Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse

Russell J. Weintraub has written a fairly critical note on the House of Lords judgment in *Harding v Wealands* in the current issue (Spring 2007) of the *Texas International Law Journal*, entitled, "**Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse**" (42 Tex. Int'l L.J. 311). The (fairly long) introduction reads thus:

> *In discussing choice of law for determining damages for torts, it is necessary to distinguish between "heads" of damages and "quantification" of damages under those heads. Heads of damages list the items for which a court or jury may award damages–medical expenses, lost wages, pain and suffering, punitive damages, and perhaps others. Quantification of damages measures the proper amount under each allowable head–how much for pain and suffering?*
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> *It is also necessary to focus on the meaning of "substantive" and "procedural" as those terms are used for choice of law. For "substantive" issues a court applies the forum's choice-of-law rule to select the applicable law. "Procedural" in conflicts jargon is simply shorthand for saying that the forum's rule applies.*
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> *"Procedural" is a term used in many contexts. It may refer to the rules that govern the workings of the forum's courts–pleading, preserving objections for appeal, discovery. In the United States it may refer to a federal court's freedom to apply a federal rule when the court has subject-matter jurisdiction because of the parties' diversity of citizenship and is applying state, not federal, law to "substantive" issues. Or, as indicated above, a "procedural" issue might be one for which the forum court will not engage in its usual choice-of-law analysis, but will simply apply its own rule.*
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> *Justice Frankfurter said it as well as anyone: Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course,*

"substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.

Therefore, in deciding when to apply the "procedural" label in the context of choice of law, the question is: what justifies a forum in insisting on applying its local rule when under the forum's choice-of-law rule the law of another jurisdiction applies to all "substantive" issues? The proper standard is one that balances the difficulty of finding and applying the foreign rule against the likelihood that applying the forum's rule will affect the result in a manner that will induce forum shopping. Pleading, serving process, preserving objections for appeal, and similar issues relating to the day-to-day operation of courts are properly labeled "procedural" for choice-of-law purposes. Flouting those rules will affect the outcome, but an attorney is not likely to choose one forum over another to take advantage of such housekeeping provisions. Discovery rules require more balancing. A forum that permits massive pre-trial discovery is likely to attract plaintiffs. U.S.-style discovery is one of the reasons that American forums are magnets for the aggrieved and injured of the world. Nevertheless, it would be unthinkable to require U.S. judges and lawyers to learn and apply foreign discovery rules. Discovery is properly labeled "procedural" for choice-of-law purposes.

What about damages? Heads of damages, the items that a court or jury may include in computing the amount awarded to the plaintiff, are universally regarded as substantive. If the forum's choice-of-law rule for torts points to a Mexican state, that Mexican state's law determines the heads of damages. Quantification of damages under these heads, however, is regarded as "procedural" and forum standards apply.

The standard rule treating quantification of damages as procedural makes no sense. Quantification is the bottom line–what all the huffing and puffing at trial is about. The American devotion to jury trials in civil cases and the tendency of American juries to award "fabulous damages" are the primary reasons that foreign plaintiffs attempt to litigate their cases in U.S. courts. I have opposed this silliness, but the windmills show little sign of weakening. The United States Supreme Court has indicated the direction to take. Gasperini v. Center for Humanities, Inc. held that federal courts exercising diversity jurisdiction must

apply "the law that gives rise to the claim for relief" to determine whether a jury verdict awards excessive damages. Other U.S. courts have not taken this hint that quantification of damages is too important for a "procedural" label.

One bit of sanity that survives in this choice-of-law madness is that courts regard statutory limits on recovery as "substantive." They apply these limits when their choice-of-law rules select the tort law of the jurisdiction where the statute is in force. In Harding v. Wealands, however, the House of Lords, construing the Private International Law (Miscellaneous Provisions) Act 1995, has rejected even this limit on the "procedural" label when quantifying damages.

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