC 190.

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hurdles, the court would proceed to determine the claim in accordance with the law of the forum.[3]

Having abolished the rule of double actionability, the 1995 Act went on to provide rules for choosing the law to be used for determining issues relating to tort. Under section 11, the general rule is that the applicable law is the law of the country in which the events constituting the tort in question occur. However, section 12 provides for displacement of the general rule in some circumstances.[4]

Nevertheless, the scale of change imposed by the 1995 Act was limited, first by section 14(2): 'Nothing in this Part [of the Act] affects any rules of law (including rules of private international law) except those abolished by section 10 above'; and by section 14(3)(b): 'nothing in this Part [of this Act] . . . affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.'

Thus it was clear that the applicable law, as determined by application of sections 11 and 12 of the Act, is the law applicable only to issues of *substance* in the dispute between the parties to the action. The law applicable to questions of *procedure* is the law of the forum, ie the law of England and Wales (Northern Ireland or Scotland).

C. The Facts

Tanya Wealands and Giles Harding first met in March 2001 at a wedding in Australia. Mr Harding was British and had always lived and worked in England. Ms Wealands was an Australian who had always lived in New South Wales (NSW). Their relationship developed quickly. Three months after meeting, Ms Wealands gave up her job in Australia and moved to live with Mr Harding in England. She obtained a two-year working visa and started work in London.

In January 2002 Miss Wealands returned to NSW for her father's 60th birthday. She intended to stay five weeks. Mr Harding joined her slightly later. The plan was that they would have a holiday together and then both return to England.

On 3 February 2002 Miss Wealands was driving her Suzuki jeep on a dirt track road in NSW. She had bought and insured the car before she had moved to England. Giles Harding was sitting at the front of the vehicle. For some unknown reason, Ms Wealands lost control of the jeep and it rolled onto the roof. Unfortunately, Mr Harding suffered devastating injuries and was rendered tetraplegic by the accident.

[3] At least until the Privy Council decision in *Red Sea Insurance v Bouygues* [1995] 1 AC 190.

[4] Section 12 provides:

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

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

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

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

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After the accident, whilst still in NSW, they decided to marry. They both returned to England in March, but the relationship soon fell apart.

Mr Harding issued proceedings in England and the claim form was served on Ms Wealands shortly before she returned to Australia. Ms Wealands applied to stay the proceedings on the ground of *forum non conveniens* but her application was unsuccessful.

Ms Wealands accepted liability for the accident. The only issue was quantum.

D. The Preliminary Issue: the Application of the NSW Motor Accidents Compensation Act 1999

A preliminary issue was ordered to be tried as to whether damages should be assessed according to English law, as was contended on behalf of Mr Harding, or according to NSW law, as was argued on behalf of Ms Wealands.

Under the NSW Motor Accidents Compensation Act 1999 (MACA), damages for personal injury arising out of motor accidents are restricted. In particular, there is a cap on general damages for pain, suffering and loss of amenity well below the English level of awards for injuries of the maximum severity; and there is a statutory discount rate of 5 per cent imposed for calculation of the present value of an award of damages for future economic loss—compared to the discount rate of 2.5 per cent applied in English law. The NSW statute expressly provides that the limitations imposed by the Act have been instituted for the purpose of reducing the burden of claims on the insurance industry and thus keeping motor insurance premiums affordable.

It was estimated, on behalf of Mr Harding, that the effect of applying MACA rather than English law would be to reduce the damages recoverable by about 30 per cent; this equated to a reduction of about £1.5m in Mr Harding's case.

In determining whether or not damages should be assessed in accordance with MACA, the court had to address two questions. First, whether the rules imposed by MACA were substantive or procedural. It was common ground that all questions of procedure were for the law of the forum (ie English law). Second, in so far as the provisions of MACA were substantive, what law was applicable under the 1995 Act to substantive issues of quantum. Under section 11, the applicable law was prima facie the law of NSW (as the law of the place where the events constituting the tort occurred), but Mr Harding contended that this should be displaced in favour of English law, under section 12.

At first instance, Ms Wealands failed on both of these points.[5] Elias J held that the applicable law was that of England and that the assessment of damages was in any event procedural. In displacing the general rule, Elias J found that the factors connecting the case with England rendered it substantially more appropriate to apply English law. In particular, he relied on the fact that Ms Wealands and Mr Harding had been living together in a 'settled relationship' in England prior to the accident. He found that there were significant similarities with the case of *Edmunds v Simmonds*.[6]

[5] [2004] EWHC 1957 (QB).

[6] [2001] 1WLR 1003. In Edmunds, the claimant and defendant were friends and were on holiday together in Spain when the claimant was injured by the defendant's negligent driving. Both were English, the claimant returned to be cared for in England and she would suffer her losses in England. Garland J held that these were overwhelming factors leading to the application of English law under s 12.

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E. Court of Appeal

1. Applicable law

The Court of Appeal[7] unanimously[8] overturned the judge on the question of applicable law.

Waller LJ held that it was not intended that the general rule under section 11 should be displaced easily. This followed from what he had previously held in *Roerig v Valiant Trawlers Limited*.[9] It had to be shown that it was *substantially* more appropriate for English law to apply rather than NSW law.

At paragraph 20, Waller LJ said:

> I accept, accordingly, that this court should be very cautious in differing from the judge's evaluation made in this case. But even acting cautiously I simply cannot accept a conclusion that the defendant's link at the material time with England and with Mr Harding was far more significant than her Australian connection, or that the strongest factor favouring New South Wales was the fact that Ms Wealands was insured there. I would fully understand, having regard to the settled relationship, that Mr Harding and Ms Wealands were in, that if they had been on holiday in France when this accident occurred England might have been found to be substantially more appropriate and to have displaced French law. But where the general law, by virtue of s 11 being the law where the tort occurred, is also the national law of one of the parties, it will, I suggest, be very difficult to envisage circumstances that will render it substantially more appropriate that any issue could be tried by reference to some other law. In this case all that the judge relied on, as Mr Haddon Cave emphasised, was the parties' 'settled relationship', but however settled that relationship, Ms Wealands had left her car in New South Wales, was still a citizen of Australia driving on a New South Wales driving licence, and the accident occurred in New South Wales.

Although the point was re-argued in the House of Lords, they did not find it necessary to resolve the argument, and in this respect the reasoning of the Court of Appeal remains undisturbed. Therefore the approach of the Court of Appeal in both *Roerig* and *Harding* will still govern the application of section 12 of the 1995 Act.[10]

F. Substance or Procedure?

The Court of Appeal was not unanimous on the question of the division between substance and procedure.

The majority looked at the question from first principles. Arden LJ considered the question from a starting point of 'the damages principle' put forward (*obiter*) in *Roerig*, namely that 'matters concerning the quantification of damages are matters of procedure

[7] [2004] EWCA Civ 1735; [2005] 1 WLR 1539; [2005] 1 All ER 415.

[8] Waller, Arden LJJ and Sir William Aldous.

[9] [2002] 1 WLR 2304 (p 2310 F–G). In *Roerig* itself the accident took place on an English registered boat (therefore in England) and the tortfeasor was English. The deceased and his dependents were all Dutch and living in Holland. There were other factors connecting the tort to Holland, in that the deceased was under the supervision of a Dutch fishing master at the time of the accident and the fishing expedition was in every respect Dutch (embarking and disembarking in a Dutch port). These factors were insufficient to displace the general rule. Waller LJ said: 'Where the Defendant is English and the tort took place in England it cannot surely be said that it is substantially more appropriate for damages to be assessed by Dutch law simply because the Claimant or the deceased is Dutch.'

[10] Although in the light of House of Lords decision on the substance/procedure divide the importance of s 12 in the context of the assessment of damages in tort is much diminished.

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whereas matters relating to heads of damages are matters of substance'.[11] Sir William Aldous approached the problem more directly from the wording of the 1995 statute and in particular the meaning of the words 'procedural' and 'procedure' in section 14(3)(b) of the Act.[12]

Arden LJ's view was that there was no bright line between the concept of admissible heads of damage (treated by some of the House of Lords in *Boys v Chaplin* as crucial to establishing double actionability) and the assessment of damages under such heads. As Arden LJ pointed out, a cap on damages is not a legal category of damage, nor is it part of an evaluation process.[13] She took the view, on analysis, that there was nothing binding in *Boys v Chaplin* or other authority to prevent the court from approaching the present question afresh. Sir William Aldous took a similar approach.[14]

Arden LJ and Sir William Aldous therefore considered, from first principles, the proper scope of the rule that matters of procedure should be left for the law of the forum. Arden LJ held that the scope had to be found in the context of the 1995 Act. Reverting to the law of the forum should be the exception, not the rule.[15] The applicable law should be given effect to. The word 'procedure' should not be stretched or strained to cover issues which are not truly procedural.[16]

The majority were clearly influenced by developments in Australia. The High Court of Australia has considered the distinction between substance and procedure in a

[11] Para 47.

[12] Para 77 ff.

[13] Para 50:

'Certainly, the House of Lords in *Boys v Chaplin* proceeded on the basis that there was a distinction between "heads of damage" and the "assessment of damages", and that the former were matters of substance whereas the latter was procedural. However, the House did not have to, and did not, define those terms. The application of a cap is not a head of damage in the sense of legal category of damages. Nor does it involve in any real sense an "assessment" of damages, since no evaluation of damages is involved: the application of a cap is a mechanical exercise. Moreover, the statutory question posed by the 1995 Act is: are the provisions of MACA questions of procedure or substance? In my judgment, the answer to that question has to be found by examining the nature of those concepts, relative to damages, rather than simply through the prism of heads and measurement of damages.'

[14] Paras 86, 101, and 106:

'[…] there are passages in the speeches in *Boys v Chaplin* to support the view that, as far as damages are concerned, it is a question of substantive law whether a head of damages was recoverable, but quantification of the actual head is procedural. But that does not answer the crucial question in this case namely whether the restrictions upon the amount of damages are procedural. No doubt such restrictions affect the amount of damages and are therefore part of the quantification, but they are not part of the rules governing or regulating the mode of conduct of the court when assessing the damages.'

[15] Para 52:

'How then is the distinction between substance and procedure to be ascertained in any particular case? In my judgment, the first step is to have regard to the context . . . In the context of section 14, a principled approach requires the court to start from the position that it has already decided that the proper law of the tort is not the law of the forum, ie that some other law applies to the tort, either because it is the lex loci delicti or because it is substantially more appropriate than the lex loci delicti. On this basis, a reference to the law of the forum must be the exception, and it must be justified by some imperative which, relative to the imperative of applying the proper law, has priority.'

[16] Paras 103 and 105.

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number of cases including *Breavington v Godleman*,[17] *McKain v Miller*,[18] *Stevens v Head*[19] and *John Pfeiffer v Rogerson*.[20] Prior to *Pfeiffer,* the High Court of Australia had held that all matters relating to remedies were procedural in nature. Mason CJ, however, advocated a much narrower definition of procedure. In *Stevens v Head*, Mason CJ (dissenting) repeated what he had already said in *McKain*, namely that 'provisions or rules dealing with the measure of damages are substantive in nature' and that conflicts rules should operate in order to fulfil foreign rights.

In *Pfeiffer v Rogerson* the High Court of Australia departed from *Stevens v Head* and accepted Mason CJ's formulation of the distinction between substance and procedure. The majority (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) stated:

> [. . .] matters that affect the existence, extent 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, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain* 'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and all other provisions or rules are to be classified as substantive.[21]
>
> . . .
>
> laws that bear upon the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws.[22]

The majority of the Court of Appeal essentially adopted this approach and took the view that rules relating to the assessment of damages, which limit the damages recoverable, are substantive rules because they affect the substantive rights and obligations of the parties. The procedure of the forum needs to be applied in the assessment of damages if, but only if, there is no procedure for implementing the foreign substantive rule of assessment;[23] one should therefore characterize as procedural those rules which are directed to governing or regulating the mode or conduct of the court proceedings. All other provisions or rules are to be classified as substantive.

The statements to the contrary, by the majority of the High Court of Australia in *Stevens v Head*,[24] which were accepted by the Court of Appeal in *Roerig*, were flawed, according to Sir William Aldous, because they were concerned with the impact of the double actionability rule, and making it workable.[25]

The majority found support for their approach in *Dicey and Morris*, from the Law Commission and from the wording of the 1995 Act.[26] They also noted that their approach would discourage forum shopping.[27]

They concluded that the restrictions in MACA all had the effect of restricting damages and were therefore substantive.

Waller LJ dissented. He adhered to his view in *Roerig* that once the heads of damage have been established, all questions going to the assessment of damages were procedural.

[17] (1988) 169 CLR 41.
[18] (1991) 174 CLR 1, 24.
[19] (1993) 176 CLR 433.
[20] (2000) 203 CLR 503.
[21] ibid 543–4, para 99.
[22] ibid 544, para 102.
[23] Paras 57, 60, and 95. At para 60: 'In my judgment, when, in the context of conflicts of laws, the court says that a particular issue is one of procedure rather than substance (and under section 14 it is a question for the court), the court is really saying that it cannot, for whatever reason, apply the relevant foreign law to that issue.'
[24] [1992] 176 CLR 433.
[25] Para 102.
[26] Paras 86, 104, and 105.
[27] Paras 69 and 105.

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G. House of Lords

The House of Lords[28] allowed Mr Harding's appeal. They unanimously rejected the majority's reasoning in relation to the substance/procedure divide. The leading speeches in the House of Lords were delivered by Lords Hoffmann and Rodger.

The House of Lords accepted that the term 'procedure' might be ambiguous out of context.[29] In the context of the 1995 Act, however, they held that procedure had a meaning fixed by reference to the understanding of that term in private international law prior to 1995.

Lord Hoffmann's speech, in particular, considered older cases of private international law, predating the emergence of the 'double actionability rule' in 1870, such as *Huber v Steiner*[30] and *Don v Lippmann*.[31] From these early cases Lord Hoffmann derived an entrenched principle that in private international law all matters of remedy were for the courts of the forum.[32] He was of the view that this distinction had been recognized by the majority of the House of Lords in *Boys v Chaplin*. He expressed the view that, whilst rules as to heads of damage go to the actionability of the tort, rules as to the amount of damages relate solely to the remedy. In particular, Lord Hoffmann said in relation to the distinction between the cause of action and the remedy:[33]

> In applying this distinction to actions in tort, the courts have distinguished between the kind of damage which constitutes an actionable injury and the assessment of compensation (ie damages) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy.

[28] Lords Bingham, Woolf, Hoffmann, Rodger, and Carswell.

[29] Para 36, Per Lord Hoffmann:

'Of course, taken out of context, the word "procedure" is ambiguous. In its narrow and perhaps most usual sense it means, as La Forest J expressed it in *Tolofson v Jensen* [1994] 3 SCR 1022, 1072 those rules which "make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of *both* parties". Or it can have a wider meaning which embraces what Mason CJ in *Stevens v Head* (1993) 176 CLR 433, 445 called "the traditional equation drawn between matters relating to a remedy and matters of procedure". This is the sense it which the term has always been used in English private international law. If section 14 is read in its context, against the background of the existing rules of common law and the report of the Law Commission, there can be no doubt that the latter meaning was intended.'

[30] (1835) 2 Bing NC 202.

[31] (1837) 5 Claimant & Fin 1, HL (Sc).

[32] Interestingly, both *Huber v Steiner* and *Don v Lippmann* are contract cases. There does not appear to have been any tort case which considered, prior to the double actionability rule, whether matters relating to the assessment or quantification of damages should be regarded as being determined by the law of the forum. This may have been because in tort the English Court always applied English law.

[33] Para 24.

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Since the 1995 Act, by section 10, expressly only abolished the rule of double actionability, and therefore did not abolish this old rule of private international law, Lord Hoffmann therefore concluded that there remained a rule of private international law that matters pertaining to the remedy (including the amount of damages) were exclusively for the courts of the forum.

The House of Lords refused to countenance an updating construction of the phrase 'questions of procedure' in the 1995 Act, to reflect the change of approach adopted in Australia in *Pfeiffer,* and the approach in other jurisdictions. This was even though the 1995 Act had not defined procedure but had merely left it to be interpreted according to the common law. The quantification of damage was treated as a matter of procedure in 1995 when the Act was passed and would continue to be so treated until there was legislative intervention. As Lord Hoffmann said: 'the question was not what the law should be but what Parliament thought it was in 1995'.[34]

The House of Lords also held that the Australian decision of *John Pfeiffer v Rogerson* provided little guidance given that the High Court of Australia had abandoned the traditional rule that all matters of remedy were for the law of the forum as a result of constitutional imperatives of Australian federalism.[35]

Mr Harding had also relied on statements by the then Lord Chancellor during debate on the Bill in the House of Lords, in which Lord Mackay had referred to the distinction between heads of damage and assessment of damage surviving the passing of the Act.[36] Whilst a majority of the House of Lords in *Harding* held that this statement was not admissible as an aid to construction under the rule in *Pepper v Hart*[37] it was effectively adopted by all their Lordships.

Significantly, Lord Hoffmann also concluded, contrary to the view of the Law Commission and the editors of *Dicey & Morris,*[38] that statutory ceilings or caps in tort (as opposed to contract) cases were procedural. In his view the old shipping case of *Cope v Doherty*[39] (cited in *Dicey & Morris* in support of the contention that statutory caps in tort claims were prima facie substantive), when properly analysed, was a case where the limitation statute had been held to operate as if it imposed a contractual term limiting damages. It therefore was not authority for the proposition that caps were substantive in tort.[40]

As a result, statutory caps on damages imposed by the applicable law will be disregarded in tort claims. Lord Hoffmann did leave open the question whether rules which

[34] Para 51: 'There can however be no doubt about the general rule, stated by Lord Mackay in the House of Lords debate, that "issues relating to the quantum or measure of damages" are governed by the lex fori. And this was the rule which Parliament intended to preserve. Even if there appeared to be more logic in the principle in *Pfeiffer's* case (and *Dicey & Morris*, 13th edn (2000), p 172, supports Arden LJ on this point) the question is not what the law should be but what Parliament thought it was in 1995.'

[35] (2000) 203 CLR 503. With respect, this does not seem to be correct. Whilst the federal context was plainly a significant factor in the High Court of Australia deciding to adopt a choice of law rule based on the lex loci delicti for intra-national torts (pp 529–38), the reasoning in relation to the distinction between substance and procedure was not premised on any particularity of the Australian federal context (pp 542–4).

[36] *Hansard* HL vol 562 col 1419, 1421–2 (27 Mar 1995).

[37] [1993] AC 593.

[38] 14th edn (2006) at 7-040.

[39] 4 K&J 367; 2 De G & J 614.

[40] Para 46.

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provide for a conventional sum of money to be paid where liability is found to exist should be procedural or substantive.[41]

In summary, the position resulting from the decision of the House of Lords is that all matters relating to the quantum of damages, which do not go to the actionability[42] of tort, including the question of any caps, are governed by the law of the forum.

H. Observations

The House of Lords took a strict black letter law approach and expressly did not concern itself with whether the present law is satisfactory. The effect of the decision, however, is to widen significantly the application of the law of the forum and as such diminish the scope of the applicable law.

Moreover, focusing on the difference between rules which go to actionability (such as heads of damage) and rules which go to the amount of damages is, it is submitted, artificial. In particular, drawing a distinction between caps or restrictions which extinguish (or partially extinguish) the *right* to damages, and those which simply limit the *extent* of the right, has an air of unreality, is impossible to defend, and 'invites elusion by subtle legislative drafting'.[43] Also identifying whether foreign rules of law, with which the domestic court may be unfamiliar, go to actionability, as opposed to the amount of damages, may in practice cause difficulty.

The position in tort is also at odds with the position in contract. Article 10 of the Rome Convention (as enacted by the Contracts (Applicable Law) Act 1990) provides as follows:

> 1. The law applicable to a contract by virtue of Article 3 to 6 and 12 of this Convention shall govern in particular:
>
> . . .
>
> (c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law; . . .

This accords with the Court of Appeal's approach to the substance/procedure divide in *Harding*. In so far as there is a rule of law which governs assessment, which is not incapable of being applied by the procedure of the courts of the forum, it shall govern the assessment of damages.

Thus, in contract, rules of the applicable law relating to the assessment of damages must be applied within the limits of the powers conferred by English procedural law. Accordingly, if a patient brings a clinical negligence claim in contract against an overseas private hospital, and the contract is governed by a foreign law which imposes a cap on clinical negligence awards, the English court (as the court of the forum) must apply the foreign law to the assessment of damages, including the cap. It is difficult to see any reason why the result should be different if the claim is brought in tort.

The approach taken by the House of Lords is also out of step with the position taken in many other jurisdictions.[44]

[41] An example from English law is that a claim for a bereavement award under Fatal Accidents Act 1976 is fixed at £10,000.

[42] Such as heads of damage and foreseeability of damage.

[43] B Opeskin, 'Statutory Caps in Australian Conflict of Laws' (1993) 109 LQR 533, 537.

[44] eg Australia (see above); Canada, where the Supreme Court have also taken a narrow view

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The decision of the House of Lords will also encourage forum shopping, as appeared to be recognized by Lord Rodger.[45] A claimant is clearly going to sue where he or she is likely to recover more: English awards are some of the most generous in the world. This choice is clearly at the expense of the defendant. This is a particular problem in the absence of the doctrine of *forum non conveniens* in relation to claims falling under the Brussels–Lugano Regime, especially after *Owusu v Jackson*.[46]

The distinction between substance and procedure affirmed by the House of Lords may also lead to injustice. The House of Lords decision ignores the fact that there may be a link between liability and the level of damages. A system of law may well create strict liability whilst at the same time limiting the damages recoverable for breach of duty. Permitting separation of the rules of liability and limitation of damage breaks the linkage intended by the foreign law. A foreign workers' compensation statute might impose strict liability on the employer but at the same time restrict the compensation to which the employee is entitled, by, for example, imposing caps or restricting future loss by setting higher than normal discount rates. The price of strict liability is, effectively, restricted compensation. The policy and intention of such a statute is circumvented if a claimant suing in England can claim the benefit of strict liability but not pay the price of the restricted compensation. Such circumvention also runs contrary to comity, in that respect is not given to the policy of the forum where the wrong occurred.

The decision in *Harding* can also lead to injustice as between accident victims. Where the same law applies, there can be no good justification for two victims of the same accident to have their damages assessed according to different legal principles simply because of where the claim happens to be brought.

Finally, one result of applying English law to the assessment of damages may be that the defendant's insurance cover may be inadequate to meet a claim assessed in accordance with the English law of quantum, even though it would have been sufficient to cover any liabilities assessed in accordance with the applicable law.[47] For example, the minimum motor insurance required in the European Union is only €1m, which is more than sufficient for awards in most States. This, however, would be grossly inad-

of the meaning of procedure—*Tolofson v Jensen* [1995] 120 DLR 289, 317–22 (per La Forest J); United States, where the Restatement of the Law (Second) Conflict of Laws provides at §171 that 'the law selected by application of [the choice of law rule] determines the measure of damages' (the commentary makes clear that this includes caps); Germany, where the applicable law governs all matters relating to the assessment of damages—*Munchener Kommentar Zum Burgerlichen Geseztbuch* (2006) 2240–1, 2443 (Junker); *Palandt, Burgeliches Gesetzbuch* (2006) 2604, 2608. The Convention on the Law Applicable to Traffic Accidents 1971 should also be considered. Although the United Kingdom is not a signatory, many European countries are and apply its jurisdictional rules in relation to road traffic accident claims. Under Article 3, 'the applicable law is the internal law of the state where the accident occurred'; under Article 8, the applicable law determines liability, 'the existence and kinds of injury or damage which may have to be compensated' and the 'kinds and extent of damages'.

[45] Para 64: 'In Part III Parliament did not enact a comprehensive scheme and a number of exceptions. It simply provided that the law chosen in accordance with sections 11 and 12 is to be used to determine certain issues, while the law of the forum is to continue to be used to determine others. . . .This policy may be criticised as being liable to encourage forum shopping or on some other ground, but it is the policy of the legislature . . .'

[46] [2005] QB 801.

[47] *John Pfeiffer Pty Ltd v Rogerson* [2000] 203 CLR 536 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

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equate to cover English damages in respect of catastrophic injuries. The danger of inadequate cover, if all questions of assessment are regarded as procedural, and to be determined by the law of the forum rather than the applicable law, is vividly illustrated by *Hulse v Chambers*,[48] where there was insufficient cover under a Greek policy to meet a claim assessed in accordance with English law.

The impact of *Harding* may be short-lived, however. The European Commission's proposed Regulation on the law applicable to non-contractual obligations (Rome II) envisages that issues relating to the assessment of damages should be governed by the applicable law.

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II. REGRESSION AND REFORM IN THE LAW OF DOMICILE

In the United Kingdom the law pertaining to domicile has the rather dubious distinction that, although subjected to concerted criticism from commentators and law reformers alike for over half a century, it has largely remained unchanged.[1] Common law jurisdictions around the world have succeeded in passing legislation which, to varying degrees, has modernized the concept,[2] yet in Britain a series of initiatives have either failed to complete the legislative process or not even made it to Parliament.[3] The reason

[48] [2001] 1 WLR 2386.

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[1] The domicile of dependence of married women was abolished by the Domicile and Matrimonial Proceedings Act 1973, s1.

[2] (Australia) Domicile Act 1982, (Canada–Manitoba) Domicile and Habitual Residence Act 1983, (New Zealand) Domicile Act 1976, (South Africa) Domicile Act 1992.

[3] The initial attempt at reform stemmed from the first report of the Lord Chancellor's Standing Private International Law Committee, (Cmd 9068, 1954), which recommended, inter alia, the abolition of the revival of the domicile of origin and the creation of rebuttable presumptions as to a person's domicile. These were adopted in a private Members' Bill introduced in 1958 (Hansard HL vol 209 col 371, 15 May). The Bill stirred strong views but passed the House of Lords in three readings, only to lapse in the House of Commons due to the end of the parliamentary session. A watered-down successor was introduced in 1959 (Hansard HL vol 213 col 709, 22 Jan) and would have proceeded to the House of Commons, but was withdrawn by its sponsors who anticipated strong opposition, see: M Mann, 'The Domicile Bills' (1959) 8 ICLQ 457. The Private International Law Committee was instructed to reconsider the matter in the aftermath of the failure of the Bills and in 1963 a new report was issued (Cmnd 1955). This did not advance the debate; other than endorsing the approach put forward in the first report the Committee meekly noted that there could be an exception in any new regime for business men, although it acknowledged this would undermine the reform, or, there could be a separate fiscal domicile, but this would raise issues of great complexity. Whilst the report did not encourage the adoption of an independent domicile for married women, this issue and several matters relating to the domicile of children, were the subject of legislation in the Domicile and Matrimonial Proceedings Act 1973. Substantive reform was proposed again in 1985 with the publication of a joint consultation document by the Law Commissions (Working Paper No 88, Consultative Memorandum No 63) which notably called for a rebuttable presumption of acquisition of a domicile where there was seven years' habitual residence in a country as an adult. This was removed in the subsequent report and draft bill (Law Com No 168, Scot Law Com No 107) leaving recommendations that the concept of domicile of origin be abolished, an adult's existing domicile be retained until a new one was acquired and a presumption that a child be domiciled in the country with which he is most closely connected. The draft bill was however never taken forward, being formally abandoned almost nine years later (Hansard HC vol 269 cols 488–489w, 16 Jan 1996).

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