HOUSE OF LORDS SESSION 2005–06
**[2006] UKHL 32**

*on appeal from[2004] EWCA Civ 1735*

# OPINIONS

# OF THE LORDS OF APPEAL

# FOR JUDGMENT IN THE CAUSE

**Harding (Appellant)**
***v.***
**Wealands (Respondent)**

**Appellate Committee**

Lord Bingham of Cornhill
Lord Woolf
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Carswell

**Counsel**

*Appellants*:
Charles Haddon-Cave QC
Michael McParland
(Instructed by Stewarts)

*Respondents*:
Howard Palmer QC
Charles Dougherty
(Instructed by Kennedys)

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ON
WEDNESDAY 5 JULY 2006

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE**

**Harding (Appellant) *v.* Wealands (Respondent)**

**[2006] UKHL 32**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. I am in full agreement with the opinions of my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry, which I have had the advantage of reading in draft. For the reasons which they give, I also would allow the appeal and restore the order of Elias J.

**LORD WOOLF**

My Lords,

2. I am able to confine my opinion to a single issue because I agree with the opinions of Lord Hoffmann and Lord Rodger of Earlsferry which I have read in draft.

3. I have also had the advantage of reading the opinion of Lord Carswell in draft. While Lord Carswell agrees with Lord Hoffmann's and Lord Rodger's "reasons" and "conclusions", he does so subject to "one slight qualification" (paragraph 79).

4. Lord Carswell makes his qualification because of his understanding of what is the natural meaning of the word "procedure" (paragraph 83). As to this, Lord Carswell is in agreement with the judgments of Arden LJ and Sir William Aldous in the Court of Appeal. Arden LJ accepted that "damages are not naturally regarded as

procedure" (paragraph 58) and Sir William suggests that the natural meaning of "procedure" is "the mode or rules used to govern and regulate the conduct of the court's proceedings" (paragraph 86). Lord Carswell adds, however, that in the field of private international law the word "procedure" has a "special meaning" which is wider than that which might be regarded as "natural".

5. Lord Carswell, having adopted this approach to the natural meaning of procedure, treats the "special meaning" as justifying reliance on *Pepper v Hart* [1993] AC 593 to resolve the significant issue of construction at the heart of this appeal.

6. I am in agreement with Lord Carswell that, if it is necessary to rely on *Pepper v Hart* to decide the meaning of "procedure" in section 14(3) (b) of the Private International Law (Miscellaneous Provisions) Act 1995, the evidence of what was said in Parliament by the then Lord Chancellor conclusively resolves this issue in the Appellant's favour. Lord Carswell rightly points out that this is an outstanding example of a case where the evidence as to what was said during the passage of the legislation through the Parliamentary process makes it abundantly clear that it was the intention of Parliament by enacting section 14(3)(b) that the law of this country and not that of New South Wales is to be applied by the courts of this jurisdiction to the calculation of the Appellant's damages. This is despite the fact that the Appellant's accident occurred and his injuries were caused as the result of negligence of the Respondent in New South Wales.

7. However, I unfortunately differ from Lord Carswell as to his reasoning for relying on *Pepper v Hart*. The word "procedure" is frequently used in contrast to "substance" in order to distinguish between questions of procedural law and substantive law. Thus, unsurprisingly it is used together with the word "practice" in this context in section 1 and Schedule 1 of the Civil Procedure Act 1997 to identify the scope of the Civil Procedure Rules. The scope of the language is wide enough to encompass the contents of a civil procedure code which deals with evidence and remedies.

8. In determining the meaning of the word "procedure" the context in which the word is being used is of the greatest significance. In section 14(3) (b) "procedure" is used in conjunction with "rules of evidence, pleading or practice". In that context it is natural to regard the

assessment of damages as being a matter of procedure rather than substance.

9. The fact that the present context is one in the field of conflicts of law does not mean that "procedure" is being used in a special sense rather than in the sense in which you would expect it to be used having regard to the context in which it appears. It makes good practical sense to draw a distinction between the treatment of questions of procedure and questions of substance; the former to be dealt, as you would expect in accordance with the procedure normally applied by the court in which the proceedings are brought.

10. This does not however mean that a cap on the amount of damages is obviously a question of procedure rather than a question of substance and if I had been left in doubt as to the correct answer I would certainly have been prepared to apply *Pepper v Hart.*

11. The limits on the amount of damages on which the Respondent seeks to rely are contained in the Motor Accidents Compensation Act 1999 of New South Wales. That Act contains in Chapters 3, 4, 5 and 6 a detailed statutory procedural code containing the machinery for recovering compensation for motor accident injuries, including the way damages are to be assessed. The code is clearly one that has provisions which it would be very difficult, if not impossible, to apply in proceedings brought in this country, even though they may be capable of being applied in other parts of Australia. To have different parts of that code dealt with by different systems of law would not be an attractive result and in some cases this would produce an impractical result. (See for example s.132 which requires, in the case of a dispute over non economic loss, for the degree of impairment to be assessed by a medical assessor in New South Wales.) The greater part of the code is clearly procedural and those parts which could be arguably regarded as substantive should be treated as being procedural as well.

12. For these reasons, as well as those given by Lord Hoffmann and Lord Rodger, I would allow this appeal and restore the judgment of Elias J.

**LORD HOFFMANN**

My Lords,

13. The issue is whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to the applicable law selected in accordance with Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (hereafter "Part III") or whether it is a question of procedure which falls to be determined in accordance with English law. The Court of Appeal, by a majority (Arden LJ and Sir William Aldous, Waller LJ dissenting) held that it should be determined in accordance with the applicable law, which they decided was the law of New South Wales. In my opinion the dissenting opinion of Waller LJ was correct and the question is one of procedure governed by the law of the forum. I also agree with the speech to be delivered by my noble and learned friend Lord Rodger of Earlsferry, which I have had the advantage of reading in draft.

14. The accident happened on 3 February 2002 on a dirt track near Huskisson in New South Wales, when the respondent Ms Wealand lost control of the vehicle she was driving and it turned over. Negligence is admitted. The appellant Mr Harding, who was a passenger, was severely injured and is now tetraplegic. Mr Harding is English and Ms Wealand Australian. They had formed a relationship when Mr Harding visited Australia in March 2001 and in consequence Ms Wealand had come to England in June 2001 to live with Mr Harding. At the time of the accident they had gone together to Australia for a holiday and a visit to Ms Wealand's parents. The vehicle belonged to Ms Wealand and she was insured with an Australian insurance company. After the accident, Mr Harding and Ms Weal and returned to England.

15. The action was tried by Elias J, who applied English law to the assessment of damages for two reasons. First, because the assessment of damages was a matter of procedure governed by the *lex fori* and secondly, because even if it was a matter of substantive law, it was in this case "substantially more appropriate" to apply English law: see section 12 of Part III. The Court of Appeal, as I have said, allowed the appeal on the first point by a majority and allowed it unanimously on the second. I shall first address the question of substance and procedure.

16. Personal injury caused by negligence is an actionable wrong in Australian common law. In New South Wales, common law liability for transport accidents was briefly abolished by the Transport Accidents Compensation Act 1987 (NSW) and a statutory scheme of compensation substituted but the Motor Accidents Act 1988 (NSW) repealed the 1987 Act and section 6 reinstated the common law:

> "The law relating to a right to or a claim for damages or compensation or any other benefit (pecuniary or non-pecuniary) against any person for or in respect of the death of or bodily injury to a person caused by or arising out of a transport accident…shall be as if the [1987 Act] had not been passed and the common law and the enacted law (except that Act) shall have effect accordingly."

17. The 1988 Act did however contain detailed provisions concerning awards of damages for injuries suffered in motor accidents. These have been replaced by Chapter 5 of the Motor Accidents Compensation Act 1999 (hereafter "MACA"), which was in force at the time of the accident. Section 123 provides that "a court cannot award damages to a person in respect of a motor accident contrary to this Chapter." The provisions of Chapter 5 which would have been relevant to an award of damages by a court in New South Wales are:

(a) The maximum recoverable for non-economic loss (pain and suffering, loss of amenities of life, loss of expectation of life, disfigurement) is A$309,000 subject to indexation (section 134);
(b) In assessing loss of earnings, an excess of net weekly earnings over A$2500 must be disregarded (section 125);
(c) There is no award for the loss of the first 5 days of earning capacity (section 124);
(d) No award may be made for gratuitous care which does not exceed 6 hours a week and is for less than 6 months and the amount recoverable for care exceeding these minima is limited to sums specified in section 128;
(e) The discount rate for calculating the present value of future economic loss is prescribed as 5% (section 127);
(f) Credit must be given for payments made to the claimant by "an insurer" (section 130);
(g) No interest is payable on damages for gratuitous care or non-economic loss and entitlement to interest on other damages is subject to conditions, principally relating to the timely provision of information by the claimant (section 137).

18. None of these provisions forms part of English law. Perhaps the most striking difference is the 5% discount rate, compared with the 2.5% rate set by the Lord Chancellor under the Damages (Personal Injury) Order 2001 (SI 2001/No 2001) pursuant to his power under section 1 of the Damages Act as the rate appropriate to ensure that the claimant is fully compensated. The claimant says that under the provisions of MACA he would recover about 30% less than he would under English law.

19. Until Part III was enacted, the English common law rule for determining whether damage caused by acts committed abroad was actionable in tort was that laid down by the Court of Exchequer Chamber in *Phillips v Eyre* (1870) LR 6 QB 1, 28-29:

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England…Secondly, the act must not have been justifiable by the law of the place where it was done."

20. I observe in passing that, since the common law of Australia is on this point the same as the law of England, there is no doubt that the damage suffered by Mr Harding would have satisfied this double actionability test. But Willes J, giving the judgment of the court, went on to say:

> "the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation…such law is no bar to an action in this country."

21. What distinction was Willes J seeking to draw by saying that the foreign law would not affect an action in this country if it touched "only the remedy or procedure"? He referred to *Huber v Steiner* (1835) 2 Bing NC 203, which concerned an action brought in 1835 on a French promissory note made in 1813 and payable in 1817. The defendant pleaded that by French law an action upon the note was prescribed but Tindal CJ held that, upon its true construction, the French law did not extinguish the debt but only barred the creditor from obtaining a remedy. It was therefore a matter of French procedure which an English

court would disregard. Conversely, *Don v Lippmann* (1837) 5 Cl & F 1 was an action brought in Scotland in 1829 on two French bills of exchange accepted in 1810. The House of Lords held the defendant entitled to rely on the Scottish 6 year period of prescription because, as Lord Brougham said, at p 13:

> "Whatever relates to the remedy to be enforced, must be determined by the lex fori, the law of the country to the tribunals of which appeal is made."

22. Lord Brougham in turn referred to *De la Vega v Vianna* (1830) 1 Barn & Ad 284 in which the plaintiff, a Spaniard, had the defendant, a Portuguese, arrested in England for non-payment of a debt contracted in Portugal. The defendant claimed to be released on the ground that in Portugal imprisonment for debt had been abolished in 1774. Lord Tenterden CJ, at p 288, was unmoved:

> "A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."

23. An even earlier case touching upon the same distinction between the cause of action and the remedy is *Robinson v Bland* (1760) 2 Burr 1077, an action upon a bill of exchange given in Paris in payment of gaming debts. By English law the debt was unenforceable but the plaintiff alleged that in France the debt could be enforced in a Court of Honour. Wilmot J said, at p 1084:

> "I cannot help thinking, that where a person appeals to the law of England, he must take his remedy according to the law of England, to which he has appealed."

24. 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.

25. This was the distinction made by the House of Lords in *Boys v Chaplin* [1971] AC 356, in which the plaintiff had been injured in a traffic accident in Malta. By the law of Malta, non-economic damage (pain and suffering, loss of amenity) was not actionable. Only financial loss was compensatable. The plaintiff brought proceedings in England and one of the questions raised by the appeal was whether the rule excluding liability for non-economic damage was part of the substantive law of Malta or concerned only the remedies which a Maltese court could provide.

26. Lord Hodson, Lord Wilberforce and Lord Pearson agreed that the rule was part of the substantive law of tort liability. In Malta, causing non-economic damage was not an *injuria*; not an actionable wrong. Lord Hodson said, at p 379:

> "questions such as whether loss of earning capacity or pain and suffering are admissible heads of damage must be questions of substantive law. The law relating to damages is partly procedural and partly substantive, the actual quantification under the relevant heads being procedural only."

27. Lord Wilberforce said, at p 389:

> "The broad principle should surely be that a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded,

under the law of the place where the wrong was committed. This non-existence of exclusion may be for a variety of reasons and it would be unwise to attempt a generalisation relevant to the variety of possible wrongs. But in relation to claims for personal injuries one may say that provisions of the lex delicti, denying, or limiting, or qualifying recovery of damages because of some relationship of the defendant to the plaintiff, or in respect of some interest of the plaintiff (such as loss of consortium) or some head of damage (such as pain and suffering) should be given effect to."

28. Lord Pearson said, at p 394:

"If the difference between the English law and the Maltese law could be regarded only as a difference of procedural (or adjectival or non-substantive) law, there would be an easy solution of the problem in this appeal. On that basis the nature and extent of the remedy would be matters of procedural law regulated by the lex fori, which is English, and the proper remedy for the plaintiff in this case according to English law would be that he should recover damages for all the relevant consequences of the accident, including pain and suffering as well as pecuniary expense and loss…But I am not convinced that the difference between the English law and the Maltese law can reasonably be regarded as only a difference of procedural law. There is a radical difference in the cause of action, the right of action, the jus actionis. A claim to be reimbursed or indemnified or compensated for actual economic loss is substantially different in character from a claim for damages for all the relevant consequences of the accident to the plaintiff, including pain and suffering. If an accident caused no economic loss, but only pain and suffering, there would be a cause of action according to English law, but not according to Maltese law. Surely that must be a matter of substantive law."

29. On the other hand, Lord Guest said, at p 382 that ?

"It would not be correct, in my view, to talk of compensation for pain and suffering as a head of damage

> apart from patrimonial loss. It is merely an element in the quantification of the total compensation"

and Lord Donovan said, at p 383, that once the claim was actionable in an English court, "it was right that it should award its own remedies".

30. Thus the majority held that the Maltese law denying liability for non-economic damage was substantive law to be governed by the *lex causae* while the minority thought that it was a matter of remedy to be governed by the *lex fori*. All of them agreed that the quantification of the damages to be awarded for actionable heads of damage was a question of remedy or procedure.

31. The next question is whether this distinction between questions of liability and questions of remedy or procedure was affected by Part III. Section 10 abolishes the *Phillips v Eyre* (1870) LR 6 QB 1 requirement of double actionability "for the purpose of determining whether a tort or delict is actionable" and the common law exceptions to that rule created by cases like *Boys v Chaplin* [1971] AC 356 and *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190. Section 11 substitutes a "general rule" that the applicable law is the "law of the country in which the events constituting the tort or delict in question occur." Section 12 provides for displacement of the general rule in certain cases in which it is "substantially more appropriate" for the applicable law to be different. This was the provision applied by Elias J on his alternative hypothesis that the MACA restrictions were substantive. But section 14 provides:

> "(2) Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above.
>
> (3) Without prejudice to the generality of subsection (2) above, nothing in this Part ? …
>
> (b) 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."

32. It will be noticed that whereas the older cases spoke of questions of "remedy" being governed by the *lex fori* and Willes J in *Phillips v*

*Eyre* (1870) LR 6 QB 1, 29 spoke of "remedy or procedure", section 14(3)(b) refers only to "procedure". Does that mean that the old rule that *remedies* were a matter for the *lex fori* was to be abolished and the rule preserved only so far as it related to questions which could strictly speaking be regarded as *procedure*? In my opinion this would be absurd. In this context, the terms "remedy" and "procedure" had been regularly used interchangeably. Thus in *Boys v Chaplin* [1971] AC 356 Lord Hodson said, at p 378, that "the nature of a plaintiff's remedy is a matter of procedure to be determined by the *lex fori*. This includes the quantification of damages…". Lord Guest, at p 381, posed the question as: "Assuming that the conduct was actionable in Malta, what law is to be applied to the ascertainment of the damages? Is it to be the substantive law, the law of Malta, or is to be the procedural law which is the *lex fori*?"

33. Furthermore, section 14(3) is expressed to be without prejudice to the generality of section 14(2), which says that nothing in Part III is to affect any rules of law except those abolished by section 10. Section 10 is concerned with the rules which determine "whether a tort…is actionable" and not with the rules concerning the remedies available for actionable injury.

34. The conclusion that the amount of damages for an injury actionable by the lex causae must be determined according to the lex fori was to be left untouched is confirmed by the Report of the Law Commission and the Scottish Law Commission (*Private International Law: Choice of Law in Tort and Delict* (Law Com No 193, Scot Law Com No 129), published in 1990, on which Part III was based. Paragraph 3.38 dealt with damages:

> "The Consultation Paper [Law Commission Working Paper No 87 and Scottish Law Commission Consultative Memorandum No 62, which had been published in 1984] provisionally recommended that there should be no change in the present law on the question of damages, which we confirm. Accordingly, the applicable law in tort or delict determines the question of the availability of particular heads of damages whereas the measure or quantification of damages under those heads is governed by the *lex fori*."

35. There are several statements in the Consultation Paper to the same effect, which it is unnecessary to cite.

36. Mr Haddon-Cave QC, who appeared for the appellant, said that if the House thought that the language of section 14(2) and (3) was ambiguous or obscure, it should resolve the ambiguity by reference to a statement made in Parliament by the Lord Chancellor during the passage of the bill. For my part, I do not think that there is any ambiguity or obscurity. 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) 120 DLR (4th) 289, 321 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. For my part, therefore, I see no need for Mr Haddon-Cave to resort to Hansard.

37. If, however, there had been any ambiguity which needed to be resolved, I am bound to say that this is as clear a case within the principle stated in *Pepper v Hart* [1993] AC 593 as anyone could hope to find. At the Report stage in the House of Lords, Lord Howie of Troon put down an amendment to add a further paragraph to what is now section 14(3), so that it would read "[nothing in this Part] (d) authorises any court of the forum to award damages other than in accordance with the law of the forum". Lord Howie declared an interest on behalf of Cape Industries plc, which had a few years earlier been sued in Texas for asbestos-related injuries (see *Adams v Cape Industries plc* [1990] Ch 433) and was anxious that Part III should not import American scales of compensation into English courts. In the debate on 27 March 1995 the Lord Chancellor, Lord Mackay of Clashfern, made what was obviously a carefully prepared statement:

> "With regard to damages, issues relating to the quantum or measure of damages are at present and will continue under Part III to be governed by the law of the forum; in other words, by the law of one of the three jurisdictions in the United Kingdom. Issues of this kind are regarded as procedural and, as such, are covered by Clause 14(3) (b).
>
> It follows from this that the kind of awards to which the noble Lord referred of damages made in certain states, in particular in parts of the United States, will not

> become a feature of our legal system by virtue of Part III. Our courts will continue to apply our own rules on quantum of damages even in the context of a tort case where the court decides that the 'applicable law' should be some foreign system of law so far as concerns the merits of the claim.
>
> Some aspects of the law of damages are not regarded as procedural and, in accordance with the views of the Law Commissions in their report on the subject, Part III does not alter this. These aspects concern so-called 'heads of damages'—the basic matter which is being compensated for—such as special damage relating to direct financial loss. Whether a particular legal system permits such a head of damage is not regarded as procedural but substantive and therefore not automatically subject to the law of the forum. This seems right given the intimate connection between such a concept and the particular nature of the case in issue. But again, I foresee no significant increase in awards of damages because a particular head of damage permitted by some foreign system of law would continue, so far as the quantum allocated to it in any finding is concerned, to be regulated by our own domestic law of damages.
>
> I hope the noble Lord will feel reassured…"

38. Lord Howie declared himself reassured and did not move his amendment. The Lord Chancellor's statement clearly satisfied the requirements of being (a) clear and (b) made by the Minister promoting the bill: see Hansard (HL Debates) 27 March 1995, Cols 1421-1422.

39. My Lords, the next question is whether the provisions of MACA to which I have referred should be characterised as relating to the actionability of the economic and non-economic damage suffered by Mr Harding or to the remedies which the courts of New South Wales provide for such damage. On this point we could not have better authority than that of the High Court of Australia in *Stevens v Head* (1993) 176 CLR 433. The majority (Brennan, Dawson, Toohey and McHugh JJ) analysed the equivalent damages-limitation provisions of the Motor Accidents Act 1988, at pp 454-460, and concluded that they were concerned with quantification rather than heads of damage. Although MACA is more restrictive of the court's power to award damages than the 1988 Act, the character of the relevant provisions is in my opinion the same. Thus, at p 459, the majority said of section 79(3) of the 1988 Act, which provided that the maximum amount ("only in a

most extreme case") which might be awarded for non-economic loss was A$180,000:

> "[It] is plainly a provision which affects the measure of damages but does not touch the heads of liability in respect of which damages might be awarded. It is simply a law relating to the quantification of damages and that, as we have seen, is a matter governed solely by the lex fori."

40. These extracts are from the opinion of the majority. But there is nothing in the dissenting judgments by Mason CJ and Deane and Gaudron JJ to suggest that, if they had accepted that the court should apply the traditional distinction between actionability and remedy, including quantification of damages, they would have disagreed with the way the majority characterised the provisions of the 1988 Act. It was the traditional distinction itself which the minority rejected. Thus Mason CJ, at p 445, proposed that the court should adopt:

> "a new criterion for the substance-procedure distinction which…characterize[s] as procedural 'those rules which are directed to governing or regulating the mode or conduct of court proceedings'. All other provisions or rules are to be classified as substantive."

41. Deane J likewise said, at p 462, that the lex fori should be applied "only to the extent that it was procedural in the narrow sense of being directed to regulating court proceedings in that State" and Gaudron J adopted the same test: see pp 469-70.

42. In principle, therefore, I think that the relevant provisions of MACA should be characterised as procedural and therefore inapplicable by an English court. But Mr Palmer QC, who appeared for the defendant, submitted that in English private international law a limit or "cap" on the damages recoverable is regarded as substantive. There is, it is true, some authority for this proposition. The 7th edition (1958) of *Dicey's Conflict of Laws*, edited by Dr JHC Morris, contained the statement, at p 1092, "statutory provisions limiting a defendant's liability are prima facie substantive; but the true construction of the statute may negative this view" with a footnote: "This is suggested by two dicta in *Cope v Doherty* (1858) 4 K & J 367, 384-385 and (1858) 2 De G & J 614, 626."

43. *Cope v Doherty* concerned an application by the owners of an American ship which had collided with and sunk another American ship to limit its liability pursuant to section 504 of the Merchant Shipping Act 1854. Wood V-C held that the section did not apply to collisions between foreigners. The owners argued that the limitation rule was procedural and should therefore be applied as part of the lex fori. I should have thought that the short answer was that whether the rule was substantive or procedural, Parliament had said that it should not apply to foreigners and that was the end of the matter. But the Vice-Chancellor dealt with the argument on its own terms, 4 K & J 367, 384-385:

> "Clearly an Act, which limits the damage to which the ship owner is to be liable under circumstances like the present, deals with the substance and not the form of the procedure. It in effect forms a contract that, whereas by the natural law the owner of the ship or property that has been injured would be entitled to damages to the full extent of the loss he has sustained, all those persons upon whom the Legislature can impose such a contract, that is to say, all its own subjects, shall forego that which the natural law – the common law, as we should call it in England – would give them, and shall be entitled only to the amount of the value of the ship by which the injury has been inflicted, and of the freight due or to grow due in respect of such ship during the voyage."

44. Thus his reasoning was that the statute operates as if it imposed a contractual term limiting the damages recoverable. In fact, one of the reasons why the Vice-Chancellor held that the statute did not apply to foreigners was that he thought that, as a matter of international law, the United Kingdom could only impose such a deemed contract upon British ships. Such a term in a contract would clearly be a modification of the substantive obligations of the parties. As Lord Diplock said in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849:

> "The contract…is just as much the source of secondary obligations as it is of primary obligations; and like primary obligations that are implied by law, secondary obligations too can be modified by agreement between the parties".

45. When *Cope v Doherty* went to the Court of Appeal, Turner LJ dealt with the point very briefly ((1858) 2 De G & J 614, 626):

> "An attempt was made on the part of the appellants to bring this case within *Don v Lippman* and cases of that class, but I think those cases have no bearing upon the point. This is a question of liability, and not of procedure."

46. In my opinion the proposition in *Dicey* was too widely stated. *Cope v Doherty* is authority for the proposition that a contractual term which limits the obligation to pay damages for a breach of contract or a tort, or a statutory provision which is deemed to operate as such a term, qualifies the substantive obligation. It is not part of the rules of the *lex fori* for the assessment of damages. I therefore agree with the opinion of Street CJ in *Allan J Panozza & Co Pty Ltd v Allied Interstate (Qld) Pty Ltd* [1976] 2 NSWLR 192, 196-197 that a statutory limitation on damages deemed to be incorporated into a contract of carriage is "an express limitation upon the substantive liabilities." But, as the majority said in *Stevens v Head* (1993) 176 CLR 433, 458:

> "Where the sources of the rights and obligations of contracting parties are in part the express terms of the contract and in part the provisions of its proper law, the courts of the forum are constrained to ascertain the parties' rights and obligations from those sources, not from the *lex fori*. In our respectful opinion, there is no valid analogy between the rules for determining the contractual rights and obligations arising in part from the proper law of the contract and the conflict of law rules governing the assessment of damages in respect of extraterritorial torts."

47. The Merchant Shipping (Amendment) Act 1862 extended the right to limit liability to all ships of whatever nation and thereafter it became impossible to regard such a provision as equivalent to a contractual term imposed upon British subjects. In my opinion, therefore, Clarke J was right in *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286 to treat a modern limitation statute (in that case, of Singapore) as a procedural provision, limiting the remedy rather than the substantive right: see also *Seismic Shipping Inc v Total E&P UK plc (The Western Regent)* [2005] EWCA Civ 985; [2005] 2 Lloyd's Rep 359, 370.

48. There is accordingly in my opinion no English authority to cast any doubt upon the conclusion of the Australian High Court in *Stevens v Head* (1993) 176 CLR 433 that, for the purposes of the traditional

distinction between substance and procedure which treats remedy as a matter of procedure, all the provisions of MACA, including limitations on quantum, should be characterised as procedural. This was also the view of the Court of Appeal in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21; [2002] EWCA Civ 21; [2002] 1 WLR 2304. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, however, the High Court reversed itself, abandoned the traditional rule (at least for torts committed in Australia) and confined the role of the *leges fori* of the Australian States to procedure in the narrow sense of rules "governing or regulating the mode or conduct of court proceedings": see pp. 543-544. This change was said to be required by constitutional imperatives of Australian federalism. In a later decision (*Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520, para 76 the court left open the question of whether it would apply to foreign torts. But the decision in the *Pfeiffer* case 203 CLR 503 clearly influenced the judgments of the majority in the Court of Appeal in this case, to which I must now turn.

49. Arden LJ said, at p 1559, para 52 that "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". That, if I may respectfully say so, seems to me plainly right. But then, instead of putting the 1995 Act into the context of the previous common law and the proposals of the Law Commission, she approached the matter in a more abstract way, saying that a reference to the law of the forum must be "justified by some imperative which, relative to the imperative of applying the proper law, has priority". Such a reason, she suggested, might be the inability of the English court to "put itself into the shoes of the foreign court" and adopt some procedure which was not available in this country. But otherwise, she thought that the principle adopted in the *Pfeiffer* case should be applied and restrictions on the right to recover damages in the foreign law should not be regarded as procedural.

50. Arden LJ may have been influenced in her approach to the construction of section 14(3)(b) by her view, expressed earlier in her judgment, at p 1559, para 51, that what she called "the damages principle", ie the rule that the assessment of damages is governed by the *lex fori*, was "one of uncertain meaning and application". So she felt that she was entitled to start on the basis that section 14(3)(b) was, so to speak, written on a clean sheet of paper. Of course there were peripheral uncertainties and differences of opinion. We have seen that in *Boys v Chaplin* [1971] AC 356 Lords Guest and Donovan were willing to give the concept of procedure wider application than the majority, although, if I may say so with respect, the majority were in my opinion plainly

right. There was also some uncertainty, largely generated by Dicey's interpretation of *Cope v Doherty* 4 K&J 367; 2 De G & J 614, about whether a statutory limitation on damages could be construed as substantive. I could add other possible uncertainties which have not yet come before the courts. For example, there may be rules of foreign or domestic law, under which a tort or other wrongful act gives rise to a liability to pay a conventional sum of money, which make it impossible to separate the concept of actionable damage from the concept of a remedy for that damage. It might be more realistic to say that the rule simply lays down the conditions under which the claimant is entitled to payment of a prescribed sum of money. But I do not propose to explore this or other hypothetical cases because they do not arise in this case and, so far as I know, have not arisen in the past.

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 the 13th edition (2000) of *Dicey and Morris*, 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. As Lord Lloyd of Berwick said of a provision in the Limitation Act 1980 in *Lowsley v Forbes* [1999] 1 AC 329, 342:

> "It is Parliament's understanding of the existing law when enacting the Limitation Amendment Act 1980 that matters, not what the law is subsequently shown to have been. As Lord Simon of Glaisdale said in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 648:
>
> > 'Once it is accepted that the purpose of ascertainment of the antecedent defect in the law is to interpret Parliament's intention, it must follow that it is Parliament's understanding of that law as evincing such a defect which is relevant, not what the law is subsequently declared to be.'
>
> If common error can make the law, so can parliamentary error."

52. Sir William Aldous likewise said [2005] 1 WLR 1539 1566, para 86 that the term "procedure" in section 14(3)(b) "should be given its natural meaning". He placed considerable reliance upon *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, despite the express statements

in that case that it was, for Australian reasons, departing from traditional principles of English law. Such a construction was, he said, supported by *Dicey and Morris*, which is true, and by the Law Commission's Report, which in my opinion is not true. The only passage in the Commission's Report which may be said to support the conclusion reached by Sir William Aldous (although not his reasoning) is paragraph 3.39, which reproduces Dicey's comment that "a statutory ceiling on damages" is a question of substance. But the Law Commission appears to have thought this proposition could be reconciled with its statement in the previous paragraph (3.38) which I have already quoted. In my opinion, that paragraph is consistent neither with the narrow construction of "procedure" adopted by Sir William Aldous nor with a characterisation of limits on damages as not being procedural in the broader sense.

53. In my opinion, therefore, Elias J was right to treat the MACA restrictions as entirely inapplicable. In the circumstances it is unnecessary to decide whether, if they had been properly characterised as substantive, it was open to the Court of Appeal to reverse his judgment that it was substantially more appropriate to apply English law. The hypothesis necessary to raise this question is in my view somewhat artificial, because most of the reasons why it may be more appropriate to apply English law are the reasons why the assessment of damages is traditionally characterised as a matter for the lex fori. I would therefore prefer not to express a view on this question. In my opinion the appeal should be allowed and the judgment of Elias J restored.

**LORD RODGER OF EARLSFERRY**

My Lords,

54. In January 2002 the claimant and the defendant were living together in London. The defendant, who is Australian, travelled to New South Wales to attend a family wedding. A fortnight later the claimant flew out to join her. On 3 February near Huskisson, New South Wales, the claimant was a passenger in a car driven by the defendant when it was involved in an accident. As a result of the accident the claimant was rendered tetraplegic. He subsequently commenced the present action for damages for his injuries against the defendant who was living in England at the time. She admits liability. The claimant contends that

the English court should assess the damages according to English law, while the defendant contends that the assessment of damages is regulated by the law of New South Wales which limits the amounts which can be recovered.

55. Until comparatively recently, any private international law questions in a case like the present would have been decided according to the common law. A person who had suffered damage abroad and who wished to bring proceedings to recover compensation for that damage in the English courts had to show that his claim, or any particular head of claim, relating to the damage was actionable both under English law, the lex fori, and under the law of the country where the injury had been sustained, the lex loci delicti: *Phillips v Eyre* (1870) LR 6 QB 1. In *Machado v Fontes* [1897] 2 QB 231 the Court of Appeal had relaxed the rule to a certain extent by holding that it was sufficient if the act was wrongful in the country where it was committed, even though any damage would not have been actionable in civil proceedings there. In *Boys v Chaplin* [1971] AC 356 this House overruled *Machado v Fontes* and declared that, in general, the damage or head of damage had indeed to be actionable under the lex loci delicti as well as under English law. Provided that the claim passed this test, the foreign law then fell out of the picture and the defendant's liability for the damage or head of damage was determined in accordance with English law: [1971] AC 356, 385B–386A per Lord Wilberforce. The remedy to make good the plaintiff's damage was, however, a matter for the law of the forum. So, in assessing and awarding damages, an English court would apply English law.

56. When this House restored the double actionability rule to its full rigour in *Boys v Chaplin*, there was a somewhat increased risk that the test would exclude certain claims which it would actually be just to admit. Recognising this, the House held that, in appropriate cases, a claim or head of claim could proceed even though it was not actionable under the lex loci delicti. The flexible test for recognising these situations which Lord Wilberforce formulated came to win acceptance. In *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, the Privy Council held, conversely, that, where justice required in particular circumstances, an action could proceed in the courts of the forum on the basis of the lex loci delicti, even though the damage or head of damage would not be actionable under the lex fori.

57. In the eyes of their supporters, in this version the common law rules for determining whether damage or a head of damage was

actionable in an English court displayed a welcome pragmatic flexibility; to their critics, the rules were too uncertain to provide sure guidance for practitioners. In 1990 in a joint report, *Private International Law: Choice of Law in Tort and Delict*, the English and Scottish Law Commissions sided with the critics and recommended that the common law rules for determining actionability should be replaced by a statutory scheme. The Commissions confirmed, however, at para 3.38, that "the measure or quantification of damages … [should be] governed by the *lex fori*." In due course Parliament enacted the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"), Part III of which makes provision for new choice of law rules in tort and, for Scotland, in delict.

58. The first step which Parliament had to take was to abolish the pre-existing common law rules of double actionability which were perceived to be causing the problem. Except for defamation claims, where the common law is preserved by section 13, Parliament abolished these rules in section 10. Indeed Part III affects these rules and no others. This is stated expressly in section 14(2):

> "Nothing in this Part affects any rules of law (including rules of private international law) except those abolished by section 10 above."

This provision serves to delimit the scope of the enactment in Part III and means that there is no room for arguing that the abolition of the rules covered by section 10 must have impliedly effected a change in some other rule of law. More particularly, it immediately suggests that Part III does not affect the assessment of damages since that matter was never governed by the double actionability rules which were abolished by section 10. If that is so, the assessment of damages must continue to be governed by the lex fori.

59. The abolition of the common law rules was just the first step in the reform. The next step was to replace them with new rules. That is what Part III is designed to do. As section 9(1) explains, the rules in Part III are to apply for choosing the law ("the applicable law") to be used for determining "issues relating to tort or (for the purposes of the law of Scotland) delict." So Part III does three things. First, it provides that the English court is to use a particular law (the applicable law) to determine whether an actionable tort has occurred: section 9(4). In effect, this replaces the double actionability test. But, secondly, section

9(4), read along with subsection (1), goes on to provide that the applicable law is to be used to determine other "issues relating to tort". Finally, sections 11 and 12 provide the rules by which the applicable law, which is to be used to determine these issues, is to be chosen. Under section 12 the English court can separate out various issues relating to the tort and, where appropriate, a different law is to be used to determine different issues (*dépeçage*).

60. Where matters are in dispute, the first step will be for the court to use the rules in sections 11 and 12 to decide what the applicable law is. Rather as, under *Boys v Chaplin* [1971] AC 356, there was a general rule of double actionability which could be disapplied in certain circumstances, so too section 11 gives the general rule for choosing the applicable law, while section 12 provides for that general rule to be displaced where it would be substantially more appropriate for the law of another country to apply. Once the court has chosen the applicable law or laws in accordance with these sections, the judge will use the chosen system or systems to determine whether an actionable tort has occurred and any other issue "relating to [the] tort" which arises. Parliament has not defined "issues relating to tort", but it has at least indicated certain matters which do not fall within that category. These are to be found in section 14(3) which provides inter alia:

> "Without prejudice to the generality of subsection (2) above, nothing in this Part –
>
> …
>
> (b) 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."

This provision reinforces section 14(2) by spelling out three types of rule which Part III is not to affect and one approach which it is not to authorise. It is not to affect any rules of evidence, pleading or practice and it is not to authorise a court to determine "questions of procedure in any proceedings" otherwise than in accordance with its own law. So, while Part III authorises - indeed requires - an English court to use the applicable law to determine "issues relating to tort", it does not authorise the court to use anything other than English law to determine any "questions of procedure" which arise in the proceedings.

61. Here the defendant argues that under sections 11 and 12 the applicable law relating to the issue of the assessment of damages is the law of New South Wales. So the claimant is not entitled to recover any more by way of damages for his personal injuries than he would be entitled to recover under the Motor Accidents Compensation Act 1999 ("MACA") of New South Wales. For his part, the claimant says that questions relating to the assessment of damages are "questions of procedure" and so, in accordance with section 14(3)(b), the English court must determine them by using English law. By a majority (Arden LJ and Sir William Aldous, Waller LJ dissenting), the Court of Appeal upheld the defendant's contention that the MACA rules should be applied to the assessment of damages. The result is that the maximum which the claimant could recover by way of damages for his injuries is substantially less than he would be able to recover if the judge had to apply English law.

62. The critical question concerns the interpretation of the expression "questions of procedure" in section 14(3)(b). In the Court of Appeal, [2005] 1 WLR 1539, 1559, para 52, Arden LJ explained how, in her view, the English court should approach it:

> "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."

Later, [2005] 1 WLR 1539, 1563, para 66, Arden LJ held that there was "a guiding principle" that

> "Once the court has decided that the law of New South Wales is the proper law of the tort, it is logical, so far as possible, to apply the law of New South Wales throughout."

Adopting this approach, she considered, at p 1562, para 61, that the context of section 14 suggested that

> "the approach of Mason CJ in *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 that procedure covers matters as to the mode and conduct of trial is the basic approach of section 14."

On that basis the assessment of damages was not a question of procedure and so was, presumably, to be included among the "issues in the claim" which section 9(4) directs the court to determine by using the applicable law.

63. In my respectful view Arden LJ was wrong to see section 9(4) as containing a guiding principle and section 14(3)(b) as containing an exception which the court can invoke only where there is some overriding imperative for doing so.

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. The matters where the United Kingdom courts are to continue to use the law of the forum are spelled out in section 14(3). In particular, Parliament has decided not to authorise an English court to use anything other than English law to determine "questions of procedure". 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 and, as such, it is entitled to exactly the same weight and respect as the policy in section 9(4) that certain other issues are to be determined by the law chosen in accordance with sections 11 and 12. There is accordingly no reason to regard the rule requiring an English court to use English law to determine questions of procedure as "the exception", for which some overriding imperative must be found. On the contrary, the words of section 14(3)(b) should be interpreted and applied in a straightforward fashion, giving them the meaning which is appropriate in the context in which they occur.

65. So, does the expression "questions of procedure" in section 14(3)(b) include questions relating to the assessment of damages? Like Arden LJ, Sir William Aldous adopted a restrictive interpretation of

those words: for him, at p 1566, para 86, "the word 'procedure' in the 1995 Act should be given its natural meaning namely, the mode or rules used to govern and regulate the conduct of the court's proceedings." In many contexts something like that might well be regarded as the appropriate meaning and it might very well not include the assessment of damages. But here the expression "questions of procedure" is being used within Part III of a statute on private international law. So it is a fair assumption that Parliament meant the expression to be understood in the way that it would be understood in the field of private international law. In fact, the scheme of Part III would not work on any other basis. In a case like the present, the English court has to decide whether to characterise the relevant aspects of the assessment of damages as issues relating to tort, to be governed by the applicable law, or to regard them as questions of procedure, to be governed by English law. Given that the characterisation under section 9(2) is "for the purposes of private international law", in carrying it out, the court must have regard to the general principles of private international law. To be consistent, the court must apply the same general approach when considering the other side of the question, which involves interpreting and applying section 14(3)(b).

66. By the time Parliament legislated in 1995, it was generally understood that, for the purposes of private international law, some questions relating to damages were substantive while others were procedural. Questions relating to the actionability of heads of claim were substantive, while questions as to the quantification of damages for actionable heads of claim related to the remedy and so were classified as procedural. So, for instance, Lord Hodson said in *Boys v Chaplin* [1971] AC 356, 379D:

> "I am now, however, persuaded that questions such as whether loss of earning capacity or pain and suffering are admissible heads of damage must be questions of substantive law. The law relating to damages is partly procedural and partly substantive, the actual quantification under the relevant heads being procedural only."

Lord Wilberforce, [1971] AC 356, 392F-393C, was somewhat dismissive of an analysis purely in terms of what he called "the accepted distinction between substance and procedure", but none the less he too envisaged that certain questions relating to damages were to be classified as "procedure" and so as a matter for the application of the lex fori. Similarly, Lord Pearson spoke, at p 394E-F, of "procedural (or

adjectival or non-substantive) law" which would regulate the recovery of damages. In *Mitchell v McCulloch* 1976 SC 1, 7, Lord McDonald referred to counsel for the pursuer's argument that "procedural matters, including the measure of damages, are determined solely by the lex fori." In *Stevens v Head* (1993) 176 CLR 433, 447, Mason CJ summarised the current thinking:

> "The law relating to damages is partly procedural and partly substantive. According to the traditional application of the substance-procedure distinction, the question whether legislative provisions dealing with awards of damages are substantive or procedural has been approached by asking whether the provisions affect the character of the wrong actionable or go only to the measure of compensation. This approach is consistent with the equation traditionally drawn between matters of procedure and matters relating to remedies."

67. These references, which could be multiplied, demonstrate that questions of the quantification or assessment of damages had long been regarded as "procedural" as opposed to "substantive". I have accordingly no doubt that when Parliament used the expression "questions of procedure" it was intended to cover questions relating to the assessment of damages. Indeed, if that were not so and the assessment of damages were to be regarded as an issue relating to tort to be determined by reference to the applicable law, Parliament would have made a major change in this aspect of the law - despite the Law Commissions' recommendation that the existing state of the law should be preserved.

68. Counsel for the defendant contended, however, that, even if Parliament had used the expression "questions of procedure" in that way when it passed the 1995 Act, the common law was not set in stone and an "updating construction" should be given to section 14(3)(b), to take account of developments since 1995. In particular, the High Court of Australia, which would, in 1995, have accepted that the assessment of damages was procedural (*Stevens v Head* (1993) 176 CLR 433), had now changed direction and held, in the words of the majority, that *"all* questions about the kinds of damage, or amount of damages that may be recovered, would ... be treated as substantive issues governed by the lex loci delicti": *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 544, para 100. In making this change, members of the court had regard

to the view of La Forest J, giving the opinion of the Supreme Court of Canada in *Tolofson v Jensen* (1994) 120 DLR (4th) 289, 321, that

> "the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of *both* parties."

Counsel for the defendant submitted that the expression "questions of procedure" in section 14(3)(b) should now be interpreted in a way which took account of this development. In effect, by adopting the High Court's revised classification of questions relating to the assessment of damages as matters of substance, Arden LJ and Sir William Aldous accepted that argument.

69. In my view, however, the argument falls down for a variety of reasons. This is not a case of the kind envisaged by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822, where a new state of affairs, or a fresh set of facts bearing on policy, has come into existence since the 1995 Act was passed and the courts have to consider whether they fall within the parliamentary intention expressed in the words of the enactment. Indeed the decision of the Supreme Court of Canada in *Tolofson v Jensen* antedated the 1995 Act - but Parliament did not follow its lead. All that the appellant can point to, therefore, is a change in the way that the High Court of Australia classifies questions about the quantum of damages for purposes of the common law rule in intra-Australian cases. As is plain from the judgments in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, however, their Honours were knowingly altering what had previously been well settled law. Moreover, they were doing so because they felt impelled by what they saw as a requirement of the federal nature of the constitution. A similar consideration influenced the Canadian Supreme Court in *Tolofson v Jensen* (1994) 120 DLR (4th) 289. It remains to be seen whether the High Court will hold that all questions about the kind or amount of damages are to be determined by the lex loci delicti in international cases: *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520, para 76. These decisions of the Canadian and Australian courts, which show how the common law can be reshaped, may give ammunition, or food for thought, for critics of the policy adopted by Parliament in the 1995 Act. But they contain nothing which can justify the House in altering what would otherwise be the appropriate interpretation of the statute.

70. The passage which Lord Hoffmann has quoted from the Hansard report of the speech of the Lord Chancellor, Lord Mackay of Clashfern, in reply to the probing amendment in the name of Lord Howie of Troon, confirms the construction which I would, in any event, have placed on the words in section 14(3)(b). But more importantly, perhaps, it shows that Parliament was assured that the provision would prevent damages being awarded by reference to the law and standards of other countries. The particular problem raised by Lord Howie related to the high level of damages in the United States which he was anxious should not be replicated here. But it would be equally unacceptable if, say, United Kingdom courts had to award damages according to a statutory scale which, while adequate in another country because of the relatively low cost of services etc there, would be wholly inadequate in this country, having regard to the cost of the corresponding items here. As Parliament was assured by the Lord Chancellor, section 14(3)(b) guards against such eventualities. The interpretation advocated by the defendant would undermine the basis on which Parliament legislated.

71. The defendant relies on the provisions of MACA. So the ultimate question is whether the relevant provisions are to be regarded as procedural or substantive for the purposes of private international law. If they are procedural, they are to be disregarded since questions of procedure are to be regulated by the law of the forum in accordance with section 14(3)(b). If they are substantive, then they would apply if the law of New South Wales were the applicable law, as the Court of Appeal held, reversing Elias J.

72. Lord Hoffmann has analysed the passage in Dicey and Morris, *Conflict of Laws*, to the effect that "statutory provisions limiting a defendant's liability are prima facie substantive; but the true construction of the statute may negative this view." I respectfully agree with his analysis. In any event, as the passage recognises, in any given case the answer to the question must depend on the construction of the relevant provision in the context of the particular statute. In the present case the defendant relies on various provisions in Chapter 5 of MACA, headed "Award of damages". Many of them derive from equivalent provisions in the Motor Accidents Act 1988. The restrictions on the damages recoverable for non-economic loss under that Act were considered by the High Court of Australia in *Stevens v Head* (1993) 176 CLR 433. Applying the customary common law approach in private international law, the High Court classified them as procedural. That decision is not conclusive of any or all of the matters in dispute, but it does provide useful guidance from the highest court in the country.

73. Section 122(1) of MACA explains that Chapter 5 applies to, and in respect of, "an award of damages" relating to death or injury in motor accidents. Section 123 provides that "A court cannot award damages to a person in respect of a motor accident contrary to this Chapter." While, of course, it may be necessary to look beneath the surface of a statutory provision to ascertain its nature, the legislature is here signalling that the provisions in Chapter 5 are directed to what a New South Wales court can award by way of damages. In other words, prima facie at least, they are concerned, not with the scope of the defendant's liability for the victim's injuries as such, but with the remedy which the courts of New South Wales can give to compensate for those injuries. For purposes of private international law, prima facie they are procedural in nature.

74. Of course, when it enacted MACA the Parliament of New South Wales was not concerned with the categories of private international law. So, not surprisingly, Chapter 5 contains provisions on matters which would traditionally fall on the substantive side of the line for purposes of private international law. This is the case, for example, with mitigation of damages in section 136. The same goes for section 138, on contributory negligence, and section 140, on volenti non fit iniuria.

75. Neverthless, in Parts 5.2 and 5.3, dealing respectively with damages for economic and non-economic loss, the provisions are formulated in a way that emphasises their nature as directions to the courts of New South Wales. For instance, where the legislature refers to "an award of damages", it is referring to something that can only be made by a court. So, under section 125(2), in "an award of damages" for economic loss, "the court is to disregard" any amount by which the injured person's weekly earnings would have exceeded $A2,500, subject to indexation. Under section 127(1), "where an award of damages is to include compensation" for future economic loss, the present value of that future loss "is to be qualified by adopting the prescribed discount rate" – clearly a direction to a judge who is going to include this kind of compensation in an award of damages as to how to go about it. Similarly, under section 134, the maximum amount "that a court may award" for non-economic loss is now $A309,000, again subject to indexation.

76. Undoubtedly, in practice these and other provisions can be expected to govern the amounts for which claims are settled outside the courts. But that does not make them substantive. It merely means that litigants, who know what the court can and cannot award, will settle their claims accordingly. More particularly, it does not mean that the

provisions are to be regarded as substantive rather than procedural for purposes of private international law. In that context, the brocard ubi remedium ibi ius would be an unsafe guiding principle.

77. I would accordingly hold that the provisions of Chapter 5 of MACA on which the defendant relies relate to the remedy which the courts of New South Wales can award and are procedural for the purposes of section 14(3)(b) of the 1995 Act. That being so, they fall to be ignored when the English court awards damages for the claimant's injuries. I recognise that this means that the defendant's insurers may have to meet a higher claim for damages than would be the case if the provisions of MACA applied. I recognise also that making a higher award would conflict with certain of the overall objects set out in section 5 of MACA. But I do not regard that as a compelling consideration since, as defendant's counsel was careful to acknowledge, the impact on the scheme of applying a different scale of damages in claims litigated in this country is unlikely to be anything other than marginal.

78. For these reasons, as well as for those given by Lord Hoffmann, with whose speech I am in full agreement, I would allow the appeal and hold that the quantification of damages is to be determined in accordance with English law. Since all the issues in dispute relate to the quantification of damages, it is unnecessary to decide which law would be the applicable law for determining issues relating to tort in accordance with sections 9(1) and (4) of the 1995 Act.

**LORD CARSWELL**

My Lords,

79. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hoffmann and Lord Rodger of Earlsferry. I fully agree with their reasons and conclusions, with one slight qualification on one aspect of the case, on which I shall add a few words.

80. Your Lordships have found it possible to decide the question of construction of section 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995 without recourse to external aids.

The appellant's counsel also relied strongly, however, on the statement made in the House of Lords on 27 March 1995 by the then Lord Chancellor, Lord Mackay of Clashfern, set out in para 37 of Lord Hoffmann's opinion. This was not just an expression of the Government's intention from a most authoritative source, it was a reassurance to Lord Howie of Troon that his amendment was not necessary, since issues relating to the quantum or measure of damages would come within the ambit of the words "questions of procedure" in section 14(3)(b). As Lord Hoffmann has said (para 37), it is as clear a case for the application of the principle stated in *Pepper v Hart* [1993] AC 593 as anyone could hope to find. If the officious bystander had volunteered his opinion on the point, it could have been nothing short of conclusive.

81. *Pepper v Hart* has been out of judicial favour in recent years (no doubt largely because there were some instances of its over-use, though there have been some trenchant and irreconcilable critics), and courts have constantly striven to avoid resorting to it. I do consider, however, that the principle has a place in statutory interpretation. As Lord Nicholls of Birkenhead remarked in *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262, 291-292 at para 65, it would be unfortunate if *Pepper v Hart* were now to be sidelined, as there are occasions when ministerial statements are useful in practice as an interpretative aid, perhaps especially as a confirmatory aid. I would simply remark myself that it would be wilful blindness for courts to deprive themselves of its assistance in proper cases.

82. The conditions for the application of the *Pepper v Hart* principle have been authoritatively stated in a number of cases and do not require repetition. It is sufficient to refer to the opinion of Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 634-635 and to the several expressions by Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396-99, *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816, 840-1, paras. 56-59 and *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262, 291-2, paras 65-6.

83. I would regard the essential precondition of ambiguity as satisfied in the present case. I agree with the remarks of Arden LJ in the Court of Appeal (para 58) that "Damages are not naturally regarded as procedure" and Sir William Aldous (para 86) that the natural meaning of "procedure" is "the mode or rules used to govern and regulate the

conduct of the court's proceedings"; cf La Forest J in *Tolofson v Jensen* (1994) 120 DLR (4th) 289, 321 on the purpose of the substantive/procedural classification. In the field of private international law, however, the word bears a special meaning, as your Lordships have indicated. It is the context which gives it the wider meaning than that which might be regarded as natural: see para 36 above, per Lord Hoffmann. So long as one could be quite satisfied that in using the words "questions of procedure" in section 14(3)(b) Parliament intended that special meaning to be adopted, then the interpretation is clear. There are strong reasons, as your Lordships have set out, for concluding that it did intend to adopt the special meaning, and it is quite possible to say that no ambiguity exists. In my opinion there may, however, be said to be sufficient possible ambiguity to justify resort to the Lord Chancellor's statement in Hansard as a confirmatory aid. The other conditions in *Pepper v Hart* [1993] AC 593 are obviously satisfied. When one does so, the intention of Parliament is entirely clear and the correctness of the conclusions reached by your Lordships on the construction of section 14(3)(b) is fully confirmed.

84. I would allow the appeal and restore the judgment of Elias J.