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for this but, given that only 53% of those who declined the opportunity to make a statement were similarly content with their decision at the same point in the process,²⁸ it seems fair to say that victims, those whom the scheme was designed to benefit, had gained from being offered the chance. Even a majority of respondents who described making the statement as upsetting (20/34) found that, overall, going through that process made them feel better.²⁹ Again, the evidence from the evaluation indicates that victims want primarily to be kept informed rather than to influence the outcome of the case.³⁰ Accordingly, if victim statements only cause a small ripple in the waters of fairness to the accused, rather than the expected tidal wave, and if, at the same time, they increase, even minimally, victim satisfaction with the criminal process, there are clear benefits in rolling the scheme out nationwide. The evaluation's authors are to be commended for a balanced piece of research on which such a conclusion could be based. The Scottish Government is still considering their findings and has not yet determined whether the scheme should be extended or not.³¹

Claire McDiarmid
University of Strathclyde

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Classification of Delictual Damages – *Harding v Wealands* and the Rome II Regulation

In Scottish – or English or Northern Irish – private international law, damages have traditionally been regarded as a mixture of substance and of procedure.¹ Although it is difficult to draw a dividing line, it has generally been agreed that the heads of damage are an issue of substance and should be governed by the *lex causae*, while the quantification of damages is an issue of procedure and should be decided according to the *lex fori*.² However, the division between substance and procedure is not clear-cut. Whether ceilings on damage awards are covered under the “heads of damage” or the “quantification of damages” is particularly controversial. These issues have been examined in a number of recent English cases.³ The latest decision, by the House of Lords in *Harding v Wealands*,⁴ might have been expected to be the last word.

²⁸ Para 6.65; table 6.27.

²⁹ Para 6.48.

³⁰ Para 6.79.

³¹ <http://www.scotland.gov.uk/Topics/Justice/criminal/18244/17068/7188>

¹ *McElroy v McAllister* 1949 SC 110 at 133 per Lord Keith; *Boys v Chaplin* [1971] AC 356 at 379 per Lord Hodson.

² *Dicey, Morris and Collins: Conflict of Laws*, 14th edn, by L Collins et al (2006) paras 7-035, 35-053.

³ *Edmunds v Simmonds* [2001] 1 WLR 1003; *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304; *Hulse v Chambers* [2001] 1 WLR 2386.

⁴ [2006] UKHL 32, [2007] 2 AC 1.

However, despite the high status and careful exposition of a unanimous decision, its importance is greatly limited by new European legislation. Contrary to the existing Scottish (English) rules, the Rome II Regulation provides that the assessment of damages or remedy claimed is governed by the *lex causae*.⁵

A. *HARDING v WEALANDS*

(1) The facts

In *Harding v Wealands*, the claimant, Mr Harding, an Englishman, was rendered tetraplegic following an accident in New South Wales caused by the defendant, Ms Wealands, an Australian national. Mr Harding brought an action in England and Ms Wealands conceded liability. Under the law of New South Wales, the Motor Accidents Compensation Act 1999 imposes a restriction on the damages for injuries suffered in motor accidents. There is no such restriction in English law. It was unanimously agreed in the Court of Appeal,⁶ and not questioned in the House of Lords, that the applicable law on the substance was the law of New South Wales. In the Court of Appeal the question came down to the classification of assessment of delictual damages. If this was classified as a question of substance, the law of New South Wales law applied, to the advantage of the defendant; if it was classified as procedure, English law applied, to the advantage of the claimant. A majority of the Court of Appeal decided that assessment of damages was an issue of substance. The House of Lords unanimously held that assessment of damages is procedural, that a cap on damages is an issue of assessment of damages, and therefore that English law applies to that issue as the *lex fori*.

(2) The issues

In delivering the leading speech, Lord Hoffmann considered the old choice of law cases, and concluded that the traditional rule regarded matters of remedy as procedure which is governed by the *lex fori*.⁷ This common law approach had not been affected by part III of the Private International Law (Miscellaneous Provisions) Act 1995.⁸ Lord Hoffmann then concluded that statutory ceilings on damages are matters of procedure rather than substance.⁹ Although a report by the Law Commissions on *Choice of Law in Tort and Delict* had stated that “a statutory ceiling on damages is a substantive issue for the applicable law in tort or delict rather than a

5 Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II). OJ 2007 L199/40, art 15(c).

6 [2005] 1 All ER 415.

7 [2007] 2 AC 1 at para 24.

8 Paras 31-38. See the similar reasoning of Lord Rodger at paras 62-69. Only Lord Carswell, at paras 79-83, felt it necessary to rely on a statement to this effect in the House of Lords during the passage of the Act by Lord Mackay of Clashfern, then Lord Chancellor.

9 Paras 39-53. On the question of whether a cap on damages is a matter of procedure Lord Woolf (para 10) conceded that the answer was not “obvious”, while Lord Hoffmann (para 51) hinted that it might not be the best result but that his job was to preserve the common law rule that “Parliament intended to preserve” by the 1995 Act.

procedural issue for the *lex fori*”,¹⁰ Lord Hoffmann saw this as inconsistent with the view in the same report that no changes should be brought to the common law rules on the question of damages.¹¹ Since the common law classifies all matters relating to remedies as procedure, this basic principle should apply.

The House of Lords’ reasoning is controversial. The substance-procedure line in the common law is ambiguous and unclear. As Lord Pearson said in *Boys v Chaplin*, “I do not think there is any exact and authoritative definition of the boundary between substantive law and procedural (or adjectival or non-substantive) law”.¹² There is no doubt that in the 1995 Act Parliament intended assessment of damages to continue to be classified as procedure. However, there is nothing in Lord Mackay’s statement, or elsewhere in the *travaux préparatoires*, to indicate that caps on damages fell within assessment of damages. Hence the Law Commissions’ statement – following on from Dicey’s view that “statutory provisions limiting a defendant’s liability are prima facie substantive; but the true construction of the statute may negative this view”¹³ – creates a strong case for believing that Parliament would have thought that caps on damages were classified as substance.

(3) The effects

In adopting a wide definition of procedure, the House of Lords employed a strict reading both of the legislative text and of the pre-1995 common law. Even if *Harding* is correct in law, the appropriateness of this broad classification of procedure seems questionable as a matter of policy.

First of all, it may not be fair to apply different laws to the existence of liability and to the remedy. If a cause of action is unknown in Scotland but exists in the *lex causae*, it is hard to use Scots law to assess damages.¹⁴ In other cases, the *lex causae* may adopt strict liability but at the same time introduces a limitation to the remedy in order to provide a reasonable balance,¹⁵ while in the *lex fori* liability may be based on negligence or even fault, with higher damages being awarded to reflect the higher level of wrongdoing. It is unfair for the defender to be subject both to the strict liability of the *lex causae* and to the higher damages of the *lex fori*.

Secondly, it may be argued that the rule fails to observe the function of the applicable law and the *lex fori*.¹⁶ The main rationale for classifying an issue as

10 Law Commission and Scottish Law Commission, Report on *Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, Scot Law Com No 129, 1990) para 3.39. See also Dicey and Morris, *Conflict of Laws*, 13th edn, by L Collins et al (2000) para 35-055.

11 Report on *Private International Law* para 3.38.

12 [1971] AC 356 at 395.

13 This first appeared in the 7th edition of Dicey’s *Conflict of Laws* (ed J H C Morns, 1958) 1092, and was still in the editions which were current at the time of the Law Commissions’ Report (11th edn, by L Collins et al (1987) 188) and of the 1995 Act (12th edn, by L Collins et al (1993) 154). Lord Hoffmann does a careful job of analysing the cases on which the proposition in Dicey was based and concludes (paras 42-48) that it “was too widely stated” and had no application to tort rather than contract damages.

14 Dicey, Morris & Collins (n 2) para 35-056.

15 C Dougherty and L Wyles, “*Harding v Wealands*” (2007) 56 ICLQ 443 at 452.

16 P Rogerson, “Quantification of damages – substance or procedure?” (2006) 65 CLJ 515 at 516-517.

procedure, thus bringing in the *lex fori*, is convenience.¹⁷ However, there is no reason why applying the foreign law to assess damages should cause more inconvenience than applying the foreign law to decide whether a tort is actionable in the first place.¹⁸

Thirdly, it is doubtful whether this classification is up-to-date or whether it is compatible with the current practice in the world¹⁹ or in other areas of Scots law. The Rome Convention, which has been implemented by the Contracts (Applicable Law) Act 1990, provides that the assessment of damages, insofar as governed by rules of law, is governed by the *lex causae*.²⁰ This ambiguous provision separates the assessment of damages into two categories, namely the rules of law and the questions of fact. The first category, which surely covers statutory restrictions on damages, is classified as substance and governed by the *lex causae*.²¹

Fourthly, the inclusion of statutory restrictions on damages as procedure makes the scope of procedure unreasonably wide. The classification can be seen as a parochial device to limit the effects of the *lex causae* by extending the application of the *lex fori*,²² when, as Anton notes, “the constant aim of the Scottish courts should be to restrict” the domain of procedure. “To classify a foreign rule as procedural is to except it from its normal application in Scotland and, on general principles, exceptions are to be strictly interpreted.”²³

Fifthly, the current approach may open the door for forum shopping, especially when discretion to decline jurisdiction has been largely barred by the European jurisdiction system.²⁴

B. ROME II REGULATION

About twelve months after the decision in *Harding v Wealands*, the Rome II Regulation was adopted by the Council of the European Union and approved by the

17 See Anton's test of applying the foreign rules unless it is “impracticable” to do so within the terms of Scottish procedures: see *Private International Law*, 1st edn (1967) 542. See also *Roerig v Valiant Tractors Ltd* [2002] 1 WLR 2304 at para 26 per Waller LJ; J Carruthers, “Substance and procedure in the conflict of laws: a continuing debate in relation to damages” (2004) 53 ICLQ 691 at 692; C M V Clarkson and J Hill, *The Conflict of Laws*, 3rd edn (2006) 470.

18 Lord Woolf points out in *Harding* (para 11) that the New South Wales Act has “provisions which it would be very difficult, if not impossible, to apply in proceedings brought in this country”.

19 See the shifts away from the traditional English approach on treating assessment of damages as procedural in Canada and Australia, acknowledged by Lord Rodger in *Harding* (para 69) as “ammunition, or food for thought, for critics of the policy adopted by Parliament in the 1995 Act”.

20 Art 10(1)(c).

21 M Giuliano and P Lagarde, Report on the *Convention on the law applicable to contractual obligations*, OJ 1980 C282, 33; *Dickey, Morris & Collins* (n 2) para 32-301; *Cheshire and North: Private International Law*, 13th edn, by P M North and J J Fawcett (1999) 88; Clarkson & Hill, *Conflict of Laws* (n 17) 469-470; Dougherty & Wyles (n 15) at 451.

22 G Panagopoulos, “Substance and procedure in private international law” (2005) 1 *Journal of Private International Law* 69 at 71.

23 A E Anton, *Private International Law*, 1st edn (1967) 542. In stark contrast to the tendency in England to give a broad construction to procedure: see Panagopoulos (n 22) at 71.

24 See Panagopoulos (n 22) at 71; *Harding v Wealands* [2007] 2 AC 1 at para 64 per Lord Rodger; Case C-128/01 *Owusu v Jackson* [2005] ECR I-1383.

European Parliament.²⁵ It will apply from 11 January 2009, replacing the national choice of law rules in non-contractual obligations which fall within its scope. Like the traditional Scottish (and English) rules, the Rome II Regulation divides substance and procedure, and leaves the issue of procedure to the law of the forum.²⁶ However, it further provides that “the existence, the nature and the assessment of damages or remedy claimed” should be governed by the *lex causae*.²⁷ No guidance is provided as to what constitutes “the assessment of damages or remedy claimed”, but the words used are wide enough to cover all matters relating to damages, including what have been traditionally classified as procedural issues in Scotland. Under the Rome II Regulation the issue of damages is no longer a mixture of substance and procedure, but a unitary package, which is classified as “substance” and governed by the *lex causae*. As a result, the importance of *Harding v Wealands* has been greatly limited.

(1) Observations on the Rome II classification

The Rome II Regulation overturns the highly controversial rules in the UK. By classifying all matters relating to damages as substantive, it adopts a narrow definition of “procedure”, which is compatible with the practice in most of continental Europe. As already mentioned, it is not the best solution to classify assessment of damages as procedure. In addition, there are both theoretical and pragmatic reasons to classify remedies as substance. First of all, the remedy is an inseparable part of the right.²⁸ The restriction of assessment of damages can be regarded as a restriction of the right itself.

Secondly, applying the *lex causae* to both the heads and the assessment of damages is more desirable for the purposes of private international law. The function of choice of law is to select a law that is “most appropriate” to decide a dispute. The *lex causae* should have a wide scope of application and only in exceptional circumstances should its effect be declined. While the *lex fori* is often an “appropriate” system of law to govern a dispute, this is not always the case because exorbitant rules of jurisdiction still exist and because an acceptable basis of jurisdiction, such as the defender’s domicile, is not usually as appropriate a law to govern a delictual dispute as the law of the place of damage (the main rule in article 4 of Rome II).

Thirdly, the unitary solution provided by the Rome II Regulation avoids the vexed issue of how to draw a line between substance and procedure within damages. In most cases the lines between the heads of damage, the remoteness of damage, and the assessment of damage are vague. There are a number of borderline issues in addition to ceilings and floors of damages.

²⁵ n 5.

²⁶ Art 1(3).

²⁷ Art 15(c).

²⁸ Panagopoulos (n 22) at 77.

(2) Some problems

Although the Rome II Regulation brings simplicity and clarity into a traditionally vexed area, certain new problems are also created. One of the reasons that the UK Parliament classified the assessment of damages as procedure and applied the *lex fori* was to avoid excessive awards of damages. In the debate on the 1995 Act, the Lord Chancellor, Lord Mackay of Clashfern, warned against bringing “American scales of compensation into English courts”.²⁹ The *lex causae* may award punitive damages or even just levels of damages classified as compensatory but at excessively high levels by Scottish standards. By classifying assessment of damages as a matter of substance, the Rome II Regulation creates the possibility that Scottish courts will have to make extremely high damages awards when applying certain foreign laws. The difference between two legal systems on the assessment of damages will not be considered excessive or unendurable in most cases. However, when this difference is so extreme that it would be contrary to the fundamental policy or public interest of the forum, the forum should be able to find a way to reduce the level of damages awarded to a level consistent with its public policy.

The public policy exception in the Rome II Regulation has to be read in the light of recital 32. It provides that:

the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

This recital is drafted in a way that seeks to avoid the European Court of Justice giving a uniform interpretation of when excessive damages are contrary to public policy by saying that the issue is not only case-specific but also varies depending on the “legal order of the Member State of the court seised”. Part of the sensitivity here is that several legal systems in the EU award exemplary or punitive damages in certain cases. Thus it was unacceptable to categorise all exemplary or punitive damages as contrary to public policy but only “excessive” damages in those categories. A telling omission from the recital is the idea that public policy could be used to reduce damages awards that are compensatory under the *lex causae* but excessively beyond the amount that the *lex fori* would regard as necessary to compensate the victim. This might lead courts to classify the part of a damages award they believe to be excessive as exemplary or punitive even though it would be classified as compensatory by the *lex causae*. This is an unfortunate temptation to keep playing the classification game.

Another problem with applying the *lex causae* to assessment of damages is that the awards might be much lower than under the *lex fori*. This might result in those living in the forum receiving inadequate compensation because the higher costs in that jurisdiction are not anticipated by the applicable law.³⁰ The European Parliament,

²⁹ Quoted in *Harding v Wealands* [2007] 2 AC 1 at para 37.

³⁰ Lord Rodger highlights this problem in *Harding v Wealands* [2007] 2 AC 1 at para 70.

concerned about this problem in the context of traffic accidents, introduced recital 33 providing as follows:

According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.³¹

The problem with this recital is that it does not link to any substantive provision of the Regulation. It attempts to say what national substantive law should do, whereas the Regulation only helps to determine which law applies to the dispute and not what the content of that law should be.

(3) Some exceptions

The Rome II Regulation provides a different classification for the assessment of damages than the prior Scots law. However, some non-contractual obligations, notably defamation and other privacy-related delicts, are excluded,³² and the *Harding* classification will continue to apply. This means that, while the assessment of damages will be classified as substance and governed by the applicable law in most delictual cases, such as traffic accidents, product liability, and environmental damages, in cases such as defamation the assessment of damages will continue to be classified as procedure. It is doubtful whether such mixed and inconsistent rules are appropriate in the future, and the UK legislatures should think carefully about the best solution in areas outside the scope of Rome II when repealing part III of the 1995 Act. However, the political lobby that ensured defamation was outwith the scope of Rome II is likely to prevent the extension of the Rome II rules by UK legislation.

*Paul Beaumont and Zheng Tang
University of Aberdeen*

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The Scottish Parliament Elections 2007 – what kind of hackery is this?*

To put electoral law at the front and centre of popular discourse is no mean feat, and rarely bodes well. Before polls closed across Scotland on 3 May 2007,

³¹ The Commission made a Statement at OJ 2007 L199/49 that it will make a study, to be submitted to the European Parliament and Council before the end of 2008, on “the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence”. This study will take account of the variation in levels of compensation awarded to victims of road traffic accidents in different Member States and will pave the way for a Green Paper.

³² By art 1(2).

* Thanks and apologies to Amy Winehouse for the subtitle.