Accidents Abroad: Jurisdiction, Applicable Law, and European Motor Directives

BERNARD DOHERTY
39 Essex Street


**Introduction**


   *The Treaty [of Rome] does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.*

2. Most personal injury lawyers, I suspect, were content with the first part of that: personal injury cases in England were by and large the concern of English plaintiffs and English defendants applying English law.

3. By 1991, European law had developed, and so had the view from Lord Denning’s window. Having retired some years from the bench, he said:

   *No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses to the dismay of all.*

4. Even by 1991, most lawyers practising in the field of personal injury probably felt themselves at a reasonably safe distance from this raging torrent. In general European law was a problem for others.

5. The last decade has changed all that. In part, this is by the formal process of legislation. More and more areas relevant to personal injury cases come under a
European umbrella: 1 January 1993 brought in the six pack regulations; the MIB now exists by virtue of a European directive, and the agreement has to be interpreted in that light.

6. Perhaps to a greater extent, however, the real motors are social and economic: growths in real income and cheap air fares mean that millions are travelling overseas each year; increased cross border trade means more English employees working abroad and the inevitability of accidents and litigation; long hospital waiting lists are causing UK citizens to travel abroad for medical treatment.

7. There is no longer anywhere to hide. Like it or not, we are all Europeans now, and all international lawyers.

8. I shall take 3 areas which may arise for an English personal injury lawyer faced with advising a client (claimant or defendant) in relation to litigation arising from an accident abroad.
   a. Jurisdiction: can and should the case be tried in England, or should it be tried abroad?
   b. Applicable law: will the case be tried according to English law, or some other law?
   c. Motor claims: the role of the European Motor Directives?

**Jurisdiction: should the case be tried in England or abroad?**

9. I start with the traditional English position, which includes a discretionary power in the English court to refuse jurisdiction. As will be seen below, European law has significantly restricted the circumstances in which this power can be exercised.
10. If an action is commenced in England and the English court has jurisdiction, it might nonetheless stay the claim if another, foreign, court would be the proper place to have the case tried: the power to stay on grounds of *forum non conveniens*.

11. The leading discussion of when and how the power should be exercised is in the speech of Lord Goff in *Spiliada Maritime Court v Cansulex Limited* [1987] AC 460. At 476 he says:

*The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice.*

12. It is a broad general discretion taking into account all factors. Relevant factors are likely to include the law applicable to the dispute (ie if the law of Australia governed a dispute, it might all other things being equal be more appropriate to have the case tried in Australia), the domicile of the parties (if 9 parties out of 10 are resident in Australia that would be significant), where witnesses are, and so forth.

13. The most important limitation on this discretion is in relation to cases where the possible competing forum is in another EC country. In such cases, the allocation of jurisdiction is governed by the provisions formerly found in the Brussels Convention, now contained in Council Regulation (EC) 44/2001 (aka “Brussels I” aka “the Judgments Regulation”). The central jurisdictional articles for our purposes are:

*Article 2*
1. *Subject to this Regulation, persons domiciled in a Member State*
shall, whatever their nationality, be sued in the courts of that Member State.

... Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

... 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

... Article 6

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

14. There are also specific jurisdictional provisions relating to insurance disputes, consumer contracts, and employment contracts providing rules of jurisdiction more favourable to claimants. There are further a number of articles providing for exclusive jurisdiction, eg where the dispute is about real property, only the court of the Member State in which the property is situated will have jurisdiction.
15. Comparison of the English law of forum non conveniens and Brussels I shows a fundamental difference of approach. The English law places much discretion in the hands of its judges. Most continental systems prefer to proceed by mandatory rules, which increase certainty, albeit at the potential expense of anomaly or even injustice in any particular case. Brussels I is continental in its approach. Where it applies, the English court either has jurisdiction, and no discretion to refuse a case, or has no jurisdiction.

16. The potential application of Brussels I, therefore, must always be kept in mind when one or more of the parties to a proposed action is connected to another Member State of the EC. The perils of failing to do so are shown by *Watson v First Choice, Aparta Hotels* [2001] EWCA Civ 972 (by reason of its date, a Brussels Convention rather than Regulation case, but nothing turns on that.)

17. Mr Watson went to Spain on a package tour bought from First Choice. While there, he visited an accommodation block called Caledonia Park which was owned and managed by Aparta Hotels. He was refused entry, and chased away by a baton wielding security guard. In making his escape, he jumped over a low wall. On the other side of the wall was a 20 metre drop, and he suffered serious injuries. He claimed against both defendants in an action in England. Against First Choice, he sued under the contract for the package tour, a contract made with an English company and under English law. First Choice’s liability was said to arise under the Package Tour Regulations, First Choice being effectively vicariously liable for the acts of Aparta. As against Aparta, the claim was based in tort.

18. One might think that these facts were precisely what Article 6.1 of Brussels I was designed to cover, claims so closely connected that it was expedient to determine them in a single forum, and that therefore the English courts had jurisdiction. However, the European Court of Justice had already considered the words of
Article 6.1 in the Réunion Européene case, C-51/97 [1998] ECR 1-6511, and had said the following:

*Two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected.*

19. On the basis of that dictum, the judge set aside service against Aparta, leaving Mr Watson to his perhaps uncertain remedy against First Choice. The result is to English eyes difficult to justify. To answer the question by reference to the way in which each of two claims is framed, in tort or contract, rather than by reference to broader considerations of practical justice, seems to be formalism of a high degree. The Court of Appeal, perhaps unable quite to believe that Réunion Européene meant what it said, referred the case to the ECJ for an answer. The parties settled, however, before the ECJ heard the reference.

20. *Owusu v Jackson* [2002] EWCA Civ 877 shows the creative possibilities and the pitfalls of Brussels I (again, by reason of the date this was a Convention rather than a Regulation case, but nothing turns on that). Mr Owusu booked a holiday villa in Jamaica from Mr Jackson. While there, he swam in the sea. Diving into the water, he struck his head on a sand bank and suffered a C5 tetraplegia. He sued Mr Jackson and 5 other defendants, who were all involved in one way or another with the control and management of the beach off which the accident happened. The claim was brought in England. Mr Owusu and Mr Jackson were both domiciled in England. The other 5 defendants were all domiciled in Jamaica, and had carried out no relevant activities outside that country. They were all involved in one way or another with the control and management of the beach off which the accident happened.

21. Mr Jackson had insurance cover for his villa, but only in respect of judgments obtained in Jamaica, and in any event with a cover limit which would be wholly
inadequate for a tetraplegia claim. At least some of the other defendants had effectively unlimited insurance cover. It would not be unfair to think that the real reason for joining Mr Jackson into the claim was to give justification for bringing it in England against the other defendants. That is not a criticism of the conduct of the claimant’s advisers, who are obliged to conduct litigation for the best interests of their client, and were perfectly entitled to seek tactical advantage in this way.

22. Mr Jackson applied to have the claim in England stayed on grounds of *forum non conveniens* and all the Jamaican defendants applied to have service against them set aside. Almost all the relevant acts or omissions happened in Jamaica, and Jamaican law was clearly the law of the torts and arguably the law of the contract between Mr Owusu and Mr Jackson. The claimant, however, contended that there was no power to stay the claim against Mr Jackson at all. To do so would be inconsistent with the Brussels Convention, since Article 2.1 provides a mandatory requirement that (unless other articles override) a person be sued in the state of his domicile. Mr Jackson was domiciled in England, and Mr Owusu had an indefeasible right to sue him here. The same argument did not apply to the other defendants, of course. But how could the court say, the case against Mr Jackson should be tried in England, whereas as against the other defendants it should be tried in Jamaica? Practical difficulties are obvious. There might be different outcomes to trials of what should be essentially the same issues. How would one deal with the inevitable claims for contribution or indemnity between defendants?

23. The defendants argued that the Brussels Convention was concerned with regulating jurisdiction between Member States, not between a Member and a non-Member State, which was not a matter of legitimate Community interest. That was consistent with previous English authority: *In re Harrods* [1992] Ch 72.

24. The judge accepted the argument of the defendants that Jamaica was the appropriate forum. However, he agreed with Mr Owusu’s contention that the
Brussels Convention precluded a stay against Mr Jackson, and so refused to stay the claim against any defendant. The Court of Appeal did not appear entirely to support the judge’s reasoning, but thought the matter needed to be referred to the European Court of Justice.

25. In spite of the support of the UK Government, the ECJ in its decision of 1 March 2005 (Case C-281/02) reported at [2005] QB 801 supported the claimant’s position, and held that since Mr Jackson was domiciled in England, Mr Owusu had an absolute right to sue him here. The position of the other defendants was nothing to the point, nor were the difficulties and complications which might follow if the claim against Mr Jackson proceeded in England while the claims against the other defendants were remitted to Jamaica (eg inconsistent judgments, impossibility of contribution proceedings, enforcement problems).

26. The various jurisdictions of the common law world had been developing the *forum non conveniens* doctrine, regarding it as conducive to justice in individual cases and conducive to mutual respect and comity between jurisdictions. In *Airbus Industrie v Patel* [1999] 1 AC 119, Lord Goff said at 141:

> I have no doubt that it will be of some comfort to your Lordships . . . that the state of Texas has now, like other common law jurisdictions, adopted the principle of forum non conveniens . . . The principle is now so widespread that it may come to be accepted throughout the common law world; indeed, since it is founded upon the exercise of self restraint by independent jurisdictions, it can be regarded as one of the most civilised of legal principles. Whether it will become acceptable in civil law jurisdictions remains however to be seen.

27. In the event, not only have the civil law jurisdictions not adopted the principle, but they have via Brussels I and Owusu greatly diminished its role in English law.
28. A case such as Owusu show how far the waters of European law have indeed advanced up the English estuaries. That in a dispute between an English claimant and a variety of English and Jamaican defendants jurisdiction could be allocated by the Brussels Convention rather than the rules of common law would come as the greatest surprise to many common lawyers.

29. Where Brussels I does not apply, the English court may still have a greater discretion as to whether or not jurisdiction can or should be exercised. In Cooley v Ramsey [2008] EWHC 129 (QB), an English man was on a working visa in Australia when he was involved in a road traffic accident leading to multiple injuries including brain damage. He stayed in hospital in Australia for six months before his parents brought him back to England. He brought proceedings in England by his litigation friend. Partly in reliance on the earlier decision of Nigel Teare QC in Booth v Philips [2004] EWHC 1437 (Comm); [2004] 1 WLR 3292, Tugendhat J in Cooley held that the damage being suffered by the claimant after he returned to England was sufficient to ground jurisdiction. In a case governed by Brussels I, that would almost certainly not have been the case: see Marinari v Lloyd's Bank Plc [1996] QB 217. Since this was not a Brussels I case, the court nonetheless had discretion whether or not to hear the case. Liability was not in dispute, and most of the quantum evidence would come from England, so that it was appropriate to allow the case to proceed in this country.

**Applicable law: which country’s law governs the case?**

30. Most cases brought in England will be governed by English law, and that will be the default position. If neither party raises issues of foreign law, an English court will usually decide the case according to English law. But if one party pleads and establishes that the issues in the case are governed by foreign law, then the English court will decide the issues applying that foreign law.
31. Why does it matter? In principle, a decision on the applicable law could affect the outcome of the case in relation to:

a. Liability. Clearly, different countries may apply different tests for the establishment of liability for personal injuries. Some may have no fault compensation schemes for certain classes of accident; some may permit employers to use laxer standards than others. It is not possible here to develop this question, which will depend on the nature of the accident and the country in which it happened. Of course, most countries have a fault based system for road traffic accidents. And if it is an accident at work, the various directives underlying the now familiar UK regulations ought to be in force in all EC countries, with a resulting harmonisation of standards. Note, however, that those directives are concerned with standards in the workplace rather than with a unified system for compensation for injured workers, and that even where the directives have effect rules as to entitlement to compensation may differ.

b. Quantum. The rules relating to the quantification of personal injury claims vary greatly from one country to another. Some have no award of general damages for pain, suffering and loss of amenity. Others deduct state benefits in full for life. Others do not observe any principle of *restitutio in integrum*, and only a proportion of what we would consider obviously recoverable heads of damage would be recovered. In practice, this proves to be the area of most dispute over which country’s law is applicable.

c. Limitation. The period for bringing claims varies from a few months to many years.

32. The starting point for consideration of the appropriate law is Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (“the 1995 Act”), which governs the choice of law “for determining issues relating to tort” (section 9(1)). Of course, personal injury claims can also be based on contract, in which case choice of law is governed by the Rome Convention, brought into English law by
the Contracts (Applicable Law) Act 1990. Time does not permit consideration of that statute here.

33. The essential provisions of the 1995 Act for our purposes are these:

9.— (1) The rules in this Part apply for choosing the law (in this Part referred to as "the applicable law") to be used for determining issues relating to tort . . .

(4) The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort or delict has occurred.

. . .

11.— (1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the
most significant element or elements of those events occurred.

(3) In this section "personal injury" includes disease or any impairment of physical or mental condition.

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

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

(b) the significance of any factors connecting the tort or delict with another country,

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

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

34. The prima facie position, therefore, is that if the accident happens abroad, the applicable law will be the law of the country in which the accident happens.
35. While the general rule is plain and usually easy enough to apply, it is not so straightforward to ascertain whether the general rule may be displaced by the exceptions under section 12. The decision under that section involves a consideration of all the factors connecting the tort to one country and to another.

36. There are recent examples showing the approach of the courts to when the general rule will be displaced by particular factors.

37. In *Edmunds v Simmonds* [2001] 1 WLR 1003 (Garland J), the claimant (claiming by her mother and litigation friend) was on holiday with the defendant in Spain when the claimant was injured by the defendant’s negligent driving. Both were English, and the claimant returned to be cared for in England, and would suffer her losses in England. These were held overwhelming factors leading to the application of English law under section 12.

38. Note that section 12(1) speaks of whether it is more appropriate for some law other than that of the place of the tort to be used in deciding the issues in the case “or any of those issues”. It may therefore be possible to displace the general rule in relation to some issues in the case only.

39. The question arose in *Roerig v Valiant* [2002] 1 WLR 2304. A Dutch widow brought a claim in England under the Fatal Accidents Act 1976 following the death of her husband, who was a crew member on an English registered trawler. Liability was not in dispute. Nor was it seriously in dispute that, following the general rule in section 11(1) of the 1995 Act, the applicable law was English. The accident had happened on an English registered trawler, making England the place where “the events constituting the tort” happened. The defendants, however, relied on section 12 to displace the general rule on the basis of significant factors connecting the tort with Holland. They did not suggest that the whole matter was governed by Dutch law, but only the issue of the assessment of damages. The reason for so arguing was that section 4 of the Fatal Accidents Act
prohibits the deduction from the damages awarded of benefits arising to the dependent from the death. The dependants in this case received a number of valuable death related benefits, social security benefits and pensions, as well as sums under a personal accidents policy. Under Dutch law, all would be deducted from the award of damages. Under English law none would.

40. Waller LJ, delivering the lead judgment, found that the factors connecting the tort with England were essentially that the accident happened on an English registered boat, and that the defendant was an English company. There were more factors connecting the tort with Holland. The deceased was Dutch, employed on the ship by a Dutch company, paying his taxes in Holland. His family would suffer their loss of dependency in Holland. While Waller LJ accepted that in one sense these factors could be said to make it “appropriate” for damages to be assessed under Dutch law, he did not accept that they made it “substantially more appropriate”, as the section required before the general rule is displaced. To find otherwise would mean that in almost every case where the claimant was from another country, it would be appropriate to assess damages for personal injuries according to the law of that other country, and Waller LJ did not think the section was intended to have this effect.

41. Another limb of the decision in Roerig also deals with a difficult issue, namely the distinction between matters of substantive law and matters of procedural law. The distinction is often extremely difficult to draw, at least at the margins. The significance in conflict of laws cases is that substantive matters are to be decided by “the applicable law” (or lex loci delicti), whereas procedural matters are to be decided according to the law of the court deciding the issue (or lex fori). It was traditionally said that rules relating to the recoverability of a head of damages are rules of substantive law, as are rules relating to eg foreseeability, mitigation of loss, remoteness of damage, and whether exemplary damages are available. When it was established that such a head of damages was recoverable or that the
relevant liability rule relating to foreseeability etc was satisfied, the quantification of a head of claim was a matter of procedure, so to be governed by the *lex fori*.

42. In *Roerig* the specific question was whether or not the statutory rule against deduction of benefits arising as a result of death was procedural or substantive. The Court of Appeal held that whereas the question of whether or not dependency damages were recoverable or not was a matter of substantive law, the question of whether or not benefits were deductible from those damages was a matter of procedural law. So even if the law applicable to the assessment of damages had been Dutch, once it was established that dependency damages were known to the Dutch law, they would still be calculated on English principles.

43. That limb of *Roerig* was revisited in the subsequent and important case of *Harding v Wealands* [2006] UKHL 32, [2006] 3 WLR 83. In that case, a road traffic accident happened in New South Wales rendering the claimant tetraplegic. The claim was brought in England. The attempt to have the claim stayed on grounds of *forum non conveniens* in favour of the courts of New South Wales was unsuccessful. Liability was admitted, so the only issues between the parties related to the quantification of damages. The defendants averred that New South Wales law applied to the assessment of damages, and in particular relied on the Motor Accidents Compensation Act 1999 of New South Wales which imposed restrictions on the amount of damages which could be recovered.

44. The judge held that although New South Wales was the place of the tort and so *prima facie* provided the governing law, the factors connecting the case with England rendered it substantially more appropriate to apply English law. He said:

> In this case the factors connecting the tort with New South Wales are that the accident occurred there, the defendant is an Australian national from New South Wales; she was driving on a New South Wales driving licence with New South Wales insurance; and the injuries were suffered there. By
contrast, the factors connecting the tort with England are that the claimant was British, he had always lived and worked in England, he was domiciled in England at the relevant time, he and the defendant were both resident in England and living together in a settled manner; and they were only in Australia for the purposes of a holiday. The consequences of the injury would be suffered by the claimant in England and the cost of dealing with the cost of special care required in the future would have to be borne in England.

45. The judge also held that in any event, the quantification of the damages was a procedural matter, as decided by Roerig, and that the limits set down in the Motor Accidents Compensation Act 1999 of New South Wales would in any event have been inapplicable.

46. On the first question, the Court of Appeal unanimously overturned the judge. Waller LJ at paragraph 20 said:

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

47. This suggests that the position for defendants seeking to apply foreign law when accidents happened abroad to English claimants might not be so difficult as appeared for a time after *Edmunds*.

48. However, unless the Court of Appeal also overturned the judge on the question of whether the limits imposed by the Motor Accidents Compensation Act 1999 of New South Wales were substantive or procedural matters, the success on the first issue would have been academic for the defendant. In the event, the Court of Appeal did overturn the judge on this question, by a majority of 2-1, with Waller LJ dissenting. Waller LJ was of course the judge who gave the leading speech in *Roerig*, and he essentially restated his reasoning in that case.

49. The majority, however, felt that it was artificial to put under the “merely procedural” heading matters of such fundamental importance as a statutory cap on damages, and were of the view that *Roerig* overstated the position in asserting that all matters going merely to the assessment of a particular head of damage were procedural. Arden LJ followed previous Australian authority in holding that “laws that bear on the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws” (para 54). This was an attempt to change the traditional English approach, which had treated matters of quantification of damages as matters of procedure rather than substance, influenced by the approach taken by the courts of Canada and Australia (although in those countries the relevant decisions related specifically to inter-state disputes).
50. The House of Lords, however, in its turn overturned the majority of the Court of Appeal on this issue and restated the traditional understanding of the substance/procedure distinction as applied to the quantification of damages. Lords Hoffman and Rodgers gave the leading speeches. Their reasoning may be summarised as follows:

   a. English law before the 1995 Act had always treated the remedy to be granted as a matter of procedure, (“the traditional equation drawn between matters relating to a remedy and matters of procedure”, Lord Hoffman quoting Mason CJ at para 36) and that the quantification of the damages constituted something falling with the scope of remedy. They did not accept that Boys left the position open.

   b. There was nothing in the 1995 Act which suggested Parliament intended to change this longstanding rule. If it had been necessary to rely on it, a ministerial statement made by Lord Mackay of Clashfern LC made it clear that the 1995 Act was intended to leave the traditional rule intact: “issues relating to the quantum or measure of damages are at present and will continue under Part III [of the 1995 Act] to be governed by the law of the forum”.

   c. The statement in Dicey that statutory caps on damages were prima facie substantive was too widely stated. The Australian High Court had in a previous decision treated MACA as a procedural rather than a substantive statute, and were right to do so.

51. Having reached a decision on this question, it was not necessary to decide whether the Court of Appeal was right to overturn the judge’s application of section 12 of the 1995 Act, and the House declined to do so. The approach of the Court of Appeal in Roerig and Harding will still govern this issue for future cases.

52. The decision is unequivocal, and settles any debate on the present state of the law. Any change now would have to be for Parliament. Given the view which it took
of the intention of Parliament when enacting the 1995 Act, the House of Lords did not concern itself to any extent with whether the present law is satisfactory. There are, however, a number of reasons to support in principle the approach of the majority of the Court of Appeal, even if they were as a matter of construction of the 1995 Act not entitled to rule as they did.

53. The rule that matters of procedure are for the law of the forum is primarily one of convenience. As Dicey & Morris states: “The primary object of this Rule is to obviate the inconvenience of conducting the trial of a case containing foreign elements in a manner with which the court is unfamiliar. If, therefore, it is possible to apply a foreign rule, or to refrain from applying an English rule, without causing any such inconvenience, those rules should not necessarily, for the purposes of this Rule, be classified as procedural.” (14th edn, para 7-004). That statement was accepted by the Court of Appeal in Roerig at paragraph 26.

54. While once the English courts gave very wide meaning to the term procedure in this context, there has been a gradual general acceptance that courts should so far as reasonably possible give effect to the applicable law, as determined by the choice of law rules of the forum. That has led in some contexts to an acceptance that it is appropriate, so far as reasonably possible, to calculate damages in accordance with the substantive applicable law. If it is correct to apply a substantive law other than the law of the forum because that substantive law reflects the intention of the parties in contract or is the law most closely associated with the events giving rise to the tort, then if it is possible to assess damages in accordance with that substantive law, why should the courts not do so?

55. That approach has been brought into English law for contracts. The Rome Convention (brought into English law by the Contracts (Applicable Law) Act 1990) provides that the law applicable to a contract shall govern “within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of
law” (article 10(1)(c)). In a jurisdiction such as England which recognises concurrent liability in tort and contract, this rule raises the possibility of the same facts giving rise to different assessments of damage depending on whether treated as a contractual or tortious matter.

56. A further example is the Convention on the Law Applicable to Traffic Accidents (“the 1971 convention”). While the UK is not a signatory to the 1971 convention, most European countries (so most countries where UK citizens drive abroad) are, and apply its jurisdictional rules in relation to road traffic accident claims. The basic rule is in article 3: “The applicable law is the internal law of the state where the accident occurred.” The applicable law determines liability, “the existence and kinds of injury or damage which may have to be compensated” and the “kinds and extent of damages”, among other things: article 8.

57. There is little doubt in practice that in personal injury cases treating questions of assessment as procedural detracts from the significance of the applicable law rules. In both Harding and Roerig, the defendant won the argument on the law applicable to the issue of damages, but those victories were rendered academic by the assessment of damages being treated as a matter for the law of the forum (although in Roerig there was the additional factor that the claim was governed by the Fatal Accidents Act 1976). There is also little doubt that it encourages forum shopping.

58. The continuation of the traditional equation of remedy with procedure in tort cases cannot in general be justified by any particular difficulty in assessing damages by reference to foreign law. To use a discount rate of 5% to find the multiplier, one need only look at the right hand column of the relevant Ogden table. Indeed, in Harding, counsel for the claimant was able to tell the court that damages under MACA would be some 30% less than under English rules. Of course, if the foreign law provided a remedy simply unavailable to the English courts, English rules would have to be used in substitution. Equally if the foreign
rules of quantification were repugnant to English public policy, then English courts would refuse to apply them (as already provided by section 14(3)(a)(i) of the 1995 Act).

59. It is correct to say, as Arden LJ did, that “damages are not naturally regarded as procedure”. The experienced conflicts lawyer may feel no oddity, being steeped in the traditional distinctions. But it is fair to say that the claims manager who has to write a cheque for £2 million rather than £1 million would not be much comforted to be told that the difference was merely a matter of procedure. Nor would the claimant in the converse case who received a cheque for £1 million instead of £2 million. In personal injury cases, the heart (one is tempted to say the substance) of the dispute is more often than not the quantum of damages.

60. In seeking to develop the English law on the substance / procedure distinction, Arden LJ and Sir William Aldous drew upon Canadian and Australian cases, in which the courts of those countries felt able without the need for assistance from a statute to limit the scope of matters to be treated as procedural. In those jurisdictions (at least where the conflict is between the courts of two states), the guiding principle is that “laws that bear on the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws”. In *Harding*, the House of Lords has shown conclusively that in England the law is different. The question of whether it will stay different, however, remains open.

61. From 11 January 2009, a new regime for choice of law rules in tort comes into force, again by way of a European Regulation: Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, better known as Rome II. Although a European Regulation, it will create new choice of law rules in English law for all cases, rather than simply for cases in which the conflict is between the laws of two or more member states. It will apply only to “events
giving rise to damage” after its coming into force. That provision is less clear than it might seem. Consider articles 31 and 32.

Article 31
Application in time
This Regulation shall apply to events giving rise to damage which occur after its entry into force.

Article 32
Date of application
This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.

62. European legislation enters into force on the date stated in the legislation, or in default 20 days after publication in the Official Journal. There is often a distinction in European legislation between a piece of legislation entering into force and becoming applicable. That has led to debate as to what the effect of these provision is. Some contend that the court applies Rome II to cases arising out of events giving rise to damage when those events have occurred on or after 11 January 2009. That would perhaps be the most rational commencement provision, but does not appear to be what the words actually say. On its face, Rome II has come into force already (20 days after publication in the Official Journal on 31 July 2007), but it will not be applied by the courts until 11 January 2009. That would mean that if a road traffic accident happens in December 2007 and a claim form is issued in December 2008, the court would apply the 1995 Act, whereas if the claim form was issued in respect of the same accident two months later, Rome II would apply. It remains to be seen how the court will interpret the commencement date. In any event, however, given the long tail possible in some cases (industrial disease cases and product liability cases for example), the 1995 Act will be potentially relevant for years to come. But in 2009 the first cases under the coming regime will start to come through.
63. I turn finally under this head to limitation periods. The question arises in cases with a foreign element being tried in England, which limitation period applies? Is it the period set down by the applicable law, or by the law of the forum? At common law, the courts had great difficulty in establishing clear rules in conflict of laws cases as to when the English limitation period applied and when the foreign limitation applied. The matter was clarified by statute, but not made free of doubt. The statute reflects the general tendency to respect the applicable substantive law, and apply it where reasonably possible.

64. The statute is the Foreign Limitation Periods Act 1984. Section 1 provides that where foreign law is to be taken into account in the determination of a matter, then the limitation period prescribed by the relevant foreign law applies, unless English law is also relevant to the determination of the matter, in which case English limitation law applies. Section 2, however, reintroduces uncertainty. It provides:

2. —(1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

65. A detailed analysis of when a conflict with public policy will exist was carried out by Moses J in The City of Gotha v Sothebys, Moses J, The Times, 8 October 1998 (not a personal injury case). The (mostly unreported) cases on the statute are cited in his analysis. It is clear that such public policy exclusion of a foreign limitation period will be exceptional. The statute exists in order to fulfil foreign rights, not
to destroy them. The fact that the period is shorter, even much shorter, than under English law will not be enough.

66. However, it may be easier to have a foreign limitation period disapplied in personal injury cases than in, for example, commercial cases. In *Durham v T&N plc CA 1/5/96* unreported at page 12 Sir Thomas Bingham MR said that if a foreign limitation period for personal injury took no account of the claimant’s state of knowledge (ie if there was nothing generally equivalent to section 14 and/or section 33 of the Limitation Act 1980) then it might be contrary to public policy.

67. In a case where the foreign limitation period was only 12 months and where the Claimant had spent some time in hospital and had been led to believe that her claim would be met, it was held that it would cause undue hardship to her to lose her claim: see *Jones v Trolley Colls Cementation Overseas Limited* (The Times 26/1/90, Court of Appeal).

**Motor claims: the European Motor Directives**


69. In a series of motor directives, the EC has increased protection for victims of motor accidents. Among other things, it has:
   a. Provided for minimum levels of compulsory insurance throughout the EC.
   b. Provided simplified mechanisms for claiming against European drivers from outside the UK, with the MIB acting as claims handling agent for the foreign driver.
   c. Provided the legal underpinning for the 1988 MIB agreement for uninsured drivers.
70. That protection has been extended by the Fourth Motor Directive, which is particularly concerned with easing the difficulties faced by victims of road traffic accidents who are claiming in respect of accidents in other European countries. It recognises that the green card scheme does not solve all problems for a claimant having to claim in a foreign country, and refers particularly to the difficulties arising from having to deal with a foreign legal system, foreign language, unfamiliar claims settlement procedures, and unreasonable delay (preamble paragraph 6).

71. There is a requirement that “claims representatives” be appointed by motor insurers in each state (apart from their “authorised” state, where they will effectively have their seat of business anyway) (see Article 4.1). It is expressly provided by Article 4.8, however, that the appointment of a claims representative within a particular jurisdiction does not constitute opening of a branch for the purposes of jurisdictional rules. In other words, it is not possible for a claimant to use the existence of such a claims representative within his own member state to found jurisdiction to sue the insurer in the claimant’s home court.

72. The representatives should have all powers to settle claims on behalf of insurers. This requirement has been met in English law by the Financial Services and Markets Act 2000 (Variations of Threshold Conditions) Order 2002 (SI 2002/2707).

73. Perhaps the most significant step under the Directive is the creation of a direct right of action against the insurer when the accident happens in a State other than the state of residence of the injured party (Article 3). Such a right is in addition to the right of action against the (allegedly) negligent driver and the liability of the insurer is co-extensive with the liability of the driver.
74. These requirements have been brought into English law by the European Communities (Rights against Insurers) Regulations 2002, with effect from 19 January 2003. These regulations create a cause of action new to England. By regulation 3(2), in the event of a motor accident, an entitled person (defined as a resident of a Member State or European Economic Area resident) “may, without prejudice to his right to issue proceedings against the insured person, [ie the tortfeasor driver] issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle, and that insurer shall be directly liable to the extent that he is liable to the insured person.”

75. It will be noted that the right is not limited to claims with an international aspect. The 2002 regulations can therefore be used in an entirely domestic context, as long as the accident happened in the United Kingdom.

76. As indicated above, the Fourth Motor Directive indicates that it may be a good idea in the future to give injured member state claimants the right to sue in their home courts in respect of accidents happening in other member states. They did not appear to envisage at the time of enactment, however, that the Fourth Motor Directive had already achieved that goal. However, the year after the Fourth Motor Directive, Brussels I (44/2001) was enacted. The argument presented itself that the two pieces of European legislation together have created a right for a claimant injured in a road traffic accident in a member state of the European Union to claim against the liable driver’s insurer in the claimant’s home country. This is because Brussels I has special rules of jurisdiction for “matters relating to insurance”.

77. Articles 9 and 11 are within section 3 of Brussels I, the section dealing with “matters relating to insurance”. Article 9.1 states:

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled,

or
(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled.

78. Article 11(2) states:

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

79. The argument runs therefore that the implementation of the Fourth Motor Directive requires the creation of a direct action within the meaning of article 11(2), and that the injured claimant is effectively someone falling within the classes of people identified in article 9.1(2). While the injured claimant was not originally “the policyholder, the insured or a beneficiary”, being a stranger to the contract of insurance, the direct right of action against the insurer could be said to give the injured claimant rights under the policy so as to make him or her a beneficiary.

80. That argument was in the past run in England but without success for claimants. The section on international cases in Butterworths Personal Injury Service suggests that to be so (at XVIII [2128]). As will be seen, however, the Fifth Motor Directive may change the strength of the argument.

81. The preamble to the Fifth Directive states at paragraph 24.

Under Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1), injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled.

82. Further, article 5 of the Fifth Directive inserts a paragraph to like effect into the recital of the Fourth Directive, at paragraph 16(a). So the European Parliament
and/or the Council are giving their support to the argument that the claimant can sue in his/her home courts the motor insurer of the vehicle driven by the liable driver. The Fourth and/or Fifth Directives could have contained some provision to that effect in their main body, but did not. Instead, they attempt to declare the law in a recital. In European law, recitals are aids to interpretation, but not definitive. Further, a recital would usually be an aid to interpretation of the Directive or Regulation which it preceded, but here the recitals to the Fourth and Fifth Directives purport to interpret Brussels I. Nonetheless, the insertion of these recitals undoubtedly strengthens the argument for the claimant, not least because the Council is the originator of both Brussels I and (in conjunction with the European Parliament) the Fourth and Fifth Motor Directives, so it is effectively providing an interpretation of an instrument which it created.

83. The European Commission has taken the claimant’s view on the subject. A Member of the European Parliament put a question to the Commission on this issue. An answer of 23 November 2006 given by Mr McCreevy on behalf of the Commission (ref E-4382/06) was in the following terms:

*The right of the injured party to bring legal proceedings against the civil liability insurer in the courts of the Member State where the injured party is domiciled follows directly from Article 11(2) read in conjunction with Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.*

*Recital 24 along with Article 5(1) of the fifth Motor Insurance Directive 2005/14/EC(2) purely reflect the fact that the above mentioned Regulation was adopted after the fourth Motor Insurance Directive 2000/26/EC and amend the recitals of Directive 2000/26/EC(3) accordingly. Member States should therefore apply Council Regulation (EC) No 44/2001 without the need to refer to Article 5(1) of Directive 2005/14/EC.*
84. The question of whether such a direct action can be brought in the home courts of the injured party was referred to the European Court of Justice by the German Bundesgerichtshof, the highest German civil court, in September 2006. The ECJ decided the reference in _FBTO Schadeverzekeringen NV v Odenbreit_ C-463-06 on 13 December 2007, and decided in a sense favourable to claimants. The ruling was:

_The reference in Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State._

85. Note that there is still an argument left open to defendant insurers that an English claimant injured in another Member State cannot bring the proceedings in England. The proviso stated by the ECJ (at paragraph 30 of the judgment) is as follows:

_The only condition which Article 11(2) of Regulation No 44/2001 lays down for the application of that rule of jurisdiction is that such a direct action must be permitted under the national law._

86. The argument for defendants based on that proviso would be as follows. The European Communities (Rights against Insurers) Regulations 2002 apply only to accidents in the United Kingdom. If a claimant was injured in an accident in say France, the Regulations do not apply. So, the argument would run, the national law in question, being English, does not permit the direct right of action and _Odenbreit_ has no application. That argument is unlikely to succeed. It is unattractive, since it is a requirement of EU law that all Member States provide such direct right of action against insurers, and since the laws of Member States have been harmonised on that point, it is artificial to create a supposed conflict of
laws where none really exists. Probably the technical way round the argument is that when the ECJ refers to the national law, they are not referring to the law of the forum, ie the law of the court deciding the case, but by the substantive law applicable to the tort. So if the accident happened in France, and French is the law applicable to the tort, the court asks itself whether the applicable national law, French, gives a direct right of action against insurers. If it does, then the English court is able to allow such a claim. An alternative view, leading in most cases to the same result, would be to ask whether the law governing the contract of insurance in question (ie between the culpable driver and his motor insurer) allows such a direct right. In any event, it is unlikely that Odenbreit will be neutered by the argument for insurers outlined above.

10 March 2008

39 Essex Street
London WC2R 3AT
Bernard Doherty