UNITED KINGDOM

AN AGE-OLD DILEMMA: IS IT TIME FOR A 'REVOLUTIONARY APPROACH'?*

A COMMENTARY ON *HARDING v. WEALANDS*

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I. Introduction

Characterisation, the bane of the private international lawyer, has once again reared its ugly head. Is the assessment of damages in tort cases a matter of substantive law, to be determined by the *lex causae*, or a matter of procedural law, to be determined by the *lex fori*? On the 5th July 2006, the British House of Lords delivered a significant judgment; the 'assessment'[1] or 'quantification'[2] of damages, including the possible application of statutory limitations, in tort cases is a matter of procedural law, and must thus be determined according to the *lex fori*, namely English law.[3] A fair and reasonable decision? It will be argued in this article that the House

* [2004] EWHC 1956, per Elias J. (§52).

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[1] This term was used in *Kohnke v. Karger* [1951] 2 KB 670 at 676.

[2] This term was used in *D'Almeida Araujo Lda v. Frederick Becker & Co Ltd* [1953] 2 QB 329 at 338; *Coupland v. Arabian Gulf Oil Co.* [1983] 1 WLR 1136 at 1149.

[3] The terms 'quantification' and 'assessment' will be used as synonyms in this article.

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of Lords has rendered a disappointingly reticent judgment in what can only be described as a result-orientated decision. Moreover, it will be argued that taking recent developments at EU level into account, this decision is not only disappointing, but could lead to a vast increase in forum shopping within an EU context.

Despite the heavy reliance on common law rules in the field of English private international law, the law of torts has been the subject of legislative scrutiny. A 1990 Joint Law Commission Report criticised the common law rules in the field of torts as being anomalous, unjust and uncertain.[4] The report concluded that reform of the choice of law rules in tort cases was desirable. Their recommendations, which sought to strike a balance between the certainty involved in the creation of a general rule coupled with the flexibility of allowing this rule to be displaced in certain situations, formed the basis of the Private International Law (Miscellaneous Provisions) Act 1995 (hereinafter 'the 1995 Act').[5]

II. The Facts of the Case

Ms. Wealands, an Australian citizen, and Mr. Harding, an Englishman, had formed a relationship when Mr. Harding had visited Australia in March 2001. On the 3rd February 2002, whilst driving on a dirt track in New South Wales, Ms. Wealands lost control of her Suzuki motorcar causing it to turn over. Mr. Harding, a passenger in the vehicle, suffered severe injuries, becoming a quadriplegic as a result of the accident. Ms. Wealands admitted that the accident was caused by reason of her negligence. The vehicle belonged to Ms. Wealands and she was insured with an Australian insurance company. Whilst in hospital in New South Wales, Ms. Wealands and Mr. Harding decided to get married. Ms. Wealands accompanied Mr. Harding back to the United Kingdom in March 2002, when he was repatriated for continued treatment and rehabilitation. Approximately one month after returning to the United Kingdom, their relationship fell apart. Ms. Wealands remained in England for a further six months before returning to Australia.

[4] Private International Law: Choice of law in tort and delict, English Law Commission Report No. 193 (1990) and Scottish Law Commission Report No. 129 (1990). See specifically, §2.6-2.9.

[5] Two special recommendations by the Law Commissions were, however, not followed. If adopted both of these provisions would have created a special UK proviso in cases were the torts were committed in the United Kingdom, as well as for defamation cases involving publication both inside and outside the United Kingdom.

III. Decision of the High Court, 27th May 2004

Since the defendant admitted liability in relation to the negligence, the main issue at stake during the proceedings at first instance was which law was to be applied to relation to the quantification of damages. The matter was of considerable significance due to a crucial limitation in the law of New South Wales, the law of the place of the accident and thus the *lex causae*. According to the New South Wales Motor Accidents Compensation Act 1999 (hereinafter 'the MACA 1999'), a number of restrictions were to be imposed in relation to the quantification of damages. Although seven such limitations were referred to, two of these limitations were of particular importance, namely an imposed ceiling on the amount that may be awarded for non-economic loss of AUS$309,000 (approximately □186,000, £125,000 or US$232,500)[6] and a discount rate for calculating the present value of future economic loss was prescribed at 5%.[7] It was submitted, on behalf of the claimant, that should New South Wales law be applied the claimant would receive approximately 30% less in damages than if English law was to be applied.[8]

In arguing that English law ought to apply, the claimant, Mr. Harding, made three principal submissions at first instance:

(1) English law ought to be applied to all aspects of the assessment of damages pursuant to section 12 of the 1995 Act;

(2) Even if the application of the law of New South Wales law under section 11 of the 1995 Act were not displaced by English law in terms of section 12, English law should apply to the quantification of the damages as a matter of procedure; and

(3) In any event, English law ought to be applied as application of the law of New South Wales would be contrary to English public policy.[9]

In finding for the claimant, Elias J. held that the assessment of damages was a matter of procedural law to be governed by English law, and that even if the assessment of damages was to be regarded as a matter of substantive law, section 11 should *in casu* be displaced by section 12 of the 1995 Act. In dealing with the procedural argument Elias J., referring to the British House of Lords decision *Boys v. Chaplin*,[10] the English High Court decision in *Hulse and others v. Chambers and*

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[6] Section 134, MACA 1999.

[7] Section 127, MACA 1999. Five others limitation were relevant for the proceedings at hand, namely those contained in sections 124, 125, 128, 130 and 137.

[8] [2004] EWHC 1957, §10.

[9] [2004] EWHC 1957, §§11 and 12.

[10] [2004] EWHC 1957, per Elias J. (§39-40) citing *Boys v. Chaplin* [1971] AC 356, per Lord Pearson.

another,[11] the High Court of Australia decision in *John Pfeiffer Pty Ltd v. Rogerson*,[12] the Ontario Court of Appeal decision in *Somers v. Fournier*,[13] and the English Court of Appeal in *Roerig v. Valiant Trawlers*,[14] noted that the precise distinction between substance and procedure is particularly elusive. Despite the defendant's claims that the relevant passages of the decision in *Roerig* were *obiter dicta*, Elias J. deemed himself bound by the Court of Appeal decision in *Roering*. As a result he applied English law to the preliminary issue as to the quantification of damages.[15]

IV. Decision of the Court of Appeal, 17th December 2004

Two issues were raised by Ms. Wealands on appeal. Firstly, whether Elias J. was correct to allow section 11 to be displaced by section 12 of the 1995 Act, and secondly whether for the purposes of section 14 of the 1995 Act the quantification of damages was a matter for procedural law. On the first issue, the Court of Appeal was unanimous and held that, in determining the applicable law, Elias J. was incorrect to allow section 11 to be displaced by section 12 of the 1995 Act.

However, in relation to the substance *v.* procedure issue, opinion in the Court of Appeal was divided. In agreeing with Elias J. and dissenting from the majority opinion, Waller L.J. endorsed the orthodox view that the assessment of the claimant's damages was a matter of procedure to be determined by the *lex fori*. Following his own judgment in *Roerig v. Valiant Trawlers Ltd*[16] and referring to the majority decision of the High Court of Australia in *Stevens v. Head*,[17] Waller L.J. held that although the heads of damages are to be regarded as substantive; the actual quantification of those damages is a procedural matter.

In delivering the majority decision, on the other hand, Arden L.J. and Sir William Aldous construed that English law should not apply to the quantification of damages since this was a matter of substance and not procedure. Arden L.J focusing on the question how in any particular case the distinction between substance and procedure is to be ascertained held,

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[11] [2001] 1 WLR 2386.

[12] [2000] 203 CLR 503.

[13] 214 DLR (4th) 611.

[14] [2002] EWCA Civ. 21.

[15] [2004] EWHC 1957, per Elias J. (§63).

[16] [2002] EWCA Civ. 21, per Waller L.J., Sedley L.J. and Simon Brown L.J.

[17] (1992) 176 C.L.R. 433, per Mason C.J. and Deane J.

> 'The meaning of substance and procedure for the purposes of section 14 of the 1995 Act must be sought in the context of the 1995 Act [...] 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, in that some other law applies to the tort.'

In searching within the context of section 14, Arden L.J. was prepared to follow the line adopted in the minority decision of Gaudron J. in the Australian case of *Stevens v. Head*, which was subsequently adhered to by a unanimous Australian High Court in *John Pfeiffer Pty Ltd v. Rogerson*.[18] Although she noted that these arguments have thus far been limited to intrastate tortious claims, and have not yet been applied to transnational situations, she unwaveringly gave effect to the 'guiding principle' that 'laws that bear on the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural', and furthermore adhered to the decision of Mason C.J. that 'rules which are directed at governing or regulating the mode or conduct of court proceedings are procedural and all other provisions or rules are to be classified as substantive.'[19]

Furthermore, according to the Law Commissions' Report accompanying the relevant legislative provisions which eventually became the Private International Law (Miscellaneous Provisions) Act 1995, the point of view was adopted that no implementing legislation was required with respect to the quantification of damages since all were agreed 'that a statutory ceiling on damages is a substantive issue for the applicable law in tort of delict rather than a procedural issue for the *lex fori*.'[20]

Agreeing with the arguments put forward in relation to the limitation of damages, Arden L.J. went on to discuss the problems that would be encountered in drawing distinctions between different sorts of quantification rules which would be substantive or procedural. She clearly regarded the provisions of the MACA 1999 as a package of measures which should be treated as such by the English court. Finally, having noted the tendency for forum shopping and the endemic developing compensation culture in society, Sir William Aldous concurred with Arden L.J. preferring to construe the word 'procedure' in its natural meaning, namely the 'mode or rules used to govern and regulate the conduct of the court's proceedings'.[21]

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[18] (2000) 203 C.L.R. 503, per Gleeson C.J, Gaudron J, McHugh J., Gummow J. and Hayne J.

[19] First held by Mason C.J. at first instance in *John Pfeiffer Pty Ltd v. Rogerson* and subsequently by Arden L.J. in [2004] EWCA Civ. 21 (§25).

[20] §3.39, Joint Law Commission Report. This approach has also been supported in COLLINS L. (ed.), *Dicey & Morris' Conflict of Laws*, London 2006, 14th ed., §7.038.

[21] [2005] 1 All ER 415, per Sir William Aldous (§86).

V. Decision of the House of Lords, 5th July 2006

Although both of the issues that had been referred to the Court of Appeal were appealed to the House of Lords, only the substance *v.* procedure issue was dealt with extensively. As Lord Hoffmann stated 'in the circumstances it is unnecessary to decide whether, if they [the rules of the MACA 1999] had been properly characterised as substantive, it was open to the Court of Appeal to reverse the judgment that it was substantially more appropriate to apply English law.' The House of Lords, brushing the division of opinion in the Court of Appeal to one side, delivered a unanimous decision, reversing the decision of the Court of Appeal and restoring the order of Elias J. Lord Hoffmann and Lord Rodger of Earlsferry handed down the main judgments, supplemented with a few extra comments from Lords Bingham of Cornhill, Woolf and Carswell.

Lord Hoffmann held that, although the judges in *Boys v. Chaplin* were divided on whether non-economic damage was to be governed by the *lex causae* or the *lex fori*, they were nonetheless unanimous in holding that the quantification of damages 'was a question of remedy or procedure'.[22] Upon this basis he subsequently turned his attention to whether the distinction between the heads of damage and the quantification of damage was affected by the implementation of Part III of the 1995 Act. He concluded, referring to the aims and scope of the 1995 Act, that this rule was left untouched by the enactment of the 1995 Act. In having seemingly clarified the distinction between heads of damage (to be governed by the *lex causae*) and the quantification of damages (to be governed by the *lex fori*), Lord Hoffmann went on to determine whether the provisions of the 1999 MACA were in fact to be regarded as falling under the heads of damage or the quantification of damages category. Referring to the High Court of Australia decision in *Stevens v. Head* and confining the decision in *John Pfeiffer Pty Ltd v. Rogerson* to torts committed in Australia (*i.e.* intrastate torts), Lord Hoffmann concluded that the limitation provisions of the 1999 MACA were indeed procedural in nature. In a revealing comment, Lord Hoffmann admitted that there may well be 'more logic' to the rule that a limitation imposed on the quantification of damages is to be determined according to the *lex causae*.[23]

Lord Rodger of Earlsferry support and furthering the arguments tendered by Lord Hoffmann also referred the fact that Part III of the 1995 Act was restricted to those areas covered by sec. 10 of the 1995 Act. Since the quantification of damages was never covered by the double actionability rule, this area of law was left unscathed by the enactment of Part III of the 1995 Act. Lord Rodger went on to discuss the decisions of the Australian and Canadian appellate courts and admitted that these decisions did appear to reshape the common law in this field. However,

[22] [2006] UKHL 32, per Lord Hoffmann (§30).

[23] [2006] UKHL 32, per Lord Hoffmann (§51).

in his view, there would appear to be no reason (in the absence of a federal constitution) to oblige the House of Lords to adopt such an approach.[24]

VI. Some Comparative Remarks

In The Netherlands, the existence and the nature of damages which are eligible to be requested, as well as the extent and manner in which damages are calculated are governed the law applicable to the tort.[25] Although no explicit mention has been made to the 'quantification of damages' as such, it can be presumed that a Dutch judge would regard such a question as falling within the broad scope of the applicable law, taking into account parliamentary intent.[26] According to Article 103(6) of the new Belgian Code of Private International Law a similar solution has been adopted with the respect to the calculation of the damages to be awarded.[27] In the explanatory notes accompanying the Code it is stated that these provisions have been adopted along similar lines to the current proposals for an EU Rome II Regulation, and as such should be interpreted broadly.[28] Similarly, in Switzerland[29] and

[24] [2006] UKHL 32, per Lord Rodger of Earlsferry (§69).

[25] Article 7(d), Private International Law (Torts) Act. A similar solution had also been adopted in The Netherlands in relation to traffic accidents prior to the ratification of the 1971 Hague Convention: Rb. Amsterdam 22nd June 1931, in: *Nederlandse Jurisprudentie* 1932, 325; Rb. Middelburg, 1st March 1939, in: *Nederlandse Jurisprudentie* 1939, 1030; Rb. Arnhem, 28th December 1942, in: *Nederlandse Jurisprudentie* 1943, 815. See further, VONKEN A.P.M.J., *Groene Serie. De onrechtmatige daad in het ipr.* Deel IX.3, note 33.8, Supplement April 2002.

[26] Kamerstukken II (Proceedings of the Second Chamber) 2000-2001, 26 608, nr. 3, p. 10 and Kammerstukken II (Proceedings of the Second Chamber) 2000-2001, 26 608, nr. 5, p. 15.

[27] This approach is consistent with the pre-Code case law. See, for example, a 1955 Cour de Cassation case in which Dutch law, as the lex causae, was applied to the manner and measure of the damages as a result of an accident that had occurred in The Netherlands with Belgian passengers. The limitation imposed by Dutch law on the recoverable damages was held not to be contrary to Belgian public policy: Cass., 17th May 1957, in: *Arr. Cass.* 1957, I, 778; *R.W.* 1957-58, 1093; *Pas.* 1957, I, 1111; *Rev. crit. dr. int. pr.* 1959, 339; *R.C.J.B.* 1957, 192; *R.G.A.R.* 1957, 6325.

[28] Belgian Senate, 2003-2004, nr. 3-27/7, p. 247.

[29] Article 142, Swiss Code of Private International Law. Although this article does not explicitly mention the measures of damages, it has been argued in Swiss literature that this list is not exhaustive and that the measure of damages is to be determined according to the lex causae. See further BUCHER A./BONOMI A., *Droit international privé*, 2nd ed., Basel (etc.) 2004, p. 304, §1124-1125 and DUTOIT B., *Droit international privé suisse. Commentaire de la loi fédérale du 18 décembre 1987*, 4th ed., Basel (etc.) 2005, p. 503-505.

France[30] the quantification of damages is also determined according to the *lex causae*.

When crossing the Atlantic, the approach in the United States of America is much more diffuse. Although at the turn of the twentieth century, the vast majority of States referred all conflict of law matters in the field of torts to the *lex loci delicti,* the public policy exception was an ever-present escape mechanism. Nonetheless, it was generally understood in a traditional sense and applied sparingly.[31] Yet the conversion of this restrictive exception into a broader policy analysis that permitted the court to 'displace' the *lex causae* with the *lex fori*,[32] presaged the so-called conflicts revolution. Currently only 10 of the 50 states still adhere to the *lex loci delicti* principle,[33] with the other states having opted for a variety of alternatives. In a law review article in 1992 in which P. Borchers surveyed more than 800 US conflicts decisions since the start of the conflicts revolution, he noted that although the 40 States not adhering to the *lex loci delicti* principle favoured a variety of alternative solutions, in terms of the result achieved they were almost indistinguishable from each other. In general these states tended to prefer the application of the *lex fori* when compared to the 10 states that still adhered to the *lex loci delicti* principle.[34] This trend is no more evident than with respect to the measurement of damages in tort cases, were these forty states refer to the *lex fori* in determining quantum.

Since the majority of case law in this field arises in relation to traffic accidents, it is also important to note that for seventeen European jurisdictions the Hague Convention of the 4th May 1971 on the Law Applicable to Traffic Accidents forms the relevant source of law.[35] According to Article 8(4) of this Convention,

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[30] For example, LOUSSOUARN Y., BOUREL P. and DE VAREILLES-SOMMIERES P., *Droit international privé,* 8th ed., Paris 2004, p. 554, §409(e).

[31] *Loucks v. Standard Oil Co.,* 120 N.E. 198 (N.Y. 1918).

[32] *Kilberg v. Northeast Airlines Inc.,* 9 NY2d 34, 172 NE2d 526, per Desmond C.J and *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). SCOLES E.F., HAY P., BORCHERS P.J. and SYMEONIDES S.C., *Conflict of Laws,* 3rd ed., St. Paul 2000, p. 700, §17.9 and CURRIE D.P., KAY H.H. and KRAMER L., *Conflict of Laws. Cases-Comments*, 6th ed., St. Paul 1999, p. 54-55.

[33] See, for example, *Kansas Court of Appeals, Raskin v. Allison*, Docket Number 88 409.

[34] P.J. BORCHERS, 'The choice-of-law revolution: An empirical study', in: *Washington & Lee Law Review* 1992), p. 357. The main three approaches adopted by the remaining 40 states can be divided between those followed B. Currie's governmental interest analysis approach, those following R. Leflar's choice-influencing approach, and those adopting the approach taken by the Second Conflicts Restatement.

[35] Austria (3rd June 1975), Belarus (15th June 1999), Belgium (3rd June 1975), Bosnia and Herzegovina (16th December 1975), Croatia (16th December 1975), Czech Republic (11th July 1976), France (3rd June 1975), Latvia (15th October 2000), Lithuania (24th March 2002), Luxembourg (13th December 1980), The Netherlands (20th December 1978), Poland (28th May 2002), Serbia (16th December 1975), Slovakia (11th July 1976), Slovenia (16th

the 'applicable law shall determine in particular [...] the kinds and extent of damages'.[36] The United Kingdom has, however, not ratified this Convention.

In noting the current patchwork of solutions across the United States of America and the ongoing discussion in Australia, the approach taken by the House of Lords is not necessarily attributable to a civil-common law dichotomy. Moreover, it would appear that the decision of the House of Lords tends to favour the more modern American approach, than the modern European and international approach. It must be regarded as a reiteration of an orthodox principle and is, at best, attributable to a continued desire to see the application of the *lex fori* and an accompanied unwillingness to broaden the scope of the subject matters covered by the applicable law.

VII. The Future Rome II Regulation and the Implications of a UK Opt-Out

At EU level, work has already commenced on the preparation of a Regulation on the law applicable to non-contractual obligations.[37] According to the European Parliament and Council proposal, the 'assessment of the damages in so far as this is prescribed by law' is to be governed by the rules laid down in Articles 4 to 11 of the Regulation.[38] This means that,

> 'Where no choice has been made under Article 4, the law applicable to a non-contractual obligation shall be the law of the country in which the damages arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.'[39]

December 1975), Spain (21st November 1987), Switzerland (2nd January 1987), FYR Macedonia (16th December 1975). Following the declaration of independence of Montenegro, and under Article 60 of the constitutional charter of the state union of Serbia and Montenegro, the Republic of Serbia is currently continuing international personality of the state union of Serbia and Montenegro.

[36] VONKEN A.P.M.J., *Praktijkreeks IPR*, Deel 17: Verkeersongevallen, Deventer 1996, p. 58-59, §128. For relevant literature on this convention see the bibliography on the website of the Hague Conference for Private International Law, <www.hcch.net>.

[37] For the latest version of the regulation, see COM (2006) 83 final.

[38] Proposed Article 12(e), COM (2006) 83 final.

[39] Proposed Article 12(e), COM (2006) 83 final. There are also two further subsections dedicated to the choice of law ladder in the field of torts, however these have no real role in the question at hand. They state that Article 4(2): 'However, where the person claimed to be liable and the person sustaining the damage both have their habitual residence

The similarity between the wording of Article 12(e), Rome II Regulation and that of Article 10(1)(c) of the 1980 Rome Convention is striking. According to Article 10(1)(c), Rome Convention the 'assessment of damages is governed in so far as it is governed by rules of law' according to the *lex loci contractus*. Article 10(1)(c), Rome Convention thus draws a distinction between those circumstances when the assessment of damages raises a question of fact and those when it raises a question of law;[40] only those questions of fact remain to be determined by the *lex fori*. North and Fawcett, for example, refer in this context to those cases where the calculation of damages is made by a jury.[41] It is thus clear that where a limitation is imposed by statute, the quantification of damages is to be determined according to the *lex loci contractus*.

Although the diversity of solutions in the European Union is highlighted in the explanatory notes,[42] the proposed Regulation adopts a single solution granting the applicable law a wide ambit. This wide ambit would mean that should the Rome II Regulation enter into force, and should the United Kingdom utilise its opt-in, the decision in *Harding v. Wealands* would be destined for the scrap heap. Should the United Kingdom instead decide to opt-out of the Rome II Regulation (despite the fact that it has unequivocally opted into the negotiations), the problems associated with reconciling Rome II, *Harding v. Wealands* and Brussels I would be serious. Bearing in mind the absence of a *forum non conveniens* provision in the Brussels I Regulation, the decision in *Harding v. Wealands*[43] coupled with a future Rome II Regulation (as currently proposed) not applicable in the United Kingdom would lead to an enormous discrepancy in the applicable law with respect to the quantification of damages in tort cases across the European Union. In those torts cases where both a British court and the court of another Member State (other than Denmark) were competent, claimants would be advised to first calculate the possible damages award according to English law and the *lex loci delicti* before com-

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in the same country when the damages occurs, the non-contractual obligation shall be governed by the law of that country' and Article 4(3): 'notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country may apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question. For the purpose of assessing the existence of a manifestly close connection with another country, account shall be take inter alia, of the expectations of the parties regarding the applicable law.'

[40] The same distinction is also evident in the proposed Article 11(1)(c), Rome I Regulation. See further COM (2005) 650 final.

[41] NORTH P.M. and FAWCETT J.J., *Cheshire and north's Private International Law*, 13th ed., London 1999, p. 598.

[42] COM (2003) 427 final, p. 23.

[43] In this sense, it is assumed that the House of Lords will not make a distinction between the private international law rules applicable in cases within the European Union and those cases were the torts was committed outside the European Union.

mencing proceedings. In doing so a claimant could maximise the possibility of receiving a higher damages award.

VIII. Conclusions

The justification for a substance *v.* procedure distinction lies, as J. Carruthers has so powerfully stated, in the search for convenience and justice.[44] As Lord Pearson stated in *Boys v. Chaplin*, 'the *lex fori* must regulate procedure because the court can only use its own procedure, having no power to adopt alien procedures. To some extent, at any rate, the *lex fori* must regulate remedies because the court can only give its own remedies, having no power to give alien remedies.'[45] With this in mind it is perplexing to argue that having already concluded that some foreign law is applicable in determining the existence of and subsequent liability for a tort, to then argue that a limitation in the award of damages is so alien to the court as to necessitate the application of the court's own procedural law. Procedural law is, after all, directed to governing or regulating the mode or conduct of court proceedings and to argue that the existence of a limitation in the measurement of damages is so inherent to the conduct of the court proceedings as to necessitate the application of the *lex fori*, is in this author's opinion far-fetched.

Although the decision of the House of Lords is securely founded on theoretical bases, the correct application of the doctrine of precedent and a keen eye for the practical applications of the decision, it is disappointing that it did not take this opportunity to make new-headway in this field. Although the House of Lords claims to base its decision on the substance *v.* procedure distinction, closer examination of the case illustrates that this is merely a smokescreen. Even though the Court of Appeal could be criticised for not strictly adhering to the doctrine of precedent,[46] such a criticism could not be levied at the House of Lords had they chosen to uphold the Court of Appeal's decision.

It is thus disappointing that the House of Lords has failed to take any of the abovementioned future implications of this decision into account when unanimously rejecting the forceful majority of the Court of Appeal. In allowing the quantification of damages in tort cases, including the limitation of such damages awards, to be governed by the *lex fori*, the House of Lords has paved the way for an increase in forum shopping by claimants in transnational cases connected to the United Kingdom. One could argue that this is surely only in the victim's best inter-

[44] CARRUTHERS J.M., 'The substance and procedure in the conflict of laws: a continuing debate in relation to damages', in: *International Comparative Law Quarterly* 2004, p. 691-711.

[45] [1971] AC 356.

[46] ROGERSON P., 'Conflict of laws – tort – quantification of damages – substance or procedure?', in: *Cambridge Law Journal* 2005, p. 305-307.

ests, but is this really the case? Any increase in forum shopping will ultimately be borne by insurance companies, which in turn will no doubt pass on this cost by raising insurance premiums. As a result, any increase in damages awards for individual victims will ultimately be borne by all premium payers. Furthermore, the adherence by the English courts to the *lex loci delicti* in determining the substantive law issues in relation to the tort, will allow an English court to follow the imposition of strict liability for certain acts,[47] as is the case in many continental European jurisdictions, and subsequently apply English law with respect to the quantification of damages, which will often avoid the imposition of ceilings in damages awards. The inherent correlation between the limitation of damages and the level of liability will thus be lost. In short, the House of Lords has failed to take this opportunity to breathe new life into this area of law.

[47] For example in The Netherlands (Art. 185, Wegenverkeerswet / Road Traffic Act), Belgium (Article 29bis, Wet van 21 november 1989 betreffende de verplichte aansprakelijkheidsverzekering inzake motorrijtuigen of de W.A.M.-Wet / Act of 21st November 1989 concerning the compulsory strict liability concerning motor vehicles), France (Articles 1-8, Loi du 5 juillet 1985 sur les accidents de la circulation ou la loi badinter / Act of 5th July 1985 on traffic accidents) and Germany (Articles 7 and 8, Straßen- und Wegegesetz / Act on Streets and Roads).