

# Choice of Law for Quantification of Damages: A Judgment of the House of Lords Makes a Bad Rule Worse<sup>©</sup>

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## SUMMARY

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### I. CHOICE OF LAW FOR QUANTIFICATION OF TORT DAMAGES

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.<sup>1</sup> 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?

It is also necessary to focus on the meaning of “substantive” and “procedural” as those terms are used for choice of law.<sup>2</sup> For “substantive” issues a court applies the forum’s choice-of-law rule to select the applicable law.<sup>3</sup> “Procedural” in conflicts jargon is simply shorthand for saying that the forum’s rule applies.<sup>4</sup>

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1. LAWRENCE COLLINS ET. AL., 1 DICEY & MORRIS ON THE CONFLICT OF LAWS 170 (13th ed. 2000) [hereinafter DICEY & MORRIS] (stating that “[a] distinction must be drawn between remoteness and heads of damages, which are questions of substance governed by the *lex causae*, and the measure or quantification of damages, which is a question of procedure governed by the *lex fori*”).

2. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter RESTATEMENT (SECOND)].

3. *Id.*

4. See *id.* § 122 cmt. b:

“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.<sup>5</sup> 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.<sup>6</sup> 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.

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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> If the forum’s choice-of-law rule for torts points to a Mexican state,

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The courts have traditionally approached issues falling within the scope of the rule of this Section by determining whether the particular issue was “procedural” and *therefore* to be decided in accordance with the forum’s local law rule, or “substantive” and *therefore* to be decided by reference to the otherwise applicable law.

5. *Id.*

6. *Id.* cmt. a.

7. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

8. *See* RESTATEMENT (SECOND), *supra* note 2, § 122 cmt. a.

9. *See* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981) (listing the fact that “discovery is more extensive in American than in foreign courts” as one of the reasons that American courts are attractive to foreign plaintiffs). *But cf.* 28 U.S.C. § 1782(a) (2005) (giving a federal district court discretion to order “a person [who] resides or is found” within the district “to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal”).

10. RESTATEMENT (SECOND), *supra* note 2, § 171 cmt. a.

that Mexican state's law determines the heads of damages.<sup>11</sup> Quantification of damages under these heads, however, is regarded as "procedural" and forum standards apply.<sup>12</sup>

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"<sup>13</sup> are the primary reasons that foreign plaintiffs attempt to litigate their cases in U.S. courts.<sup>14</sup> I have opposed this silliness,<sup>15</sup> 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.*<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> In *Harding v. Wealands*, however, the House of Lords, construing the Private International Law (Miscellaneous Provisions) Act 1995, has rejected even

11. See *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904) (stating that "we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught") (Holmes, J.); *Harding v. Wealands*, [2006] UKHL 32 para. 24, [2006] 3 W.L.R. 83, 89 (appeal taken from Eng.) (Lord Hoffman stating that "the kind of damage which constitutes an actionable injury" is substantive for choice-of-law purposes) (emphasis omitted); RESTATEMENT (SECOND), *supra* note 2, §§ 178 (referring to § 175's choice-of-law rule for determining damages for wrongful death), 171 (referring to § 145's choice-of-law rule for determining damages for other torts).

12. See RESTATEMENT (SECOND), *supra* note 2, § 171 cmt. f (stating that "[t]he forum will follow its own local practices in determining whether the damages awarded by a jury are excessive"); DICEY & MORRIS, *supra* note 1.

For rare exceptions that treat quantification of damages as substantive, see *Karim v. Finch Shipping Co.*, 265 F.3d 258, 272 (5th Cir. 2001) (holding that the law of Bangladesh determines the quantification of damages for pain and suffering); *Bhatnagar v. Surrenda Overseas Ltd.*, 52 F.3d 1220, 1235 (3d Cir. 1995) (vacating award of non-pecuniary damages with instruction to "reassess those damages in accordance with Indian law"); *Archuleta v. Valencia*, 871 P.2d 198, 200 (Wyo. 1994) (applying Colorado law to determine whether the jury's verdict was inadequate); *cf. Palenkas v. Beaumont Hosp.*, 443 N.W.2d 354, 358 (Mich. 1989) (considering jury verdicts from other states in determining the reasonableness of a damages award); *John Pfeiffer Pty. Ltd. v. Rogerson* (2000) 203 C.L.R. 503, 544 para. 100 (Austl.) (stating 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*").

13. *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730, 734 (C.A. 1982) (Eng.).

14. *Id.*; *cf. Piper Aircraft Co.*, 454 U.S. at 252 n.18 (listing "jury trials" as a reason that U.S. courts attract foreign litigants).

15. See Russell J. Weintraub, *When and How to Demagnetise Magnet Forums*, 12 KING'S C. L.J. 195, 205-08 (2001).

16. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

17. *Id.* at 437 n.22.

18. See, e.g., *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 194 (Tex. 1968) (applying Colorado statutory limit on wrongful death recovery); *John Pfeiffer Pty. Ltd. v. Rogerson* (2000) 203 C.L.R. 503 (Austl.) (applying limit in New South Wales workers' compensation law to action brought in Australian Capital Territory).

this limit on the “procedural” label when quantifying damages.<sup>19</sup> Now to turn to that opinion.

## II. *HARDING V. WEALANDS*

Mr. Harding, an Englishman, and Ms. Wealands, an Australian, began a relationship in Australia.<sup>20</sup> She moved to England to live with him.<sup>21</sup> Ms. Wealands returned to Australia to attend a family wedding.<sup>22</sup> He later joined her for a holiday and to visit her parents.<sup>23</sup> While she was driving in New South Wales (NSW) with Mr. Harding as a passenger, she lost control and the vehicle turned over.<sup>24</sup> He was badly injured and became tetraplegic as a result of the injury.<sup>25</sup> Ms. Wealands owned the vehicle and carried liability insurance issued by an Australian company.<sup>26</sup> Both Mr. Harding and Ms. Wealands returned to England.<sup>27</sup>

A NSW statute places limits on compensation for various damages including lost earnings and non-economic damages, and in other ways restricts recovery.<sup>28</sup> Under NSW law the plaintiff would recover about thirty percent less than under English law.<sup>29</sup> The United Kingdom Private International Law Act 1995 abolished the double actionability choice-of-law rule for torts<sup>30</sup> and created a presumption that that the law of the place of injury governs<sup>31</sup> unless it is “substantially more appropriate” to apply some other law.<sup>32</sup> Section 14(3)(b) states that the statute does not authorize “questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.”<sup>33</sup>

Mr. Harding sued Ms. Wealands in the High Court of Justice in London.<sup>34</sup> That court ruled that English law determined the damages.<sup>35</sup> Justice Elias gave two reasons: (1) the NSW caps on damages were “procedural”;<sup>36</sup> (2) even if damages were substantive it was “substantially more appropriate” to apply English law because the parties “were living together in a settled relationship and resident in England,”<sup>37</sup> and “the costs of alleviating the consequences of the accident will be borne in” England.<sup>38</sup> The Court of Appeal allowed the appeal and applied

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19. *Harding v. Wealands* [2006] UKHL 32, [2006] 3 W.L.R. 83 (appeal taken from Eng.).

20. *Id.* para. 13.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Harding v. Wealands* [2006] UKHL 32, [2006] 3 W.L.R. 83, para. 14 (appeal taken from Eng.).

26. *Id.*

27. *Id.*

28. *Id.* paras. 16-18.

29. *Id.* para. 18.

30. Private International Law (Miscellaneous Provisions) Act 1995, § 10. The double actionability rule required that the tort be actionable under the laws of both the forum and of the jurisdiction where the tort was committed. *See Chaplin v. Boys*, [1971] A.C. 356 (H.L. 1969) (appeal taken from Eng.).

31. Private International Law (Miscellaneous Provisions) Act 1995, § 11.

32. *Id.* § 12.

33. *Id.* § 14(3)(b).

34. *Harding v. Wealands*, [2004] EWHC (QB) 1957.

35. *Id.* paras. 53-54.

36. *Id.* para. 64.

37. *Id.* para. 33.

38. *Id.* para. 35.

Australian law.<sup>39</sup> The judges of the Court of Appeal agreed that it was not more appropriate to apply English law if the NSW statutory caps on damages were substantive,<sup>40</sup> but they split 2-1 on the issue of whether the caps were substantive, the majority voting for the substantive classification.<sup>41</sup> With five Law Lords participating, the House of Lords unanimously allowed the appeal and restored the judgment of the trial court on the ground that quantification of damages is procedural.<sup>42</sup>

Lord Hoffman stated that he found no ambiguity in the meaning of “procedure” as used in section 14(3)(b) of the Private International Law Act 1995.<sup>43</sup> Procedure in English private international law had always included all issues relating to quantification of damages.<sup>44</sup> The only authority that statutory limits on recovery are substantive is found in one of the leading English treatises on conflict of laws:

But Mr. Palmer, who appeared for the defendant, submitted that in English private international law a limit or “cap” on the damages recoverable is regarded as substantive. There is, it is true, some authority for this proposition. The 7th edition (1958) of *Dicey’s Conflict of Laws* edited by Dr. JHC Morris, contained the statement, at p 1092, “statutory provisions limiting a defendant’s liability are prima facie substantive; but the true construction of the statute may negative this view.”<sup>45</sup>

Lord Hoffman rejected this statement in Dicey’s treatise as “too widely stated” because the case cited by Dicey is only “authority for the proposition that a contractual term which limits the obligation to pay damages for a breach of contract or a tort, or a statutory provision which is deemed to operate as such a term, qualifies the substantive obligation.”<sup>46</sup>

On the question of whether the NSW statutory limits on recovery are procedural, Lord Hoffman states “we could not have better authority than that of the High Court of Australia in *Stevens v Head*.”<sup>47</sup> *Stevens v Head* held that the damage limits in an earlier version of the NSW statute were procedural and did not apply to a suit in Queensland by a New Zealand citizen against a Queensland resident.<sup>48</sup> The defendant struck the plaintiff in NSW near the Queensland border with a motor vehicle that was insured and registered in Queensland.<sup>49</sup> Lord Hoffman noted<sup>50</sup> that the High Court of Australia had overruled *Stevens v Head* in *John Pfeiffer Pty. Ltd. v Rogerson*.<sup>51</sup> *Pfeiffer* held that limits on non-economic damages in

39. *Harding v. Wealands*, [2004] EWCA (Civ) 1735, [2005] 1 W.L.R. 1539.

40. *Id.* paras. 21 (Waller, L.J.), 45 (Arden, L.J.), 76 (Sir William Aldous).

41. *Id.* paras. 22-42 (Waller, L.J.) (procedural), 55 (Arden, L.J.) (substantive), 81 (Sir William Aldous) (substantive).

42. *Harding v. Wealands*, [2006] UKHL 32, [2006] 3 W.L.R. 83, 92 (appeal taken from Eng.).

43. *Id.* para. 36.

44. *Id.* paras. 32-38.

45. *Id.* para. 36.

46. *Id.* para. 46.

47. *Id.* para. 39.

48. *Stevens v. Head* (1993) 176 C.L.R. 433 (Austl.).

49. *Id.* at 437-38.

50. *Harding v. Wealands*, [2006] UKHL 32, [2006] 3 W.L.R. 83 para. 48 (appeal taken from Eng.).

51. *See John Pfeiffer Pty. Ltd. v. Rogerson* (2000) 203 C.L.R. 503, paras. 182-83, 199-200 (Austl.).

the NSW Workers' Compensation Act were substantive, and applied to a suit in the Australian Capital Territory.<sup>52</sup> A Capital Territory employee of a Capital Territory employer had been injured on the job in NSW.<sup>53</sup> Lord Hoffman dismissed this overruling as “required by constitutional imperatives of Australian federalism.”<sup>54</sup>

*Pfeiffer* states:

Within a federal nation such as Australia, the capacity of a party to legal proceedings to choose the forum within which to bring such proceedings can be one of the advantages of the interconnected polity. However, such a facility ought not to involve the capacity of one party seriously to prejudice the legal rights of an opponent.<sup>55</sup>

It may be reasonable to recognize the right of a litigant to choose different courts in the one nation by reason of their advantageous procedures, better facilities, or greater expedition. However, it is not reasonable that such a choice, made unilaterally by the initiating party, should materially alter that party's substantive legal entitlements to the disadvantage of its opponents. If this could be done, the law would no longer provide a certain and predictable norm, neutrally applied as between the parties. Instead, it would afford a variable rule which particular parties could manipulate to their own advantage. Such a possibility would be obstructive to the integrity of a federal nation, the reasonable expectations of those living within it, and the free mobility of people, goods, and services within its borders—upon the assumption that such movement would not give rise to a significant alteration of accrued legal rights.<sup>56</sup>

This statement expresses, not some peculiar aspect of “Australian federalism,” but sound general choice-of-law principles that would mandate the opposite result in *Harding*.

Lord Hoffman writes that if the word “procedure” were ambiguous in section 14(3)(b) of the Private International Law Act, “this is as clear a case . . . as anyone could hope to find”<sup>57</sup> where resort to legislative history would demonstrate that Parliament intended that term to include quantification of damages:

At the Report stage in the House of Lords, Lord Howie of Troon put down an amendment to add a further paragraph to what is now section 14(3), so that it would read: “[nothing in this Part] (d) authorises any court of the forum to award damages other than in accordance with the law of the forum.” Lord Howie declared an interest on behalf of Cape Industries plc, which had a few years earlier been sued in Texas for asbestos-related injuries and was anxious that Part III should not import American scales of compensation into English courts. In the debate on 27 March 1995 Lord Mackay of Clashfern LC [Lord Chancellor] made what

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52. *Id.* paras. 199-200.

53. *Id.* para. 6.

54. *Harding v. Wealands*, [2006] UKHL 32 para. 48, [2006] 3 W.L.R. 83, 96 (appeal taken from Eng.).

55. *Pfeiffer*, 203 C.L.R. at 552, para. 128.

56. *Pfeiffer*, 203 C.L.R. at 553, para. 129.

57. *Harding*, [2006] UKHL para. 37.

was obviously a carefully prepared statement: “With regard to damages, issues relating to the quantum or measure of damages are at present and will continue under Part III to be governed by the law of the forum; in other words, by the law of one of the three jurisdictions in the United Kingdom. Issues of this kind are regarded as procedural and, as such, are covered by clause 14(3)(b). It follows from this that the kind of awards to which the noble Lord referred of damages made in certain states, in particular in parts of the United States, will not become a feature of our legal system by virtue of Part III. Our courts will continue to apply our own rules on quantum of damages even in the context of a tort case where the court decides that the “applicable law” should be some foreign system of law so far as concerns the merits of the claim. Some aspects of the law of damages are not regarded as procedural and, in accordance with the views of the Law Commissions in their report on the subject, Part III does not alter this. These aspects concern so-called “heads of damages”—the basic matter which is being compensated for—such as special damage relating to direct financial loss. Whether a particular legal system permits such a head of damage is not regarded as procedural but substantive and therefore not automatically subject to the law of the forum. This seems right given the intimate connection between such a concept and the particular nature of the case in issue. But again, I foresee no significant increase in awards of damages because a particular head of damage permitted by some foreign system of law would continue, so far as the quantum allocated to it in any finding is concerned, to be regulated by our own domestic law of damages. I hope the noble Lord will feel reassured.”<sup>58</sup>

This excerpt from the Parliamentary proceedings focuses on avoiding introducing “American scales of compensation into English Courts.”<sup>59</sup> That policy would not apply to rejecting statutory limits on damages that would reduce recovery below the English standard. Lord Roger of Earlferry recognizes this distinction:

The particular problem raised by Lord Howie related to the high level of damages in the United States which he was anxious should not be replicated here. But it would be equally unacceptable if, say, United Kingdom courts had to award damages according to a statutory scale which, while adequate in another country because of the relatively low cost of services etc there, would be wholly inadequate in this country, having regard to the cost of the corresponding items here.<sup>60</sup>

This is an argument, not for treating the NSW statutory limits on recovery as procedural, but for applying English substantive law on one of the grounds stated by Justice Elias in his High Court of Justice decision—that it was “substantially more

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58. *Id.*

59. *Id.* para. 37.

60. *Id.* para. 70.

appropriate” to apply English law because the parties “were living together in a settled relationship and resident in England.”<sup>61</sup>

The fact that Ms. Wealands carried liability insurance issued by an Australian company does not make it less appropriate to apply English law. Justice Elias also addressed the effect of Australian insurance.<sup>62</sup> He referred to Justice Garland’s opinion in *Edmunds v. Simmonds*,<sup>63</sup> which applied English law in a suit between English residents to recover compensation for injuries incurred in a motor vehicle accident in Spain:

The judge accepted that the fact that the insurers were Spanish was a relevant factor, but he did not consider that it was sufficiently strong in that case to prevent section 12 dis-applying Spanish law. He accepted a submission that the insurers would contemplate that many of their clients hiring cars would be foreign and there was always a possibility that damages would be assessed in accordance with another system of law.<sup>64</sup>

Another way of saying this is that the payment in *Edmunds v. Simmonds* was just grist for the actuarial mill. The payment is added to costs that are used to calculate future premiums.<sup>65</sup>

In this context, the only viable unfair surprise argument concerning insurance focuses on unfair surprise to the insured. This may occur if the liability regimes of the place of injury and a distant forum are so different that liability insurance adequate at the place of injury is inadequate to meet forum standards for quantifying damages. If the tortfeasor cannot reasonably foresee the need for insuring at the higher level, it is unfair to impose forum law to compensate a forum resident. For example, suppose a Texas resident vacationing in Mazatlán on the Pacific coast of Mexico is run over by a Mexican driver. The law of Sinaloa, the Mexican state where Mazatlán is located, does not permit recovery for pain and suffering, and has low statutory limits on the recovery of economic damages.<sup>66</sup> Under Sinaloa law, the Texan would recover a small fraction of what he would recover under Texas law. Then further suppose that a Texas court acquires personal jurisdiction over the Mexican driver in Texas by personal service while the Mexican is visiting Texas. The Mexican defendant has liability insurance that is adequate under Sinaloa compensation standards, but is wholly inadequate under Texas measurements of recovery. It would be outrageous to apply Texas law to determine either heads of damages or compensation under those heads. On the other hand, if two Texas friends vacation together in Mazatlán and one injures the other while driving in that city, the driver had better have liability insurance keyed to Texas compensation standards. A Texas court will apply Texas law as the jurisdiction that has the “most significant relationship” to the parties and the occurrence.<sup>67</sup> If the defendant is

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61. *Harding*, [2004] EWHC (QB) para. 33.

62. *Id.* para. 26.

63. *Edmunds v. Simmonds* [2001] 1 W.L.R. 1003 (Q.B. 2000).

64. *Harding*, [2004] EWHC (QB) para. 28.

65. See Daniel J. McNamara, *Automobile Liability Insurance Rates*, 35 INS. COUNS. J. 398, 401 (1968).

66. See *Villaman v. Schee*, Nos. 92-15490, 92-15562, 1994 WL 6661, at 3 (9th Cir. Jan. 10, 1994).

67. See *Gutierrez v. Collins*, 583 S.W.2d 312, 318-19 (Tex. 1979).

surprised, it is because he did not heed the warning that the Supreme Court of Texas issued in 1979.<sup>68</sup>

Lord Hoffman gives mixed signals on whether he would invoke the “substantially more appropriate” avoidance of the law of the place of wrong if he were not compelled by legislative history to consider foreign statutory limits on recovery as procedural.<sup>69</sup> One passage seems to say, “yes”: “Even if there appeared to be more logic in the principle in *Pfeiffer’s* case [in which the High Court of Australia treated statutory limits on recovery as substantive] . . . the question is not what the law should be but what Parliament thought it was in 1995.”<sup>70</sup> At the end of his opinion he states, however, that because the NSW statutory limits on recovery are procedural:

it is unnecessary to decide whether, if they had been properly characterised as substantive, it was open to the Court of Appeal to reverse [the trial judge’s] judgment that it was substantially more appropriate to apply English law. The hypothesis necessary to raise this question is in my view somewhat artificial, because most of the reasons why it may be more appropriate to apply English law are the reasons why the assessment of damages is traditionally characterised as a matter for the *lex fori*. I would therefore prefer not to express a view on this question.<sup>71</sup>

On the contrary, as demonstrated above by the two hypothetical cases concerning automobile accidents in Mexico,<sup>72</sup> it will sometimes be appropriate to ignore foreign limits on damages and sometimes outrageous, depending on the forum’s contacts with the parties and the occurrence.

Lord Woolf offers another reason for regarding the NSW statutory limits on recovery as procedural:

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

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68. *Id.*

69. *See supra* note 32 and accompanying text.

70. *Harding*, [2006] UKHL para. 51.

71. *Id.* para. 53.

72. *See supra* text accompanying notes 65-68.

could be arguably regarded as substantive should be treated as being procedural as well.<sup>73</sup>

That some provisions of the NSW statutory scheme cannot be applied in England is not a reason for ignoring limits on compensation included in that scheme. If, for example, Mr. Harding had been injured by a stranger in NSW and the stranger, a resident of NSW, was served with process while visiting England to obtain personal jurisdiction over him,<sup>74</sup> an English court should not deprive the defendant of the protection of the NSW statutory limits on recovery.

### III. PUBLIC POLICY

There is no reasonable objection to the U.K., through its Parliament or courts, declaring that it is against public policy to award compensation that is excessive by U.K. standards. This declaration would not justify a court's awarding higher damages than available under the law of the place of wrong, as the House of Lords did in *Harding*. The only justification for awarding higher damages would be that substantive choice-of-law analysis pointed to English law as applicable; to use the wording of the Private International Law Act, it was "substantially more appropriate" to apply English law.

Suppose the opposite situation when English quantification of damages is lower than that of the place of wrong. A New Yorker negligently injures a fellow New Yorker in New York. The tortfeasor moves to England with all his assets. The injured party can obtain personal jurisdiction over the tortfeasor in New York under the New York long-arm statute,<sup>75</sup> but wisely declines to do so. Because all the tortfeasor's assets are in England, any New York judgment could not be satisfied in the United States. The injured party would have to get the New York judgment recognized and enforced by an English court. An English court will not recognize the New York judgment. Although a tort committed in England is a basis for personal jurisdiction over the tortfeasor in an English court,<sup>76</sup> an English court will not recognize that basis for jurisdiction in countries with which it does not have a judgment-recognition treaty.<sup>77</sup> An English court is compelled by the Private International Law Act to quantify damages by English standards rather than New York Standards. This is especially relevant for non-economic damages such as pain and suffering, for which New York standards are likely to produce a much higher award.

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73. *Harding*, [2006] UKHL, para. 11.

74. Although the Brussels Regulation setting out permissible bases for personal jurisdiction in European Union courts excludes personal service on someone temporarily present in the forum, this exclusion does not apply if the defendant is not domiciled in the EU. See Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 4, Annex I, 2001 O.J. (L 12) 1, 4, 18. England retains personal service in England as a basis for personal jurisdiction over defendants not domiciled in the EU. See *Chellaram v. Chellaram*, [2002] EWHC (Ch) 632, [2002] 3 All E.R. 17; 1 DICEY & MORRIS, *supra* note 1, at 291.

75. N.Y. C.P.L.R. § 302 (a)(2) (McKinney 2002).

76. See Council Regulation 44/2001, *supra* note 74, art. 5(3), at 4.

77. See 1 DICEY & MORRIS, *supra* note 1, at 487-88.

Is this a just result? The Act compels an English court to apply English law when proper choice-of-law analysis would not.<sup>78</sup> The forum's public policy is a legitimate basis for refusing to apply a foreign rule that, to use Cardozo's classic statement, "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."<sup>79</sup> Cardozo assumed that a forum thus rejecting a foreign rule selected by the forum's choice-of-law rule should dismiss the case.<sup>80</sup> Rejecting the foreign rule does not justify the forum in applying its own substantive law. True, a number of United States courts, not prepared to replace the place-of-wrong tort choice-of-law rule, but dissatisfied with the result of applying that rule, have used public policy to substitute forum law.<sup>81</sup> Lord Hope of Craighead stated a better approach to using public policy to reject a foreign rule and, instead of dismissing the case, rendering a judgment on the merits under a different law. In *Kuwait Airways Corp. v. Iraqi Airways Co.*, the House of Lords rejected Iraqi law that would justify the conversion of aircraft belonging to the Kuwaiti State.<sup>82</sup> In his opinion, Lord Hope noted that the public policy under which the Lords refused to apply Iraqi law was "based on the Charter of the United Nations and the resolutions which were made under it."<sup>83</sup> He stated that "a principle of English public policy which was purely domestic or parochial in character would not provide clear and satisfying grounds for disapplying the primary rule which favours the *lex loci delicti*."<sup>84</sup>

In the case suggested above, of a New York tortfeasor fleeing to England with all his assets, it should not offend English public policy to apply New York law for quantification of damages. If the tortfeasor was an Englishman visiting in New York, an English court would be more justified, as Lord Howie suggested in Parliament, in refusing to "import American scales of compensation into English courts."<sup>85</sup> Reasonable people may differ as to whether the Englishman should be able to injure an American in the U.S. and then draw around him the protective cloak of English law. The standard choice-of-law would point to English law. It would make more sense to someone who has not had their mind numbed by a legal education to reach this result on the basis of public policy rather than pretending that the matter is procedural. If adequately counseled, the injured American will know that if he sues in England, he will get a smaller judgment than if he sued in the U.S. He would sue in England only if his choice was a partial loaf or none at all.

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78. *See supra* Part I.

79. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

80. *Id.*

81. *See, e.g.*, *Alexander v. General Motors Corp.*, 478 S.E.2d 123 (Ga. 1996) (applying Georgia law of strict liability rather than Virginia law requiring proof of negligence to product liability action by Georgia resident who purchased car in Georgia and was injured by crash in Virginia, declaring Virginia law to be against Georgia's public policy); *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 529 (N.Y. 1961) (applying New York measure of wrongful death recovery rather than statutory limits of place of wrong; New York abandoned the place-of-wrong rule two years later in *Babcock v. Jackson*, 191 N.E.2d 279, 285 (N.Y. 1963)); *cf. Owen v. Owen*, 444 N.W.2d 710, 711-12, 714. (S.D.1989) (deciding to retain place-of-wrong rule, but refusing to apply guest statute of place of injury on public policy grounds; concurring opinion, joined by a majority of the court, reaching the same result under "modern" conflicts analysis).

82. *Kuwait Airways Corp. v. Iraqi Airways Co.*, [2002] UKHL 19, [2002] 2 A.C. 883 (appeal taken from Eng.).

83. *Id.* para. 167.

84. *Id.* para. 166.

85. *See supra* text accompanying footnote 58.

#### IV. CONCLUSION

Contrary to the House of Lords' holding in *Harding*, the Private International Law Act 1995 did not compel depriving the defendant of statutory limits on damages under the law of the place of wrong. If the result in *Harding* is correct it is because, in the wording of the Act, it was "substantially more appropriate" to apply English law because of the relationship between the parties and their residence in England. The real harm of the House of Lords decision is that it makes it less likely that courts will change the standard rule that characterizes quantification of damages as procedural, and therefore determined by forum criteria. This standard rule should change to accord with a functional view of "procedural" in the context of choice of law. This functional view would preclude the procedural label for any rule that is likely to affect the result in a manner that would invite forum shopping unless it would be unreasonably difficult for local lawyers and judges to apply foreign law to the issue. More undesirable still is that *Harding v. Wealands* extends the procedural characterization of quantification of damages to the one area where U.S. and Australian courts have had the good sense not to apply it—statutory limits on recovery.

Fortunately, *Harding* may have a short life in the United Kingdom. A draft Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, referred to as "Rome II," which seems ready for enactment in 2007, includes among the issues governed by the Regulation's choice-of-law rules "the existence, the nature and the assessment of damage or the remedy claimed."<sup>86</sup> This language appears broad enough to include quantification of damages. If so, this would constitute a desirable reversal of the standard rule treating quantification of damages as a procedural matter to be resolved under forum standards.<sup>87</sup> The United Kingdom has agreed to be bound by Rome II.<sup>88</sup>

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86. Council Common Position (EC) No. 22/2006 of 25 Sept. 2006, art. 15(c), 2006 O.J. (C 289E) 68, 73. Cf. *id.* art. 1(3), at 71: "This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 [choice of law for the formal validity of a unilateral act relating to a non-contractual obligation] and 22 [Regulation's choice-of-law provisions apply to 'rules which raise presumption of law or determine the burden of proof']."

87. I urged this change from a previous draft when I was invited to address the European Parliament Committee on Legal Affairs and the Internal Market, which was working on Rome II. See Russell J. Weintraub, *Rome II and the Tension between Predictability and Flexibility*, 41 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 561, 564-65 (2005).

88. Council Common Position (EC) No. 22/2006, *supra* note 86, at 70, para. 35. Ireland has also opted in. *Id.* Denmark has not. *Id.* para. 36. Under the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56, 56 (amending the 1992 Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253, 253 (known as the "Maastricht Treaty")), the United Kingdom, Ireland, and Denmark could elect not to be bound by new Council regulations.