

LOSS DISTRIBUTION ISSUES IN MULTINATIONAL TORT CLAIMS: GIVING SUBSTANCE TO SUBSTANCE

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Introduction

With the growth of the movement of individuals between nations, it is natural that the number of tort claims involving elements from more than one jurisdiction has increased and will continue to do so. This has created a need for clear rules on questions of loss distribution or compensation, given that this is the focus of most claims in tort. These questions include:

- ✓ The nature of the remedy available to the plaintiff
- ✓ The heads of damages that may be available
- ✓ How to quantify the claim under each relevant head of damage
- ✓ Any defences that might affect quantification, such as contributory negligence

Other relevant issues, including the appropriate limitations period to apply and survival of actions, will not be considered in detail in this paper. Non-monetary remedies have recently been considered elsewhere.²

Traditionally, the question as to which law should be applied to resolve these loss distribution issues has been resolved by resort to the distinction between substance and procedure. It is trite law that matters of substance are to be governed by the law of the cause, with matters of procedure to be governed by the law of the forum. This apparently simple and sensible distinction has, however, caused and continues to cause difficulties for courts in a range of jurisdictions. For example, the High Court of Australia has recently expressly reserved the question whether in international torts cases the question of kinds and quantification of damages should be governed by the law of the place of the wrong,³ justifying a fuller examination of the issue. Further, despite the *Private International Law (Miscellaneous Provisions) Act 1995 (UK)*,⁴ uncertainty remains in the

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² George Panagopoulos 'Substance and Procedure in Private International Law' (2005) 1 *Journal of Private International Law* 69, 82-91

³ *Regie Nationale Renault v Zhang* (2002) 210 CLR 491 (*Zhang*). Speaking of its earlier decision in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (*Pfeiffer*), the unanimous court said in *Zhang* 'the conclusion was reached that the application of limitation periods should continue to be governed by the *lex loci delicti* and, secondly, that 'all questions about the kinds of damage, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti* (original emphasis). We would reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort' (520).

⁴ It is not clear at this time whether this statute will be amended or repealed once Rome II becomes effective in 2009.

correct approach, evidenced by conflicting recent English decisions.⁵ Canadian courts are to some extent in retreat from earlier positions.⁶

The uncertainty and inconsistency involved in the approach to the issue by the common law courts justifies a fuller examination of this issue. The focus of this article then will be how best to determine the issue of loss distribution or compensation in a tort case involving more than one country, in the context that this cannot be regarded as a settled issue given the variety of judicial and legislative responses in this area in recent years. In so doing, the article will consider the methodology adopted by the courts in the recent cases. The article will conclude that a narrow definition of procedure should be taken, so as not to undermine the general trend in favour of territoriality, to best meet the objectives of choice of law rules, and to not encourage forum shopping in seeking compensation for a tort. We must in doing so remember the purpose of the substance/procedure distinction. We should not adopt the past right/remedy distinction.

Background

It is said that for at least seven centuries, courts have applied a rule that substantive rights are to be governed by the law of the cause, while procedural issues are to be governed by the law of the forum.⁷ While this is unremarkable, the difficult issue has been where to draw the line between matters that are substantive and those that are procedural. It has been argued there is no clear line of demarcation between the two:

we (should) admit that the substantive shades off by imperceptible degrees into the procedural, and that the 'line' between them does not 'exist', to be discovered by logic and analysis, but is rather to be drawn so as best to carry out our purpose⁸

⁵ The House of Lords overruled the Court of Appeal in the *Harding v Wealands* litigation, to be discussed presently.

⁶ Compare for example the Supreme Court of Canada's views on this issue in *Tolofson v Jensen* [1994] 3 SCR 1022 with that of the Ontario Court of Appeal in *Somers v Fournier* (2002) 214 DLR (4th) 611

⁷ Edgar Ailes 'Substance and Procedure in the Conflict of Laws' (1941) 39 *Michigan Law Review* 392: 'It is perhaps the most inveterate doctrine of the conflict of laws that all questions of procedure in a given instance are governed by the *lex fori* ... regardless of the law under which the substantive rights of the parties accrued. Ailes refers to a 1265 French case where before the Parliament of Paris, the defendant offered an excuse for non-appearance in English terminology, arguing that the law of England allowed the claim. The defendant's contention was overruled on the ground that the matter was 'de processu causae' and governed by the law of the forum. He states the exact date at which this doctrine was applied in English law is unknown, but cites then a 1705 case where the Court of Chancery applied the English statute of limitations in a suit upon a foreign obligation (*Dupleix v De Roven* 2 Vern. 540, 23 ER 950 (1705).

⁸ Walter Wheeler Cook 'Substance and Procedure in the Conflict of Laws' (1933) 42 *Yale Law Journal* 333, 343-344. It is submitted there is a legitimate purpose to the distinction – why should the local court inconvenience itself by adopting the form of foreign proceedings? However, there is also an illegitimate purpose to it, with some commentators commenting on the distinction as an 'escape device' open to a court which does not wish to apply an aspect of the law of the place of the wrong. By classifying the issue as procedural instead, it bypasses the problem: Jean-Gabriel Castel 'Back to the Future! Is the New Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?' (1995) 33 *Osgoode Hall Law Journal* 35, 70. Lord Wilby in *Boys v Chaplin* [1971] AC 356, 393 suggested there was 'artifice' in regarding a right to recover damages for pain and suffering as procedural. One wonders what other reason there can be for this artifice, other than to provide what the forum court considers to be an appropriate remedy in the circumstances.

Unfortunately, many courts have proceeded as if there were a clear line of demarcation between the two, and relied on the words and language used in relevant statutes, rather than bear in mind the purpose of the distinction. For example, in the context of limitation periods, a strict distinction was drawn between limitation statutes which actually extinguish the right to bring the action, and statutes which merely forbid recovery after a certain period. The former had been classified as substantive, the latter merely procedural,⁹ though this did not escape criticism,¹⁰ and the distinction was finally abolished in several countries by a combination of legislation¹¹ and case law,¹² though it continues to exist in the United States.¹³ While this issue might have been resolved one way or another, other issues relevant to the characterization of procedure remain.

However, the experience with limitation periods is considered instructive. Limitation periods that once were considered to be procedural are now seen to be substantive. As

⁹ *McKain v R W Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1 (per Brennan Dawson Toohey and McHugh JJ at 41), *Pedersen v Young* (1964) 110 CLR 162, *Commonwealth v Verwayen* (1990) 170 CLR 394, *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, Edgar Ailes 'Limitation of Actions and the Conflict of Laws' (1941) 39 *Michigan Law Review* 474, 495. The view was explained as being based on a belief that unless statutes of limitation were procedural, foreign litigants might have advantages that were not available to forum litigants. There was a further view that a common law cause of action gave the plaintiff a right that endured forever. A statute of limitation would usually only remove the remedy. (The rights of the defendant were not considered in this analysis): *Tolofson v Jensen* (1994) 3 SCR 1022, 1069

¹⁰ W E Beckett 'The Question of Classification in Private International Law' *British Yearbook of International Law* 46, 71, Australian Law Reform Commission *Choice of Law Report* No 58 (1992) 10.33 (recommending abolition of the distinction), Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR at 267 referred to the 'inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance', *McKain v Miller* n9 per Mason CJ at 23-24, Deane J at 48 ('the unavailability of a remedy by reason of a limitation period will ordinarily be of immeasurably greater significance than the theoretical persistence of the underlying right'), Gaudron J at 61-62.; Adrian Briggs 'Conflict of Laws and Commercial Remedies' in Andrew Burrows and Edwin Peel (eds) *Commercial Remedies* (2003) p274-278; Adrian Briggs *The Conflict of Laws* (2002) p38 dismisses the distinction as simply 'an arid exercise in theory' with no justification; per Goudling J in *Chase Manhattan Bank NA v Israel-British Bank (London)* [1981] Ch 105, 124 'right and remedy are indissolubly connected and correlated ... it is as idle to ask whether the court vindicates the suitor's substantive right or gives the suitor a procedural remedy as to ask whether thought is a mental or a cerebral process'.

¹¹ S16 *Foreign Limitation Periods Act* 1984 (UK) and in each Australian state; see for example, the *Choice of Law (Limitation Periods) Act* 1996 (Qld)

¹² In Australia - *Pfeiffer* at 544 (Gleeson CJ Gaudron McHugh Gummow Hayne JJ), Kirby J (554-555) and Callinan (574), in Canada - *Tolofson v Jensen* (1994) 3 SCR 1022, 1071, and in South Africa - *Society of Lloyds v Price; Society of Lloyd's v Lee* [2006] SCA 87.

¹³ The *Restatement (Second)*, revised in 1988, which provide regarding statutes of limitation the general rule that, unless exceptional circumstances of the case make such a result unreasonable, the forum should apply its own statute of limitations barring the claim, and its own statute of limitations permitting the claim, unless (a) maintenance of the claim would serve no substantial interest of the forum, and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence. Some American states still maintain a distinction between statutes that create the right and those that do not - a recent example is *Gomez v ITT Educational Services Inc* 71 SW 3d 542 (Arkansas 2002). In 1998, the Court of Appeals (Sixth Circuit) applied the limitation period of the forum to a matter involving a Californian defendant. The Ohio agreement between the parties stated that Californian law would apply to the parties' relations. The plaintiff was the wife of the deceased, who had contracted with the defendant. Californian law time-barred her claim; Ohio law allowed it. The court applied the Ohio limitation period, so the plaintiff could bring her claim, although the action would have been statute-barred in California: *Cole v Mileti* (1998) 133 F 2d 433 (Sixth Circuit).

we will see, this is not a new thing in law – there is a long history of what in the past was procedural now being seen as substantive.¹⁴ There is less scope for a court to justify resorting to its own laws to resolve the issue. It is submitted that this trend should be applied in the context of financial remedies, where the position remains equivocal.

One of these contentious issues is the related (as we will see below) distinction between a law which denied a remedy in respect of a particular head of damage in negligence (a substantive law), and a law which affected the quantification of damages in respect of a particular head of damage, which traditionally was considered to be procedural.¹⁵ This view was applied by the majority of the High Court of Australia in 1993 in *Stevens v Head*,¹⁶ where it was concluded that the quantification of damages in a tort action was a matter for the law of the forum. It was applied recently by the House of Lords in *Harding v Wealands*.¹⁷ These decisions have allowed the plaintiff to bypass provisions in the law of the place of the wrong which limited the amount for which she could recover, by bringing action in another jurisdiction where no such limits applied.¹⁸ Even the question whether a tort action survived the death of the tortfeasor has been classified as procedural.¹⁹

Reason for the Distinction

Professor Cook argued that the distinction between substance and procedure should be understood in terms of the purpose of the distinction,²⁰ interpreted by Mason CJ in *McKain* as being associated with the efficiency of litigation:

¹⁴ Edgar Ailes in ‘Substance and Procedure in the Conflict of Laws’ (1941) 39 *Michigan Law Review* 392, 402 ‘many rules of modern substantive law had their origin in procedural devices’.

¹⁵ *Boys v Chaplin* [1971] AC 356, per Lord Hodson 378-379, Lord Guest 381-382, and Lord Wilberforce 393; Lord Donovan thought the forum court should ‘award its own remedies’ (383)(similar to Tindal CJ in *Huber v Steiner* (1835) 132 ER 80, who thought that ‘so much of the law that affects the rights and merit of the contract ... is adopted from the foreign country, so much of the law as affects the remedy only ... is taken from the law of the forum of that country where the action is brought’); cf Lord Pearson 394-395 who thought quantification of damages was a matter of substance. The majority view here is inconsistent with the position in another context - quantification of damages in a breach of contract context has been held to be substantive: *Ekins v East India Co* (1717) 24 ER 441. A fuller discussion of the judgments in *Boys* appears in J J Fawcett ‘Policy Considerations in Tort Choice of Law’ (1984) 47 *Modern Law Review* 650

¹⁶ (1993) 176 CLR 433 per Brennan Dawson Toohey and McHugh JJ, Mason CJ Deane and Gaudron JJ dissenting

¹⁷ [2006] 3 WLR 83

¹⁸ The case provides a perfect example of forum shopping at work. Perhaps surprisingly, the Australian Law Reform Commission in its *Choice of Law Report No 58* (1992) recommended that quantification of damages should be regarded as substantive in interstate tort matters, but continue to be regarded as procedural in international tort matters (para 10.45)

¹⁹ *Grant v McAuliffe* (1953) 264 P 2d 944 (California)(court applied the forum law to resolve the issue whether the action was survived on the basis that it was a procedural issue; the obvious point that the matter should be governed by forum law because both parties lived there was not used). However, in contrast deciding whether a plaintiff had title to sue was classified by substantive by the Scottish Court of Sessions in *FMC Corporation v Russell* (1999) SLT 99: Elizabeth Crawford ‘The Adjective and the Noun: Title and Right to Sue in International Private Law’ [2000] *Juridical Review* 347

²⁰ ‘Substance and Procedure in the Conflict of Laws’ (1933) 42 *Yale Law Journal* 333, 343-344. He then suggested the relevant question was how far the forum court could go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself, but this test was dismissed by Mason CJ in *McKain* (26) as being too vague.

That efficiency is achieved by the adoption and application of the rules of practice and procedure and by the judges' practical familiarity with those rules ... the essence of what is procedural may be found in those rules which are directed to governing or regulating the mode or conduct of court proceedings²¹

Five members of the High Court of Australia expressly adopted these comments in *Pfeiffer*.²² Similarly, Dicey and Morris state that the

Primary object of this rule (ie that procedure should be governed by the law of the forum) is to obviate the inconvenience of conducting the trial of a case concerning foreign elements in a manner with which the court is unfamiliar ... If therefore it is possible to apply a foreign rule, without causing any such inconvenience, those rules should not necessarily ... be classified as procedural.²³

To like effect are comments by Sir William Beckett:

Its basis is an obvious practical necessity. In each country courts are organized in the manner found appropriate by the *lex fori*, which determines which courts have jurisdiction in different classes of case, the method in which proceedings must be instituted and the pleadings, written and oral, conducted, and the manner and the stage at which evidence must be given and judgment delivered, and the means by which the judgments can be executed. In all these matters if it obvious that an English court cannot be expected at one time to apply French and at another Japanese procedure, and it is impossible for any law other than the *lex fori* to apply. There is absolute unanimity in the systems of all countries that all these matters are governed by the *lex fori*.²⁴

The reversion to forum law is difficult to justify for any reason except for the need for courts to be run by their own rules. These sentiments have been applied by the High Court of Australia, by the English Court of Appeal, by the Supreme Court of Canada,²⁵ and by some courts in the United States.²⁶ However, some recent decisions are in the author's view contrary to the above sentiments in the breadth they give to the concept of procedure, and it is submitted with respect these were incorrectly decided. Courts in one jurisdiction are equivocating on the application of the principles above in some kinds of case, and it will be submitted they should apply these principles completely.

The Link Between Characterisation of Procedure and Choice of Law

²¹ n9,26-27; to like effect Gaudron J in *Stevens*, p469

²² Gleeson CJ Gaudron McHugh Gummow Hayne JJ p543-544; Kirby J adopted a similar test (563), as did Callinan J (574)

²³ *The Conflict of Laws* (2006) 14th edition p178. The authors conclude that the previously wide meaning of procedure has been abandoned because it tends to frustrate the purposes of choice of law rules (p177). Refer also to Lush LJ in *Poyser v Minors* (1881) 7 QBD 329,333 'practice, like procedure, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product'. Panagopoulos neatly summarises the distinction as involving questions of manner (procedure) and matter (substance): 'Substance and Procedure in Private International Law' (2005) 1 *Journal of Private International Law* 69, 71

²⁴ Sir William Beckett 'The Question of Classification ('Qualification') in Private International Law (1934) 15 *British Year Book of International Law* 46, 66

²⁵ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Wealands v Harding* [2005] 1 WLR 1539; *Tolofson v Jensen* 1994] 3 SCR 1022, per La Forest J 'procedural characterisation identifies those rules that are necessary to make the machinery of the forum run smoothly, as distinguished from those rules that are determinative of the parties' rights' (1072)

²⁶ Eg *Heavner v Uniroyal Inc* (305 A 2d 412, 415 (1973) 'it would be an impossible task for the court to conform to procedural methods and diversities of the state whose substantive law is to be applied'.

It must be acknowledged that issues within private international law should not be seen in isolation, and specifically that the approach that should be taken to questions of substance and procedure is closely related to the question of how the substantive law to be applied is determined.

For example, when the choice of law rule involved the application of the law of the forum, at least in some form, these matters were not as crucial, because the forum court would still be applying forum law at some stage. However, as a range of jurisdictions have moved to abolish (judicially or legislatively) or largely abolish the role of the law of the forum as the substantive law, the distinction between matters of substance and matters of procedure gains more prominence. It becomes the limit defacto of the application of the law of the forum, absent some flexible exception²⁷ or other escape device such as renvoi²⁸ or public policy that will allow the court to return to forum law.²⁹ And if a flexible exception is not available in particular jurisdictions, a court may feel it necessary to give a broader application to what is procedural in order to apply forum law,³⁰ just as it might feel the need to resort to renvoi if it wishes to apply forum law.³¹

This is not defensible, and other authors and this author have elsewhere advocated the need for a flexible exception to a general rule favouring the law of the place of the wrong.³² However, it would be naïve not to acknowledge this possibility, and others have referred to the jurisprudential gymnastics that a denial of a flexible exception have forced courts in the past to take, in order that they could apply the law of the forum where they believed they should.

²⁷ A flexible exception allows a departure from the general rule in ‘appropriate cases’. It was suggested by Lord Wilberforce in *Boys v Chaplin* [1971] AC 356 in the context that while the law of the place of the wrong should be adopted as the primary choice of law rule, an exception would apply if the place of the wrong were fortuitous, or the place of the wrong did not have strong links to the parties or the events. There are clear links with this approach and a ‘proper law’ approach.

²⁸ See Anthony Gray ‘The Rise of the Renvoi in Australia: Creating the Theoretical Framework’ (2007) 30(1) *University of New South Wales Law Journal* 103; Reid Mortensen ‘Troublesome and Obscure: The Renewal of Renvoi in Australia’ (2006) 2 *Journal of Private International Law* 1; Ernst Schreiber Jr ‘The Doctrine of Renvoi in Anglo-American Law’ (1917-18) 31 *Harvard Law Review* 523

²⁹ Reid Mortensen ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ (2006) 55 *International and Comparative Law Quarterly* 839

³⁰ As Adrian Briggs puts it, ‘all possibility of a flexible exception having been denied, the manipulation of the category of procedure was all that was left in the locker’: ‘The Legal Significance of the Place of a Tort’ (2002) 2 *OxUCLJ* 133, 136

³¹ As Reid Mortensen puts it, in discussing the recent High Court of Australia decision in *Neilson v Overseas Projects Corporation of Victoria Ltd*, ‘Troublesome and Obscure: The Renewal of Renvoi in Australia’ (2006) 2 *Journal of Private International Law* 1, 21: ‘it is difficult to leave a close reading of Neilson without getting the impression that the High Court made all efforts to have the lex fori – Western Australian law – apply to the case’.

³² Elizabeth James ‘John Pfeiffer Pty Ltd v Rogerson: The Certainty of Federal Choice of Law Rules for Intranational Torts: Limitations, Implications and a Few Complications’ (2001) 23 *Sydney Law Review* 145; Geoffrey Lindell ‘Regie National des Usines Renault SA v Zhang (2002) 3 *Melbourne Journal of International Law* 362; Anthony Gray ‘Flexibility in Multistate Tort Cases: The Way Forward in Australia’ (2004) 23(2) *University of Queensland Law Journal* 435; Anthony Gray ‘Remedy Issues in Multinational Tort Claims: Fashioning a Choice of Law Rule’ (2007) 26(1) *University of Queensland Law Journal* 1

It may also be, as Reid Mortensen maintains, that once double actionability becomes unnecessary, the idea that the assessment of damages is procedural also loses whatever foundation it otherwise had, or in other words if the court does not consider the law of the forum in considering whether the claim is actionable, it should not do so when assessing the quantum of the claim.³³

Current Position in Selected Jurisdictions

(a) Australia

One should acknowledge that different views have been evident on the High Court concerning the question of the proper law to apply to the quantification of damages. There is a reasonable amount of support for the proposition that questions affecting the quantification of damages are a matter of substance to be governed by the law of the cause.³⁴ It appealed to a majority of the High Court in *Voth v Manildra Flour Mills Pty Ltd*³⁵ who, after concluding that the place of the wrong was Missouri, said

Even though Australian revenue law features significantly in the respondents' damages claim, it is merely a circumstance bearing on the question whether damage was suffered and, if so, its quantum. It does not, in any relevant sense, determine the liability of the appellant for that damage or the quantum of recoverable damage.

The writer takes this to be a statement by a majority of the High Court of Australia that the law of the forum does not determine quantum issues in international torts cases, this being a matter for the law of the place of the wrong.³⁶

³³ 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 876: 'Once the basic choice of law rule for matters of substance is freed of necessary reference to the lex fori, the idea that the assessment of damages is procedural and something for the lex fori to deal with also necessarily loses any foundation'. In other words, if the law of the forum does not recognize the head of damage the law of the place of the wrong, it cannot be expected that quantification will be for the law of the forum. However, one must acknowledge that the House of Lords in *Harding* interpreted the legislative developments in the United Kingdom that abolished double actionability not to be intended to also abolish the past practice of assessing quantum of remedies by forum law.

³⁴ For example, in *Breavington v Godleman* (1988) 169 CLR 41 – Mason CJ 'the measure of damages is plainly a question of substantive law' (79), Wilson and Gaudron JJ 'there is no reason in logic why the forum should not determine questions as to liability (*including the extent thereof*) by reference to the law of the place where the tort was committed' (91), Deane and Toohey JJ viewed provisions regarding the heads of damage available as substantive but did not comment specifically on quantification generally (139 and 170 respectively); refer also to *McKain v Miller* per Mason CJ (24), Deane J (48); and *Stevens v Head* per Mason CJ (448), Deane J (462) and Gaudron J (469); and *BHP Billiton v Schultz* (2004) 211 CLR 400 (Kirby J (460) and Callinan J (485))

³⁵ (1990) 171 CLR 539 (Mason CJ Deane Dawson and Gaudon JJ at 569-570)

³⁶ There is also some international support for this position. See for example *Cope v Doherty* (1958) 44 ER 1127, 1132, deciding that a restriction on the amount of damages to be recovered was 'a question of liability and not of procedure', and Lord Wilberforce in *Boys* (389) stated that parts of the law of the place of the wrong that denied, limited or qualified recovery of damages should be given effect. Even Willes J in *Phillips* stated that a right of action was the 'creature of the law of the place (of the wrong), and civil liability arising out of a wrong derived its birth from the law of the place and its character is determined by that law'. While *Phillips* is sometimes seen to support the orthodox view, it could also be argued to support the view that the law of the place of the wrong (as the substantive law) should govern quantum issues – quantum could be seen as part of the 'creature' of the right of action, and part of its character. Further, civil liability does not exist in a vacuum – it must relate to quantum, otherwise it is worthless. As Deane J said

Importantly, given the High Court's equivocation in *Zhang* as to whether a different approach should be taken in deciding these issues in a domestic or international torts conflict context, this majority appeared in a rare Australian case involving an international tort, thus answering any arguments that the High Court of Australia dicta statements supporting the law of the place of the wrong to govern quantification of damages applies only to intra-Australian torts.³⁷ However, this majority was destined to be shortlived, given the decisions shortly after in *Stevens v Head*³⁸ and *McKain v Miller*.³⁹ In the *Stevens* case, a majority of the court found that quantification of damages was a matter of procedure for the forum.⁴⁰ Given the importance that the dissenting position of Mason CJ, Deane and Gaudron JJ played in the subsequent development of the law in other jurisdictions, it is worth discussing their dissenting views in the two cases in more detail.

Mason CJ focused on the sensibility involved in courts of the forum applying their own rules of procedure because of the judges' practical familiarity with those rules, and that those rules ensured cases would be heard efficiently and expeditiously. As a result, procedural issues should be confined to those directed to governing or regulating the mode or conduct of court proceedings.⁴¹ He referred to broader conceptions of 'procedure' as being developed at a time when the importance of international judicial comity may not have been given the same recognition as it nowadays commanded.⁴² A broad view of procedure would, he said, frustrate the purpose of choice of law rules (to

in *McKain*, the existence and extent of a remedy is commonly accepted as an incident and measure of a right (48). It might seem artificial to divide the two, especially in the area of damages for personal injury (as all of the cases in this area are) where damage is the gist of the action. There is no right to sue without damage having been proven. See also Oliver Wendell Holmes 'Natural Law' in *Collected Legal Papers* 310,313 (1920), noted at 32 *Harvard Law Review* 40,42 (1918): A substantive right is 'only the hypostasis of a prophecy – the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it'; and Lord Holt in *Ashby v White* (1703) 92 ER 126 'it is a vain thing to imagine a right without a remedy ... if a plaintiff has a right, he must of necessity have the means to vindicate it'.

³⁷ This is important given that *Breavington*, *McKain* and *Stevens* were all intra-Australian torts cases. However, some suggest there should be no difference in the approach to interstate and international conflicts: Jean-Gabriel Castel 'Back to the Future: Is the New Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?' (1995) 33 *Osgoode Hall Law Journal* 35, 37-38 'in today's world, there is no valid justification for or advantage in treating interprovincial and international conflicts differently'.

³⁸ (1992) 176 CLR 433 per Brennan Dawson Toohey and McHugh (459), apparently reflecting a change of heart by Dawson J since *Voth*

³⁹ *McKain v R W Millar and Co (SA) Ltd* (1991) 174 CLR 1, when a majority stated that some limitation periods could be procedural in nature although they prevented compensation being awarded (Brennan Dawson Toohey and McHugh JJ (44), on the basis that the traditional distinction between those extinguishing the claim and those barring the remedy 'is firmly and clearly established as a principle of law.. the distinction has operated in practice free of injustice .. there is no warrant for discarding it'. Refer generally to Brian Opeskin 'Before the High Court: Conflict of Laws and the Quantification of Damages in Tort' (1992) 14 *Sydney Law Review* 340.

⁴⁰ Brennan Dawson Toohey McHugh JJ; Mason CJ Deane Gaudron JJ dissenting

⁴¹ *McKain* (22)(26-7), Deane and Gaudron JJ to like effect (49,56); in *Stevens v Head* (1992) 176 CLR 433 Mason CJ expresses a similar view (445,451), as does Gaudron J (466,469)

⁴² *McKain* (23)

fulfil foreign rights),⁴³ and encourage forum shoppers.⁴⁴ Deane J found the distinction between right and remedy to confound reality and good sense, in that the existence and extent of a remedy was accepted as an incident and measure of a right.⁴⁵

Regarding the specific question of the classification of remedies in *Stevens*, Mason CJ believed that quantification of damages should be a question of substance for the forum, and that suggestions in earlier cases and academic commentary to the effect that quantification was procedural were (or should be seen as) based on a very restrictive view of quantification – such as the method to be used in assessing compensation, whether once and for all or reviewable etc, and that any reading of the authorities suggesting that questions bearing on the quantum of damages was misconceived.⁴⁶

The High Court of Australia in the *Pfeiffer* case re-drew the boundary between substance and procedure. Gleeson CJ Gaudron McHugh Gummow and Hayne JJ noted that the plaintiff ‘cannot ask that the courts of the forum adopt procedures ... of a kind which their constituting statutes do not contemplate’⁴⁷, and Kirby J suggested the court adopt a principle reflecting a distinction based on which rules will make the machinery of the forum court run smoothly.⁴⁸ He made similar comments more recently in the intranational tort case of *BHP Billiton Limited v Schultz*,⁴⁹ referring to matters of procedure as those that ‘simply facilitate the bringing of claims’.⁵⁰

The current position in Australia on issues regarding the heads of damage and quantification of damage in international cases remains equivocal. The High Court has made clear that these matters are to be governed by the law of the place of the wrong in torts occurring wholly within Australia,⁵¹ and subsequent Australian cases have

⁴³ McKain (24); Deane J to like effect (50); in *Stevens v Head* (1992) 176 CLR 433 Mason CJ expresses a similar view (451)

⁴⁴ McKain (25); Deane J to like effect (50); in *Stevens v Head* (1992) 176 CLR 433 Mason CJ expresses similar concern (442,452), as do Deane J (462) and Gaudron J (466)

⁴⁵ McKain (48)

⁴⁶ 447-449

⁴⁷ 543

⁴⁸ 554, citing with approval the Canadian decision adopting such an approach *Tolofson v Jensen* [1994] 3 SCR 1022. To like effect, Callinan J concluded ‘what should be regarded as procedural are the laws and regulations which are reasonable and necessary in the lex fori for the conduct of the action only; that is to say, the laws and rules relating to procedures such as the initiation, preparation and the prosecution of the case, the recovery processes following any judgment and the rules of evidence.

⁴⁹ (2004) 221 CLR 400

⁵⁰ P460

⁵¹ *Pfeiffer* ‘all questions about the kinds of damages or amount of damages that may be recoverable would ... be treated as substantive issues governed by the (law of the place of the wrong)(Gleeson CJ Gaudron McHugh Gummow and Hayne JJ (544), ‘the statutory cap upon damages ... is .. a matter of real substance’ (Callinan J (575)). This position was confirmed in *BHP Billiton v Schultz* (2004) 221 CLR 400, per Kirby J (460), noting that the damages provisions ‘amount to an alteration of the substantive law. It applies a different rule in relation to the entitlement to, and calculation of, such a claimant’s damages’; to like effect Gummow J (444) and Callinan J (485); refer also to . Similarly, the *Second Restatement* states in s171 that the law of the cause determines the measure of damages. Methods of assessment, such as whether the assessment is by judge or jury, and what evidence is admissible on such a hearing, are matters of procedure: American Law Institute *Restatement Second, Conflict of Laws* (1971)

confirmed this position.⁵² However, similarly to the Supreme Court of Canada,⁵³ the High Court of Australia has expressly reserved in the *Zhang* case the question whether this principle should apply in international torts situations.⁵⁴ Unfortunately, no reason was provided by the High Court in *Zhang* for reserving this question for a future occasion.⁵⁵ Not surprisingly, the High Court's reservation has been criticised.⁵⁶ We have not seen any further cases where the issue of a financial remedy for an international tort has been in issue in this context.⁵⁷

It would have been easy for the court to endorse the previous position in *Stevens* that quantum was a matter for the forum, while heads were a matter for the law of the cause. It would have been easy for the court to say that its preferred view in *Pfeiffer*, that the law of the place of the wrong applied to determining both heads of damage and quantum, applied to international torts conflicts. The fact it did not either creates real uncertainty as to the High Court of Australia's thinking on such matters, although it is true that it has not been used since by any court, and remains for the moment only a theoretical escape device. Recent English cases, which broadly take the same view as the High Court did in *Stevens v Head*, will now be considered, but one re-iterates that the continuing applicability of the *Stevens* approach in Australia must be questioned after the *Zhang* decision where the question was deliberately left open.

(b) England

⁵² It was applied recently by the Court of Appeal of New South Wales in *McNeilly v Imbree* [2007] NSWCA 156, where the Court applied Northern Territory caps on damages payouts for an accident that occurred in the Territory, see also *Hamilton v Merck and Co Inc* [2006] NSWCA 55, *FAI Allianz Insurance Ltd v Lang* [2004] NSWCA 413, and *Ivancic v Zardo* [2004] ACTCA 11; cf the outcome under the old principles evidenced in *Guidera v Government Insurance Office (NSW)*(1990) 11 MVR 423 where the New South Wales Court of Appeal applied a New South Wales statute to quantify damage claims arising from an accident occurring in the Northern Territory

⁵³ *Tolofson v Jensen* [1994] 3 SCR 1022 per La Forest J: 'because a rigid rule on the international level could give rise to injustice, in certain circumstances I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can however, imagine few cases where this would be necessary'.

⁵⁴ *Zhang* (520): 'we would reserve for further consideration whether (the proposition that all questions about the kinds of damage, or amount of damages that may be recovered, are governed by the law of the place of the wrong) should be applied in cases of foreign court (unanimous joint judgment). Mortensen suggests that the making of a distinction for damages in international cases would be unprincipled and conceptually incoherent in a territory-based regime: 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 859

⁵⁵ It was not necessary for the Court to answer the question here because the case was an appeal from a decision of the New South Wales Court of Appeal on an issue of *forum non conveniens*. It had not yet been decided whether or not there was negligence on the defendant's part, so it was not necessary for the Court to consider the question of remedies.

⁵⁶ For example, Adrian Briggs 'The Legal Significance of the Place of a Tort' (2002) 2 *OxUCLJ* 133, 136. Sir William Aldous in the Court of Appeal in *Harding v Wealands* [2005] 1 WLR 1539 said it would be illogical to apply a different rule for international torts than for intranational torts.

⁵⁷ Reid Mortensen in *Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches*' (2006) 55 *International and Comparative Law Quarterly* 839 lists cases that have subsequently considered international statutes of limitation (p860) and intranational damages provisions (p861), and notes the faithful application of the *Pfeiffer* regime in these areas in subsequent decisions.

It can fairly be said there have been real difference of opinion on this issue in England over the years. Perhaps the best evidence of this is found in a comparison of the discussion of the issue in one of the leading texts. While Dicey in the first edition of his conflict of laws text states that English lawyers give ‘the widest possible extension to the meaning of the term ‘procedure’,⁵⁸ by the time the fourteenth edition is printed, the view is that

the practice of giving a broad scope to the classification of a matter as procedural has fallen into disfavour because of the tendency to frustrate the purposes of choice of law rules.⁵⁹

On this basis, the learned authors conclude that the measure of damages should not necessarily be procedural.⁶⁰

Several recent cases have directly raised the distinction, providing illustrations of the current English approach to such difficulties. In terms of the orthodox view in England as to the boundary between substance and procedure, the position (like that taken in *Stevens* in Australia) has since early legal times⁶¹ been that the issue of the heads of damage available to a successful plaintiff is a matter of substance, while the issue of quantification of damages is a matter of procedure for the law of the forum.⁶²

One should note here that each of the English cases to be considered was decided after the introduction of the *Private International Law (Miscellaneous Provisions) Act 1995 (United Kingdom)*.⁶³ Section 14(3)(b) of that Act provides that nothing in Part III authorizes questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum. In other words, the Act apparently⁶⁴ reflects the previous common law position that questions of procedure are governed by the law of the

⁵⁸ *Conflict of Laws* (1896) p712

⁵⁹ Dicey, *Morris and Collins on the Conflict of Laws* (2006) 14th ed p177 (presumably a reference to the goal of the conflict of laws being to fulfil foreign rights, or perhaps to have cross-border cases dealt with by reference to the most appropriate legal system on offer). Janeen Carruthers makes the same point: ‘Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages’ (2004) 53 *International and Comparative Law Quarterly* 691, 710

⁶⁰ P194

⁶¹ Eg *Phillips v Eyre* (1870) LR 6 QB 1, 28-29: ‘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’; *Huber v Steiner* (1835) 2 Bing NC 203; *De La Vega v Vianna* (1830) 1 Bard & Ad 284; *Robinson v Bland* (1760) 2 Burr 1077

⁶² *Chaplin v Boys* [1971] AC 356, 379 (Lord Hodson, subject to a flexible exception), Lord Guest (381), Lord Wilberforce (393), Lord Pearson stating that forum law must govern remedies ‘to some extent at least’ (394), Lord Donovan merely stating that the forum court ‘should award its own remedies’.

⁶³ Adrian Briggs ‘Choice of Law in Tort and Delict’ (1995) *Lloyd’s Maritime and Commercial Law Quarterly* 519

⁶⁴ Andrew Scott, ‘Substance and Procedure and Choice of Law in Torts’ (2007) *Lloyd’s Maritime and Commercial Law Quarterly* 44, 47 suggests three possible views: (a) an intention to recast the rules; (b) an intention to defer to the common law concept of procedure, leaving the concept free to develop in light of private international law’s principles, or (c) an intention to incorporate the common law concept, as it was understood in 1995.

forum,⁶⁵ and that quantification of damages was a matter of procedure.⁶⁶ That this is the effect of the Act was confirmed by the House of Lords in its *Harding* decision.⁶⁷

The case of *Edmunds v Simmonds*⁶⁸ involved a car accident between a rental vehicle and a truck in Spain. The rental vehicle was being driven by the defendant, with the plaintiff a passenger in the vehicle. The plaintiff and defendant were both English residents who were on holidays in Spain. The car was insured with a Spanish insurer. The court was satisfied the accident was the defendant's fault, and the only remaining issue was how damages were to be assessed. The available heads of damage were similar in England and Spain, but the way in which quantum was assessed differed.⁶⁹

The court accepted the orthodox view that heads of damage were matters of substantive law, to be governed by the law of the cause. However, issues of quantification were matters of procedure, a matter for English courts as the forum court here.⁷⁰

The rule was also applied in *Roerig v Valiant Trawlers Ltd*,⁷¹ involving an accident on a trawler registered in England and owned by the defendant, an English registered company but a subsidiary of a Dutch company. The deceased, a Dutchman, was on board the trawler as an employee of a Dutch company that was part of the same group. The vessel was on a Dutch fishing expedition in that the boat set off from a Dutch port and would return its catch to a Dutch port.

Again, the issue arose as to the quantification of damages available to the deceased's wife. Under English law, damages would be assessed without taking into account other benefits the deceased's wife might have obtained as a result of the accident, for example a life insurance policy. However under Dutch law, this was a relevant factor, and any court-ordered damages would be reduced by the extent to which the claimant had been compensated elsewhere for losses arising from the accident. The court, applying the orthodox view, found that the issue of what amounts could be deducted from damages ordered by the court was an issue of quantum, traditionally governed by the law of the

⁶⁵ C G J Morse 'Torts in Private International Law: A New Statutory Framework' (1996) 45 *International and Comparative Law Quarterly* 889,895

⁶⁶ That this was intended by the drafters of the legislation was confirmed by the Lord Chancellor, Lord Mackay of Clashfern, in his speech to the House: Hansard (House of Lords Debates) 27/3/1995, columns 1421-1422 and in the Report that eventually led to the legislative reform: 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)(1990) para 3.38 'the measure or quantification of damages under those heads (should be) governed by the *lex fori*'. This conclusion is referred to by Lord Hoffmann in *Harding*, para 34.

⁶⁷ [2006] 3 WLR 83

⁶⁸ [2001] 1 WLR 1003

⁶⁹ Specifically, the English means of assessing quantum was much more generous than the Spanish means.

⁷⁰ This distinction was an obiter observation, with the court preferring to base its reasoning on the ground that the law of the place of the wrong (Spain) should be displaced as the substantive law because given the parties' connections, it was substantially more appropriate that the matter be dealt with under British law (applying s11-12 of the *Private International Law (Miscellaneous Provisions Act) 1995* (UK)).

⁷¹ [2002] 1 *Lloyd's Law Reports* 681

forum, here English law. As a result, damages were not reduced to take account of the other payments the claimant had received.

Again in *Hulse v Chambers*,⁷² the court found that in relation to English plaintiffs injured in a motor vehicle accident in Greece, Greek law applied to the heads of damage available, but English law as the law of the forum governed how damages were to be assessed.

In *Harding v Wealands*,⁷³ the plaintiff, resident in England, was injured while travelling in a vehicle being driven by the defendant in New South Wales. The defendant was living with the plaintiff in England and employed in England at the time of the accident. He claimed compensation for his injuries in an English court. Negligence was admitted; the case revolved around the question of remedies, and in particular whether the statutory compensation scheme operative in New South Wales at the relevant time was applicable, or whether the common law English principles of compensation were applicable. The statutory scheme included provisions dealing with capping of compensation, the discount rate, how compensation must be reduced for insurance payments to the plaintiff, and when interest on damages is payable. The House of Lords overturned the decision of the Court of Appeal⁷⁴ that the New South Wales statutory provisions should be applied in the assessment of damages.

Lord Hoffmann (with whom Lords Bingham, Woolf and Rodger agreed) stated there was no intention that the *Private International Law (Miscellaneous Provisions) Act 1995* override the previous common law rules maintaining that quantum of damages was a matter for forum law.⁷⁵ He then referred to *Stevens v Head*, especially the view of the majority there that the relevant New South Wales statutory provisions were concerned with quantification rather than heads of damage. As a result, they were not applicable to this proceeding. Lord Hoffmann postulated, however, that the new position arrived at in Australia in *Pfeiffer* (a case that overruled *Stevens*), that the definition of what is procedural should be narrowly confined to rules governing or regulating the mode or conduct or court proceedings, may for some 'appear to be more logical'.⁷⁶ It had been adopted by the Court of Appeal (Arden LJ and Sir William Aldous, Waller LJ dissenting).⁷⁷ The Court of Appeal referred with approval to the developments of the

⁷² [2001] 1 WLR 2386

⁷³ [2006] 3 WLR 83

⁷⁴ The Court of Appeal decision is discussed at some length in Janeen Carruthers 'Damages in the Conflict of Laws – The Substance and Procedure Spectrum: *Harding v Wealands* (2005) 1 *Journal of Private International Law* 323; the House of Lords decision is discussed in Charles Dougherty 'Private International Law: *Harding v Wealands*' (2007) 56 *International and Comparative Law Quarterly* 443

⁷⁵ Established in the difficult case of *Boys v Chaplin* [1971] AC 356 (difficult because there is no actual ratio for the decision, and it has been partly overruled)

⁷⁶ Para 51

⁷⁷ Arden LJ thought for example that any reference to the law of the forum was exceptional; it was limited to cases where it was impossible to apply the foreign law to the issue. Sir William Aldous sought to give the word 'procedure' its natural meaning, unencumbered by the previous case law on point. In the House of Lords, Lord Carswell agreed with the view that damages are not naturally regarded as procedure; however since he believed that 'procedure' in the context of private international law had a meaning

Australian law in this area in *Pfeiffer*. He thought that this path was denied to the English courts by the clear expression of the will of the British Parliament in 1995.⁷⁸ As a result, the result in the United Kingdom continued to be that quantification of damages was for the law of the forum, with the availability of heads of damage a matter for the substantive law of the cause. This could lead to the result, as Scott and Mortensen point out, that English (and other British) courts may be asked to apply English rules to quantify losses which are not actionable in England.⁷⁹ It is an invitation to forum shoppers.

The House expressed satisfaction that quantification was a matter for English courts because

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 relative low cost of services etc there, would be wholly inadequate in this country, having regard to the cost of corresponding items here. As Parliament was assured by the Lord Chancellor, (the 1995 Act) guards against such eventualities.⁸⁰

Members of the House of Lords suggested that the word ‘procedure’ might have a special meaning in the context of private international law, and that the Act intended the word to be defined in that context, rather than a more general context.⁸¹

This understanding of Parliament’s intention may be questioned on the basis that the intent of the Act was clearly to overturn the substantive choice of law principles in tort in

different from its typical usage, he was able to join in the reasoning of the other Lords in re-affirming that quantification of damages was a procedural matter for the law of the forum.

⁷⁸ He referred to a speech made by the Lord Chancellor during the debate over the 1995, where the Lord clarified that it was intended that after the passage of the Act, the law of the forum would continue to govern the question of quantum or measure of damages. This view is supported 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 129)), 1990 para 3.38 ‘The consultation paper ... 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 availability of particular heads of damages whereas the measure or quantification of damages under those heads is governed by the *lex fori*’.

⁷⁹ Andrew Scott ‘Substance and Procedure and Choice of Law in Torts’ (2007) *Lloyd’s Maritime and Commercial Law Quarterly* 44, 59; Reid Mortensen ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ (2006) 55 *International and Comparative Law Quarterly* 839, 875

⁸⁰ Lord Rodger, para 70; I have referred elsewhere to my dislike of decisions on which law to apply being based on whether we ‘like’ what the foreign law does, given its potential for fully-fledged application of the law of the forum, and abrogation of the purpose of choice of law rules, which is to fulfil foreign rights: see Anthony Gray ‘Remedy Issues in Multinational Tort Claims’ (2007) 26(1) *University of Queensland Law Journal* 1, 3-6. In other words, the argument is that English courts should apply their own remedies because the result is more attuned with what the English judge thinks is fair compensation. However, what if the foreign law as the law of the place of the wrong does not recognise the cause of action at all? We do not in such cases allow the forum court to ignore this because we might not like the result, yet some judges are prepared to ignore the extent of the remedy provided by the law of the cause because they may not like the outcome. It seems inconsistent and not what choice of law rules are designed to achieve.

⁸¹ Lords Rodger (para 65) and Carswell (83)

the United Kingdom. Could this not also suggest an intention to draw afresh the boundaries between substance and procedure? As Scott argues

It appears rather unreasonable to attribute to Parliament the rather absurd intention to incorporate and preserve a body of common law rules developed in the context of an entirely different choice of law scheme for torts.⁸²

The approach of both the Court of Appeal and House of Lords, in characterizing the legislation rather than the issue itself, has been the subject of note and criticism by authors.⁸³ The approach adopted was not orthodox in relation to such questions.

The decision is also open to criticism that it would have led to inconsistencies depending on whether actions are brought in contract or tort. This possibility arises given Article 10 of the Rome Convention, implemented by the *Contracts (Applicable Law) Act* 1990 (UK). The Article provides that the proper law shall govern the consequences of breach, including the assessment of damages. While the decision of the Court of Appeal in *Harding* would render the rules regarding assessment of damages in contract and tort consistent, the effect of the House of Lords decision is to create different rules for assessment of damages in both contexts. One might question the desirability of such an outcome, most especially in cases of a concurrence of liability in contract and tort.⁸⁴

Subsequent to the decision being handed down, Regulation EC 864/2007 (Rome II) was made on the *Law Applicable to Non-Contractual Obligations*. OJ2007, L199/40, effective from 11 January 2009, now makes it clear that the applicable law governs 'the existence, nature and assessment of damage or the remedy claimed.'⁸⁵ As a result, the effect of the *Harding* decision, at least in the United Kingdom, has largely⁸⁶ been neutered by statute, unless the Convention is interpreted in an unexpected way.

As we will further discuss, many regard the distinction between the right and the remedy to be artificial. If the right is a matter of substance, arguably so too should all issues pertaining to the remedy.⁸⁷

⁸² Andrew Scott 'Substance and Procedure and Choice of Law in Torts' [2007] *Lloyd's Maritime and Commercial Law Quarterly* 44. He suggests the intention was merely to preserve the distinction between procedure and substance, leaving the common law to specify the boundary between those categories and their contents (50).

⁸³ Andrew Scott 'Substance and Procedure in Choice of Law in Torts' (2007) *Lloyd's Maritime and Commercial Law Quarterly* 44, 47; George Panagopoulos 'Substance and Procedure in Private International Law' (2005) 1 *Journal of Private International Law* 69, 74

⁸⁴ Admittedly, the *Harding* case itself was not such a case. Similar criticism appears in Charles Dougherty and Lucy Wyles 'Current Developments – Private International Law' (2007) 56 *International and Comparative Law Quarterly* 443, 451

⁸⁵ Refer for example to Symeon Symeonides 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 1; Paul Beaumont and T Zang 'Classification of Delictual Damages – *Harding v Wealands* and the Rome II Regulation' (2008) 12 *Edinburgh Law Review* 131

⁸⁶ However, even after Rome II, defamation claims are still assessed under the common law, so *Harding* would still apply to that extent.

⁸⁷ Brian Opeskin 'Statutory Caps in Australian Conflict of Laws' (1993) 109 *Law Quarterly Review* 533, 537; Reid Mortensen 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 876; Charles Dougherty and

(c) *Canada and South Africa*

In *Tolofson v Jensen*,⁸⁸ a narrow definition was given to procedure. Citing the reason for the rule, the Canadian Supreme Court confined procedural rules to those that existed for the convenience of the court, administering the court's 'machinery as distinguished from its product'. Limitation periods were held to be substantive.

However, since that case we have seen some retreat back to the law of the forum. A recent example is *Somers v Fournier*,⁸⁹ where the Ontario Court of Appeal considered an accident in New York. The forum court applied New York law as the law of the place of the wrong, yet applied the local Canadian statute capping damages for non-pecuniary loss, on the basis that it is procedural. This was justified on the basis that the caps reflected a policy to avoid or limit payouts for non-pecuniary damages. It was a device to avoid excessive and unpredictable damages awards for non-pecuniary losses.⁹⁰

More recently in *Vogler v Szendroi*,⁹¹ the Nova Scotia Court of Appeal disregarded part of the law of the place of the wrong, Wyoming, in a motor vehicle accident claim brought in Nova Scotia. A Wyoming rule provided for the date at which a proceeding would be deemed to have commenced for limitation of actions purposes. This was different from the date in Nova Scotian law. Had the Wyoming law been applied, the action would have been out of time. However, the judge in Nova Scotia decided that the Wyoming provision was merely procedural and so not applicable to the claim brought in Halifax, Nova Scotia. He found that the Wyoming provision related to methodology, or the manner in which an action is deemed commenced, rather than timing, or the deadline within which action must be commenced.⁹² The judge also referred to what he called policy-based considerations.⁹³

Lucy Wyles 'Private International Law: Current Developments' (2007) 56 *International and Comparative Law Quarterly* 443, 451; George Panagopoulos 'Substance and Procedure in Private International Law' (2005) 1 *Journal of Private International Law* 69, 77-78 citing *Phrantzes v Argenti* [1960] 2 QB 19 for the proposition that a remedy is an inseparable component of a right or obligation. Lord Parker CJ noted in that case that 'the remedies available must harmonise with the right according to its nature and extent as fixed by foreign law' (36-37).

⁸⁸ [1994] 3 SCR 1022

⁸⁹ (2002) 214 DLR (4th) 611; subsequently accepted in *Craig v Allstate Insurance Co of Canada* (2002) 214 DLR (4th) 103, 113

⁹⁰ This sounds to the author like an assertion that forum law provides a remedy that the forum court prefers, which the author argues should not be a reason for failing to apply the law of the place of the wrong: see Anthony Gray 'Remedy Issues in Multinational Tort Claims' (2007) 26(1) *University of Queensland Law Journal*, 1, 3-6

⁹¹ [2008] NSCA 18

⁹² In rejecting an argument that the Wyoming provision was related to statutes of limitation (themselves acknowledged to be substantive) because the commencing words of the rule were 'for purposes of statutes of limitation', the judge found that the introductory words merely identified the rationale for the provision, but did not have the effect that the provision was substantive (para 35).

⁹³ These included that (in the context of the facts of the case) the question of limitations only arose due to the commencement of a claim in accord with the rules of the forum, because the vagaries of service abroad may reduce a claimant's ability to ensure this occurs in a timely fashion, and because it was unlikely that the foreign limitation period would be designed to accommodate the delay that could occur in the service of documents for foreign proceedings (para 38). On the other hand, the Wyoming statute did not distinguish

In a recent South African case, the familiar distinction between limitation periods that extinguish the right and those that bar the remedy raised its (ugly) head.⁹⁴ The court was critical of such an approach, in a situation where a ‘gap’ was created in that the law of the cause viewed limitation periods as procedural, for the law of the forum, while the law of the forum viewed limitation periods as substantive, for the law of the cause. The court there resolved the impasse by applying the law of the cause, namely England, to the question of limitations periods. In so doing, the court declared (correctly, the author asserts), that international uniformity of decisions was very important, and would require that claims alive and enforceable according to the law of the cause ought not be defeated if brought in a different forum. Regardless of whether the relevant limitation periods extinguished the right or merely barred the remedy, English law had the closer connection with the creation, operation, interpretation and enforcement of the parties’ rights. Logically it should apply.

The Future

The writer believes that the approach of the recent English and Canadian cases has not been correct. The distinction between substance and procedure has some merit, and should be retained.⁹⁵ However, the line to be drawn in the area of assessment of damages is a matter of continuing debate. Quantification of damages for breach of contract has also usually been regarded as substantive,⁹⁶ and (as argued earlier) it is questioned whether it is legitimate to classify the matter in different ways according to whether the dispute is related to contract or tort.

(a) Reasons for the Past Broad View of Procedure

In terms of the precedent supporting the orthodox distinction between heads of damage (substantive) and quantification of damage (procedural), to the extent that such precedent is based on *Chaplin v Boys* one would have to question its continued relevance.⁹⁷ The *Chaplin* decision itself is a difficult one, with various strands of reasoning and no

on its face between service of documents for foreign proceedings and local proceedings. Prima facie it applied to both. The first reason given would justify greater resort to the law of the forum, since all issues only arise due to the commencement of a claim in accord with the rules of the forum – this reasoning could also justify using forum law to govern heads of damage and even liability, because these issues pursuant to proceedings in the forum. It is admitted that the vagaries of service abroad is an issue, but seems less of a concern when the statute of limitation is four years. It may be different if a short time frame were given within which to commence action.

⁹⁴ *Society of Lloyds v Price; Society of Lloyd’s v Lee* [2006] SCA 87

⁹⁵ cf Lord Wilberforce in *Black-Clawson Ltd v Papierwerke AG* [1975] AC 591,632 who noted that ‘for English law to abolish the distinction between substance and procedure ... might be an intelligible objective’; and Chamberlayne ‘The distinction between substance and procedure is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it are, legally speaking, part of the right itself (*Evidence*, 1911, para 171)

⁹⁶ *Ekins v East India Co* (1717) 24 ER 441

⁹⁷ In the case, Lord Hodson found that quantification of damages was a question of procedure (378-379)(citing two cases but no justification), Lord Guest relied on the same cases (381). Lord Donovan said the forum should award its own remedies (no authority or reasoning provided), as did Lord Wilberforce (393)(no authority or reasoning provided). Lord Pearson did not directly address the issue, but suggested an exception if the law of the place of the wrong were applied as the substantive law, so that an English court could award ‘adequate damages’ (in its opinion)(406).

unifying rationale. Most of the overall precedent value of the case has subsequently been eroded by legislation, the Parliament obviously finding it necessary to change the law as it stood after the *Chaplin* case, at least to some extent.⁹⁸ Rome II does not adopt this approach. This is not a vote of confidence in the decision.⁹⁹

In terms of rationale, there is the odd reference to the old forms of action as relating to the remedy sought, so a possible link is made between the forum in which the action was heard and questions of remedy.¹⁰⁰ A particular court, which might hear actions of a particular form, was also restricted in the kinds of remedy it might provide. As Cook notes 'many rules of modern substantive law had their origin in procedural devices'.¹⁰¹ Perhaps thus, the link between remedies and form (formality/procedure) was created. Such reasoning might have been applicable when the forms of action were important; obviously such reasoning is no longer applicable now.

Fundamentally, the purpose of the distinction must be borne in mind. It is not a mathematical formula to be unthinkingly applied. The author can only agree with Cook who sees 'The no-man's land, the twilight zone of our classification, where a decision one way or the other is in the abstract equally possible or logical'. Cook claims that 'no intelligent conclusion can be reached in any particular case until the fundamental purpose for which the classification is being made is taken into consideration'.¹⁰²

However, one will look in vain to see a justification (other than precedent) for the different treatment of heads of damage on the one hand, and quantum on the other, in the *Chaplin* case. Let us accept that the distinction between substance and procedure relates to practical convenience, and how far one can reasonably expect a court to go in adopting the law of the cause without unduly inconveniencing itself. If so, why is it practically convenient to consider the different heads of damage that the law of the cause will allow, but practically inconvenient to consider how the law of the cause will calculate the damages?

It is possible that the differential treatment of damages, with part being governed by the law of the cause and part by the law of the forum, parallels too closely the courts' past adherence to double actionability in *Phillips v Eyre*, and reflects an understandable but unacceptable desire to want to give to the law of the forum (read England) influence over

⁹⁸ The Privy Council also took a different approach in *Red Sea*, casting further doubt on the continuing acceptance of *Boys*, for whichever principle for which the case was said to stand. However, the distinction between substance and procedure was not an issue in the former case.

⁹⁹ In the judgment of one of the above English cases, *Roerig*, the English Court of Appeal declares the judgment of the majority in *Stevens v Head* 'compelling' (687). However, that decision, at least in so far as it relates to events connected wholly within Australia, can no longer after *Pfeiffer* be regarded as good law in Australia.

¹⁰⁰ Walter Wheeler Cook 'Substance and Procedure in the Conflict of Laws' (1933) 42 *Yale Law Journal* 333, 349, referring to Goodrich.

¹⁰¹ 402

¹⁰² Walter Wheeler Cook 'Substance and Procedure in the Conflict of Laws' (1933) 42 *Yale Law Journal* 333, 352 and 356

remedies, just as there was a desire to give English law influence over choice of law generally.

I am far from alone in this belief. In Australia, Dixon CJ in *Maxwell v Murphy*¹⁰³ refers to the ‘inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance’. Deane J in *Breavington* referred to orthodox conflicts rules as ‘show(ing) undue preference for the substantive law of the forum’.¹⁰⁴ Kirby J has noted the previous ‘dominant position of Britain in the world also led to the temptation, not always resisted, to consider that British laws were superior to those of other lands’.¹⁰⁵ Lord Wilberforce himself in *Boys* referred to the substance and procedure distinction, noted it could sometimes be a fine line, and then claimed that ‘a not insubstantial weight, perhaps unconscious in its use, is to be found in a policy preference for the adopted (in other words, preferred) solution, when judges are called on to draw the line.’¹⁰⁶ La Forest J also referred to these trends in his landmark judgment in *Tolofson v Jensen*.¹⁰⁷

In the related context¹⁰⁸ of whether a *forum non conveniens* application should succeed, one member of the House of Lords would consider whether the plaintiff would obtain ‘justice’ in the foreign jurisdiction.¹⁰⁹ This invites a judgment by the court of the merits of the laws of another country, and a comparison between English remedies and foreign remedies.¹¹⁰ This is not an exercise this author commends,¹¹¹ due to the principle of judicial comity and respect for legal systems other than our own.

¹⁰³ (1957) 96 CLR at267

¹⁰⁴ p125. See also Janeen Carruthers ‘Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages’ (2004) 53 *International and Comparative Law Quarterly* 691,710 ‘Self promotion on the part of any forum foments reluctance to concede that foreign rules are substantive and encourages litigants to indulge in the vice of forum shopping’, and A H Robertson *Characterisation in the Conflict of Laws* (1940) stating that a forum ‘should endeavour to exercise a spirit of self-restraint, not self-promotion, for the ‘whole foundation of the conflict of laws requires that a court should restrict the field of its own procedure and be prepared to follow as far as possible the foreign substantive law’ (247).

¹⁰⁵ *Pfeiffer*, 547. He added that ‘such considerations, and the ready familiarity of judges with the laws of their own forum, made it natural to expound and apply a choice of law rule that would enhance the role of the courts and law of the forum and diminish the significance of the foreign law of the place where the alleged wrong had occurred’. He made similar comments in *Zhang*, p531.

¹⁰⁶ 392. His Honour then claimed there was ‘some artifice in regarding a man’s right to recover damages for pain and suffering as a matter of procedure’ (393). Similarly, Lord Hodson conceded that ‘it is expected that a court will favour its own policies over those of other states and be inclined to give its own rules a wider application than it will give to those of other states’ (380).

¹⁰⁷ [1994] 3 SCR 1022

¹⁰⁸ They are related because one of the factors to be taken into account in assessing a *forum non conveniens* application is the relevant law that would be applied to resolve the dispute: *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460

¹⁰⁹ Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460,478

¹¹⁰ The author respectfully agrees with the comment by the High Court in *Voth* (Mason CJ Deane Dawson and Gaudron JJ) that ‘there are powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case’ (559).

¹¹¹ Refer to Anthony Gray ‘Remedy Issues in Multinational Tort Claims: Fashioning a Choice of Law Rule’ (2007) 26(1) *University of Queensland Law Journal* 1

Some have argued, given a territorial based rule of law, that arguments about forum policy are more appropriate when questions of jurisdiction arise.¹¹² However, this suggestion is particularly difficult when a jurisdiction's *forum non conveniens* rule is particularly strict, as it is, for instance, in Australia.¹¹³ It presents difficulties in Europe also given that if an English domiciled defendant commits a tort in a country to which the Brussels Regulation applies, a local claimant has the right to invoke the jurisdiction either of local or English courts.¹¹⁴

(b) The Suggested Narrow Definition of Procedure

Given the belated abandonment of the requirement of actionability by forum law in Britain and now Australia,¹¹⁵ the author agrees with the Rome II approach that we must abandon resorting to the law of the forum in assessing the quantum of damages, contrary to what has occurred recently in English and Canadian courts.¹¹⁶ It cannot be justified when the purpose of the distinction is borne in mind. This purpose is either to

- (a) consider how far the forum court could go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself;¹¹⁷ and/or
- (b) increase the efficiency of litigation by allowing judges to adopt familiar rules of practice and procedure, in other words those regulating or governing the mode or conduct of court proceedings¹¹⁸

In related discussion, Cook defined matters of substance as 'rules which determine which facts have certain specified legal consequences'.¹¹⁹ Lorenzen believed that rules of the

¹¹² *Tolofson v Jensen* [1994] 3 SCR 1022, 1054-1055

¹¹³ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538

¹¹⁴ Regulation EC 44/2001; *Owusu v Jackson* (Case C-281/02) [2005] 1 ECR 1383; [2005] 2 WLR 942; Adrian Briggs 'Forum Non Conveniens and Ideal Europeans' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 378; 'The Death of Harrods: Forum Non Conveniens and the European Court' (2004) 121 *Law Quarterly Review* 535; Council Regulation (EC) No 44/2001 22/12/00 on Civil Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters, Article 5(3)

¹¹⁵ Of course, the old common law continues to apply to defamation claims in Great Britain. New Zealand continues as one of the few countries continuing to adhere to the double actionability rule. Refer for example to *Baxter v RMC Group PLC* [2003] 1 NZLR 304; *Starlink Navigation Ltd v The Ship 'Seven Prince'* [2001] 16 PRNZ 55

¹¹⁶ The qualifier must be added that Rome II has not yet come into effect, nor has it been interpreted by the Courts as yet, hence its impact in changing the law in this area remains untested at this time.

¹¹⁷ the Cook formulation, n20; similar was the Canadian Supreme Court in *Tolofson v Jensen* [1994] 3 SCR 1022, 1071-1072 that the purpose of the distinction was 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'.

¹¹⁸ broadly, the Mason CJ Deane and Gaudron JJ line in *McKain*. This is supported in another context by John Salmond in his book on *Jurisprudence* (1924) 7th ed 'the law of procedure may be defined as that branch of the law which governs the process of litigation ... the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other (405-406)

¹¹⁹ 354

law of the cause (substantive law) included all rules that ‘bear substantially upon the rights of the parties’.¹²⁰

It is submitted that the question of what is ‘undue hindrance and inconvenience’ is too uncertain to be of much use. Of course, we must always guard against the homing instincts of judges in these cases.¹²¹ As Janeen Carruthers notes

The inconvenience argument has been applied by English and Scots courts in a restrictive, forum-preferring manner which, if we are honest, has policy and homeward trend as its root¹²²

As she further notes, the argument becomes circular, because in situations where a head of damage is not known to forum law, surely application of quantification methods of the foreign law of the cause (subject to public policy restrictions) would be more ‘convenient’ than the application of some principle of forum law.

For this reason, the more workable suggestion seems to be the second, given its more precise formulation. It was the approach favoured by the High Court of Australia in *Pfeiffer*, and by the dissenting judges in *McKain* and *Stevens*. There is not a great deal of difference between the two formulations, in that they are likely to lead to the same result in most cases.

Whichever formulation is adopted, there is no justification whatsoever in treating matters of the quantification of damages as procedural. Clearly, they do not relate to the mode or conduct of proceedings, and it would be unlikely to be an ‘undue hindrance’ to apply them. Applying the test then of confining procedural matters to those associated with the efficiency of litigation and allow judges to use familiar rules of practice and procedure, the High Court of Australia was correct in *Pfeiffer*, and the Supreme Court of South Africa was correct in *Price*, to abandon the distinction between limitation periods which extinguish the right and those which bar the remedy. Both kinds should be viewed as being substantive, governed by the law of the cause. It would not be unduly burdensome to determine and apply the limitation period of the law of the place of the wrong, nor would it lead to inefficiency of litigation to apply such a limitation period.¹²³

To the extent that the reference to quantification of damages being procedural was tied to double actionability, it can no longer be accepted given the abolition of that rule, in the United Kingdom by legislation, and in Australia and Canada by superior court jurisprudence. This assertion is itself contentious, because the House of Lords most recently in *Harding* concluded that the intention of the *Private International Law (Miscellaneous Provisions) Act 1995* (UK), though clearly to abolish the requirement of double actionability in most cases, was not to disturb the pre-existing common law

¹²⁰ Note in (1933) 47 *Harvard Law Review* 315

¹²¹ Reid Mortensen ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ (2006) 55 *International and Comparative Law Quarterly* 839

¹²² ‘Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages’ (2004) 53 *International and Comparative Law Quarterly* 691, 709

¹²³ Mason CJ in *McKain* acknowledged that the text of a limitation statute ‘would be readily available’ (27).

position that the question of heads of damage was one of substance, with the question of quantification one of procedure for the forum.

(c) Rights and Remedies Should Not be Separated

How tenable is this assertion that the right and the remedy are not (necessarily) linked, as the House of Lords most recently insisted?

There is a range of opinion, not to say logic, to the contrary. Ailes claimed it was ‘improper to speak of remedies as existing anterior to substantive rights. The one necessarily involves the other’.¹²⁴ He claimed that in the long history of Roman law, right and remedy were never sharply dissociated, and there was no evidence that Roman law was any the worse as a result. Holmes stated that a substantive right was ‘only the hypostasis of a prophecy – the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it’.¹²⁵ Panagopoulos concluded that the remedy is an integral part of the right being enforced that should not be segregated.¹²⁶ Particularly in the negligence context, Kirby J has noted recently that damage is the gist of the action.¹²⁷ Deane J in *McKain v Millar* concluded that the existence and extent of a remedy is commonly accepted as an incident and measure of a right.¹²⁸ If the object of choice of law principles is to fulfil foreign rights, as Mason CJ said in *Stevens v Head*,¹²⁹ it is difficult to see why a distinction should be made between the ascertainment of the right and the remedy it provides.

The distinction was criticized in *Chase Manhattan Bank NA v Israel-British Bank (London)*:

Right and remedy are indissolubly connected and correlated ... it is as idle to ask whether the court vindicates the suitor’s substantive right or gives a suitor a procedural remedy as to ask whether thought is a mental or cerebral process¹³⁰

It seems artificial and arbitrary to draw a line between the right and the remedy. It is reminiscent of the kind of reasoning used to maintain the distinction between different kinds of limitation periods, since abandoned. It has no place in modern choice of law

¹²⁴ Edgar Ailes ‘Substance and Procedure in the Conflict of Laws’ (1941) 39 *Michigan Law Review* 392, 403

¹²⁵ Oliver Wendell Holmes ‘Natural Law’ in *Collected Legal Papers* (1920) 310, 313; Peter Birks is also against it: ‘Rights, Wrongs and Remedies’ (2000) 20 *Oxford Journal of Legal Studies* 1

¹²⁶ ‘Substance and Procedure in Private International Law’ (2005) 1 *Journal of Private International Law* 69, 78, citing *Phrantzes v Argenti* [1960] 2 QB 19 for the proposition that for the purposes of private international law, the remedy is an inseparable component of the right or obligation. (This cannot be reconciled with the 2006 House of Lords decision in *Harding*, however).

¹²⁷ *BHP Billiton Limited v Schultz and Others* (2004) 221 CLR 400, 460

¹²⁸ (1991) 174 CLR 1, 48 ‘the unavailability of a remedy by reason of a limitation period will ordinarily be of immeasurably greater significance than the theoretical persistence of the underlying right’; Mason CJ and Gaudron J expressed similar sentiments). These three judges were dissenting in this case, but the majority decision was subsequently overturned in *Pfeiffer*.

¹²⁹ Para 20

¹³⁰ [1981] Ch 105, 124 (Goulding J); see also *J D’Almeida Araujo Ltd v Sir Frederick Becker and Co Ltd* [1953] 2 QB 329

rules. The remedy only arises when the right is recognized; one cannot have one without the other. Upon what logic then should they be distinguished?

(d) Forum Shopping is Undesirable

However, an argument for a narrow definition of what is procedural is not justified merely because of the purpose of the distinction – it can be justified on other grounds. As is obvious, the narrower the definition, the less scope there is for an opportunistic plaintiff to forum shop in order to find a forum most advantageous to his case.¹³¹ One cannot blame parties in litigation for so doing, but the law should surely not encourage a person injured in one jurisdiction to sue in another, and by so doing avoid inconvenient damages limitations or time bars.¹³² As Panagopoulos puts it

What the court should seek to do, at least in theory, is reach the same result as the foreign court in respect of the specific juridical issue to which the relevant choice of law rule applies¹³³

In other words, what is procedural should be kept to a minimum to avoid forum shopping.¹³⁴

Of course, forum shopping completely undermines the territorial basis of choice of law rules that have now been settled in most jurisdictions, often after long and tortuous paths. It is considered to be a very serious distortion of the whole object of choice of law rules, and should not be tolerated, let alone encouraged, by choices we make about what is substance and what is procedure. Judges have commented on the undesirable nature of forum shopping in this context.¹³⁵

¹³¹ Further, surely forum shopping remains objectionable whether it occurs within a country or across different countries.

¹³² This occurred in *Stevens v Head* and *McKain v Miller* and was attempted in *Breavington v Godleman*. However, in support of the majority view in *McKain* and *Stevens*, see Richard York 'Let it Be: The Approach of the High Court of Australia to Substance and Procedure in *Stevens v Head*' (1994) 16 *Sydney Law Review* 403

¹³³ George Panagopoulos 'Substance and Procedure in Private International Law' (2005) 1 *Journal of Private International Law* 69, 73

¹³⁴ Others defend forum shopping: see for example Andrew Bell 'The Why and Wherefore of Transnational Forum Shopping' (1995) 69 *Australian Law Journal* 124; Friedrich Juenger 'What's Wrong With Forum Shopping?' (1994) 16 *Sydney Law Review* 5; in this context Mason CJ and Deane J in *Stevens v Head* (1992) 176 CLR 433, 442 and 462 (and Gaudron J at 466) and *McKain v R W Miller and Co (SA) Pty Ltd* (1991) 174 CLR 1, 25 and 50 referred to forum shopping as something that choice of law rules should not encourage.

¹³⁵ For example, *Stevens v Head* (1992) 176 CLR 433, 442 per Mason CJ 'I was concerned that a resolution of the conflicts problem in such cases which gave too much prominence to the lex fori would inevitably encourage forum shopping by plaintiffs'; Deane J 'the approach adopted by the majority in *McKain* (giving procedure a broad definition) goes a long way towards converting the Australian legal system into a national market in which forum shoppers are encouraged to select between competing laws imposing different legal consequences in respect of a single occurrence' (462); and in *Pfeiffer*, Kirby J (552-553) and Callinan J (570-571); refer to La Forest J in *Tolofson v Jensen* 'To permit the court of the forum to impose its own views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster'.

Surely if a claim is not alive in the place of the wrong, it should not be alive in any other jurisdiction. This was exactly what occurred in the recent Canadian case of *Vogler v Szendroi*,¹³⁶ where the matter could not have proceeded in the place of the wrong, Wyoming, because of delayed service of action. The judge allowed the matter to proceed in Nova Scotia because of the different rules that jurisdiction uses to determine when an action has been commenced. A broad reading of what is procedural continues to allow this possibility. What purpose does this serve? It does not uphold our belief that because the wrong occurred in Wyoming, the law of Wyoming should resolve the issues.

It is generally accepted that a major purpose of conflicts of laws principles is to give effect to foreign rights:

Where rights are acquired under the laws of foreign states, the law of this country recognizes and gives effect to those rights, unless it is contrary to the law and policy of this country to do so¹³⁷

How does allowing a claim to proceed in one jurisdiction, when such a claim would not be successful if brought within the jurisdiction where the wrong occurred, do this? Yet this can and has happened if we give broad scope to the meaning of procedural laws.¹³⁸ Similarly, how does assessing a damages claim based on forum calculation methods 'recognise and give effect to rights acquired under the law of foreign states'?

The answer is that a broad reading of what is procedural, seen most recently in English and Canadian decisions, does not uphold, but subverts, territoriality, a principle which English, Canadian and Australian choice of law principles supposedly uphold.

(e) Are Issues Regarding the Classification of Statutes of Limitation and Assessment of Damages Linked?

One question relates to a possible link between the issues of statutes of limitation being classified as substantive or procedural, and the issue of whether questions about damages should be classified as substantive or procedural. Conceptually on one view they are linked, because they both allow exceptions to the now-accepted dominant principle of territoriality and to giving effect to the law of the place of the wrong as the substantive law to resolve the dispute. They both separate the right to claim something from an assessment of its value. Evidence that they are linked appears in the judgments of *Stevens* and *Pfeiffer*. The writer does not, with respect, agree with the majority judgment in *Stevens* but the judges made an interesting observation about the link. Discussing the distinction between different kinds of limitation statutes, with one being substantive and the other procedural, the majority then note

¹³⁶ [2008] NSCA 18

¹³⁷ *Hooper v Gumm* (1867) 2 Ch App 282, 289

¹³⁸ Alternatively, there is the possibility that a head of damage is available according to the law of the place of the wrong but not the forum. (This was indeed the situation that occurred in *Red Sea Insurance Co v Bouygues SA* [1995] 1 AC 190). This is the situation that leads Carruthers to conclude that 'it would be less artificial for quantification to be performed according to the law of the cause': Janeen Carruthers 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' (2004) 53 *International and Comparative Law Quarterly* 691,704.

A *similar distinction* (emphasis added) has been drawn between a law which denies a remedy in respect of a particular head of damage in negligence (a substantive law) and a law which affects the quantification of damages in respect of a particular head of damage (a procedural law)¹³⁹

Conclusions about the two issues were also drawn in the same paragraph in the *Pfeiffer* judgment – when the comment is made that the application of any limitation period should be seen as substantive in nature, the next comment is that all questions about the kinds of damage or amount of damages should ‘likewise’ be treated as substantive.

The point is – having abolished the distinction between different kinds of limitation periods (now they are all classified as substantive), should not the High Court of Australia, by parity of reasoning, also insist on the abolition of the former distinction between heads of damage and quantifications of damage, and treat them both as substantive, governed (at least in the large majority of cases) by the law of the place of the wrong? If the High Court can assert in *Pfeiffer* that ‘matters that affect the existence, extent (emphasis added) or enforceability of the rights and duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance’¹⁴⁰, why should this not be the case in both international and interstate tort conflict situations?

Certainly, these issues in England have ended up at the same position – commencing in 1984 when the *Foreign Limitation Periods Act* required that the limitation rules of the law of the cause be applied, to Rome II, which will have the effect that the law of the cause will govern quantification of damages. Mortensen criticizes the decision of the Supreme Court of Canada in *Tolofson v Jensen* in not making this link explicit, with the consequence that courts have been allowed to continue to resort to the distinction to apply their own law:

In dealing only with the characterization of statutes of limitation as substantive, La Forest J did narrow the Canadian approach to procedural law. However, in failing to link this explicitly to the need to give fuller effect to the territorial principles underlying the *lex loci delicti* rule, his Lordship left some room for the Provincial courts to maintain the characterization of other questions as procedure as a means of escaping to the *lex fori*. That this has allowed Ontario’s own ‘policy considerations’ to be elevated above *Tolofson*’s strict principle of territoriality merely reinforces the conceptual difficulty of treating the assessment of damages in this way¹⁴¹

(f) The Distinction Must Not be Used as an Escape Device

Central to the author’s thinking on these issues is the concern that the distinction between matters of substance and procedure not be misused. As indicated, it serves a useful purpose to smooth the flow of court proceedings, and to that end must be upheld. The danger, however, to which others have averred,¹⁴² is that the distinction be used for purposes that are considered illegitimate – specifically, to justify resort to the law of the

¹³⁹ 457 (Brennan Dawson Toohey McHugh JJ)

¹⁴⁰ 543 (Gleeson CJ Gaudron McHugh Gummow and Hayne JJ)

¹⁴¹ Reid Mortensen ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ (2006) 55 *International and Comparative Law Quarterly* 839, 876

¹⁴² Reid Mortensen ‘Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches’ (2006) 55 *International and Comparative Law Quarterly* 839, 857-863; Janeen Carruthers ‘Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages’ (2004) 53 *International and Comparative Law Quarterly* 691, 709

forum. Courts have a natural desire to wish to apply their own law because it is familiar. This desire has been responsible for some choice of law rules that have eventually been discarded. We should guard against the same problem in another guise – this time, an over-generous application of the concept of what is ‘procedural’. We should not use the device in order to apply forum law because we think it might deliver a ‘better’ result.¹⁴³

What is Procedural?

A broad view of what is substantive must be taken.¹⁴⁴ It has already been suggested what is substantive – the kinds of remedies that are available, things that affect the quantification of damages and statutes of limitation are all submitted to be matters of substance, to be governed by the law of the cause. Quantification of damages include whether any defences are available, including contributory negligence,¹⁴⁵ *volenti*, and the doctrine of common employment (where available) and the effect of these defences on damages. It would include whether claimed damages are too remote or reasonably foreseeable. It would include whether the principle of proportionate liability applies or not.¹⁴⁶ It would include questions of discount and/or interest.¹⁴⁷

¹⁴³ Anthony Gray ‘Remedy Issues in Multinational Tort Claims’ (2007) 26(1) *University of Queensland Law Journal* 1, 13; cf the Ontario Court of Appeal in *Somers v Fournier* [2002] OJ No 2543 ‘the policy considerations which support the goal of avoiding such awards ... favour characterization of the cap as a matter of procedural law’, and Jean-Gabriel Castel ‘Back to the Future!: Is the New Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?’ (1995) 33 *Osgoode Hall Law Journal* 35, 68: ‘Of course, there is always the possibility of resorting to public policy to avoid the application of the foreign *lex loci delicti*. Thus, where the forum has a serious relationship to the issues or the parties, it could apply its own law and in so doing base its choice on considerations of public policy as, for instance, if the *lex loci delicti* gave little or no recovery at all’.

¹⁴⁴ Lorenzen viewed it as anything which bears substantially upon the rights of the parties: Note in (1933) 47 *Harvard Law Review* 315, 317

¹⁴⁵ held to be substantive in *Fitzpatrick v International Ry* (1929) 252 NY 127,134-135 (New York Court of Appeals); Callinan J in *BHP Billiton v Schultz and Others* (2004) 221 CLR 400, 485 agreed that defences were substantive, as they affect quantification of damages.

¹⁴⁶ These issues would, of course, be a matter of evidence, but it is submitted that in the vast majority of cases (at least), including with the rapid growth of information accessibility with the Internet, it would be possible to find this information. Perhaps an exception could be needed when it is not reasonably possible to find out the law of the place of the wrong on a particular matter regarding damages. This may have been what Cooke was talking about when he asked how far a forum court could go in applying the law of the place of the wrong without unduly inconveniencing itself.

¹⁴⁷ The Australian Law Reform Commission was also minded towards a broader view of what is substantive, but appears to have been influenced by outside advice. The Commission in its *Choice of Law Report* 1992 No 58 conceded that ‘logically ... all assessment of damages should be substantive’, but concluded with a (then) orthodox view (based on the ‘prevailing view of the (unnamed) consultants’) that the assessment of damages was not to be treated as substantive in international matters (para 10.44). Part of the reasoning provided was that it would ‘surely be a practical impossibility for an Australian court as a matter of course to exercise an overseas court’s discretion as to the amount to be awarded for pain and suffering for example in an overseas motor vehicle accident. The problem of assessing the relevant awards in every jurisdiction in the world is for (sic) too daunting’. This is submitted to be weak reasoning – the Commission had earlier found that at least in most cases, the law of the place of the wrong should be applied as the substantive law in torts conflict cases. Is it more daunting to determine compensation for pain and suffering according to the law of (say) Mogadishu, than it is to determine negligence under that law? It seems to the writer to be drawing a fine distinction without clear reasoning. Further, with the development of the Internet and improved lines of communication between nations, the problem of finding the law of another country is surely less daunting than it was in 1992, though the author accepts there are

The author suggests that, consistently with the mode or conduct of proceedings/undue inconvenience tests, the following should be regarded as matters of procedure to be governed by the law of the forum:¹⁴⁸

- (a) how the matter gets to court, for example the pleadings, directions hearings, discovery etc¹⁴⁹
- (b) rules of evidence¹⁵⁰
- (c) issues of standing¹⁵¹
- (d) which court in the jurisdiction can hear the matter
- (e) whether the matter is heard by a judge or jury¹⁵²
- (f) whether damages are assessed on a once and for all basis or not¹⁵³
- (g) whether any damages awarded must be paid as a lump sum or can be paid periodically¹⁵⁴
- (h) time periods for filing documents (other than initiating process)¹⁵⁵
- (i) dismissal for want of prosecution¹⁵⁶
- (j) avenues for appeal¹⁵⁷

A narrow view of what is procedural would be consistent and intellectually coherent with general trends in choice of law rules towards territoriality and away from a requirement of actionability according to the law of the forum.¹⁵⁸ As Reid Mortensen puts it

still difficulties in relation to some countries around the world. It would be interesting to see what view the Commission would have of this issue in 2008 in the light of *Pfeiffer* and *Zhang*.

¹⁴⁸ This is not submitted as an exhaustive list but includes the kinds of matters that have previously been considered by the courts, as well as those which have not (to the author's knowledge), but which the author believes fit the definition of matters of procedure.

¹⁴⁹ *BHP Billiton Ltd v Utting* [2005] NSWSC 260; *BI (Contracting) Pty Limited* [2005] NSWSC 592

¹⁵⁰ This is procedural, according to the *Second Restatement* (p511); cf Callinan J in *BHP Billiton v Schultz* (2004) 221 CLR 400 who suggested that rules denying natural justice were substantive (491)

¹⁵¹ *Ibid* (standing referred here as the right to be heard). Crawford claims the issue of the right to sue is a substantive one: Elizabeth Crawford 'The Adjective and the Noun: Title and Right to Sue in International Private Law' [2000] *Juridical Review* 347. She refers to the Scottish case of *McElroy v McAllister* (1949) SC 110, where a Scottish man died in an accident in England, allegedly through the fault of his fellow Scottish employee. Under Scots law the executor of a will could not commence legal action on behalf of the estate; under English law the executor could. The Scottish court applied the double actionability rule, and found that the first limb was not satisfied – the executor was denied compensation.

¹⁵² The *Second Restatement* also classifies this issue as procedural only (p511).

¹⁵³ identified as procedural by Dicey and Morris, p943; see also Mason CJ (dissenting) in *Stevens v Head* (1992) 176 CLR 433, 449

¹⁵⁴ Cheshire and North's *Private International Law* p95-96; see also Mason CJ (dissenting) in *Stevens v Head* (1992) 176 CLR 433, 449

¹⁵⁵ *KC v College of Physical Therapists of Alberta* (1998) 157 DLR (4th) 31, 36; cf the recent decision in *Vogler v Szendroi* [2008] NSCA 18, where the judge found that a Wyoming provision stating that an action would only be deemed to have commenced when documents had been served on the other side was procedural only and thus not applicable where proceedings were commenced in Nova Scotia rather than Wyoming. (It was common ground that the Wyoming limitation period as the *lex causae* applied).

¹⁵⁶ Cf *Alberta Mortgage and Housing Corporation v Kalpstein* (1999) 1 WWR 355, 361

¹⁵⁷ Cf Callinan J in *BHP Billiton v Schultz* (2004) 221 CLR 400 who suggested that appeal provisions were substantive (490); an assertion Kirby J described in the same case as 'arguable' (460)

¹⁵⁸ Some might argue that the experience has been that courts have not found a narrow view of procedure to be attractive, and have constantly sought to find ways to give more scope to the law of the forum, including

Once the basic choice of law rule for matters of substance is freed of necessary reference to the *lex fori*, the idea that the assessment of damages is procedural and something for the *lex fori* to deal with also necessarily loses any foundation¹⁵⁹

It would be consistent with trends in Europe, particularly the 2007 regulation mandating the substantive law to be applicable to the existence, nature and assessment of damages or remedies in non-contractual obligation cases. It would also be consistent with the Rome Convention on contractual obligations, and there is much to be said for harmonization of the approaches in contract and tort. It is hoped that the Canadian Supreme Court will continue with its approach to substance/procedure identified in *Tolofson*, and that the High Court of Australia resolves the question left open in *Zhang* by applying the law of the place of the wrong to quantum issues, consistently with its moves elsewhere in choice of law in recent years., away from double actionability and towards the primacy of the law of the place of the wrong.¹⁶⁰ Consistency in approach might suggest then a broad view be given to what is substantive, along the lines suggested by Mason CJ and Deane J in *McKain* and *Stevens*. If Rome II is interpreted as expected, quantum issues will be resolved by the law of the cause, in countries to which the convention applies. Hopefully, this will avoid a repeat of *Harding*.

Conclusion - Remaining Faithful to the Reasons for the Distinction

The distinction between matters of substance and matters of procedure serves a purpose in conflicts law. It justifies a court in adopting its own procedures in conducting the proceedings, but does not allow a forum court to apply rules that affect substantive rights, including substantive remedies (including anything relevant to quantum). As Cook and others have argued, a narrow view must be taken of matters that are procedural, limited to matters relating to the conduct of proceedings and efficiency. Unless we bear in mind the reason for the distinction, the distinction might be used for unacceptable reasons, and to deal with problems in the conflict of laws such as choice of law that are better solved using other tools. The past distinction drawn between right and remedy, influencing positions on damages issues as well as statutes of limitation, does not serve us well and should not be continued.

a broader view of procedure. I would argue in response that choice of law rules have moved much further towards the application of the law of the place of the wrong, and as a result discounted the importance of the law of the forum. This has occurred at court level, and also in legislation and conventions. Growth in globalization, growth in international awareness more generally, and increasing ability to know what the foreign law is can only assist in future in the application of the law of the place of the wrong, wherever situated. The author believes these developments will ensure that the broad view of substance will be applied in future, and a correspondingly narrow view of procedure taken.

¹⁵⁹ 'Homing Devices in Choice of Tort Law: Australian, British and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839, 876

¹⁶⁰ I must concede that the High Court of Australia's approach on a related but distinct topic recently, that of *renvoi*, gives me some doubt as to the High Court's commitment to the law of the place of the wrong: *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; 'The Rise of *renvoi* in Australia: Creating the Theoretical Framework' (2007) 30 *University of New South Wales Law Journal* 103. The High Court there controversially applied the *renvoi* doctrine to avoid the application of the law of the wrong.

