

The *Heil v Rankin* Approach to Law-making:

Who Needs a Legislature?

David Campbell

Abstract

In a remarkably frank paper, Professor Andrew Burrows has shed some light on the process by which awards for non-pecuniary loss in personal injury cases were uplifted in *Heil v Rankin*, a process in which he played a leading role as a Law Commissioner. In apparent disregard of the criticisms to which this process has been subjected, Burrows regards it as an example of a valuable ‘methodology’ of common law law reform. These criticisms are reviewed in this paper and to them is added a criticism of the concept of ‘normal decision-making’ by the courts that is the basis of Burrows’ views. *Heil v Rankin* was far from normal decision-making, but in this it was merely of a piece with all awards of damages for non-pecuniary loss, for such damages have no grounding in the common law adjudication of awards of compensation. The further

Professor of Law, Lancaster University Law School, UK.

Corresponding author:

David Campbell, Lancaster University Law School, Lancaster University, Lancaster,
LA1 4YN, UK.

Email: d.campbell1@lancaster.ac.uk

development in *Simmons v Castle* of the judicial legislation effected in *Heil v Rankin* is also considered.

Keywords

Tort, personal injury system, non-pecuniary loss, law reform, judicial legislation

Introduction

In academic debate in which achievement is evaluated according to the criteria of economy, effectiveness or efficiency which we normally use to decide whether an expenditure of resource is justified, it is impossible to deny that the personal injury system signally fails to achieve what it had been axiomatic to regard as its goals of compensation and deterrence. As a result, the academic defence of that system has taken one of two lines. One has been to confine the discussion to the formal law of liability, for in the absence of inquiry into the empirical consequences of the formal law, the unacceptability of those consequences is not even an issue. The other has been to move the discussion to a level at which the personal injury system is provided with other justifications, such as the vindication of rights, the furnishing of corrective justice, and the contribution to social solidarity claimed by civil recourse theory, though it remains essential that no empirical inquiry be made into whether the system actually has the consequences implied by these justifications.

A most interesting question about the way that UK economic and legal policy is formulated surely arises from this decoupling of the personal injury system from its consequences. For one might have supposed that, even if this decoupling is possible within academic debate, it absolutely should not be possible within policy debate,

which is obliged to consider empirical consequences and evaluate them according to the criteria previously mentioned. But, of course, there has been no official general review of the consequences of the personal injury system since the Pearson Commission reported in 1978 (Royal Commission on Civil Liability and Compensation for Personal Injury 1978), and no general review of any sort since that conducted under the auspices of the Oxford Centre for Socio-legal Studies published in 1984 (Harris et al. 1984). As we shall see, it would be wrong to regard the numerous *Reports* of the Law Commission on personal injury and related topics in the 90s as a review in this sense, and all other official work, such as reviews of civil or personal injury litigation (the most important of which by Lord Justice Jackson (2009a) is considered at length below), or Select Committee *Reports* on the effect of changes to claims procedure and litigation funding on motor vehicle insurance (Transport Committee 2011; 2012; 2013, 2014),¹ has been fragmentary. The Pearson Commission has itself been criticised for not addressing all of the fundamental issues of the ‘compensation debate’ about personal injury (Allen et al. (eds.) 1979), but subsequent official inquiries have been much more limited. Though academic research has furnished an accurate overview of the operation of the personal injury system, and in particular of the gross disparity between the consequences of that system implied by the formal law of negligence and its actual empirical consequences (Lewis and Morris 2012; Lewis 2016), there is no such official account which, using the resources of government, would, of course, be able to provide much greater detail.

The *prima facie* paradox of the continuing existence of the personal injury system and the lack of official inquiry into what it does would, of course, be much lessened or even disappear were the personal injury system a matter of purely private

law decided by the courts in which the other branches of the state play no part, as much of the academic literature on the law of negligence implies or outright claims and as, I very strongly suspect, is the almost universal basis on which negligence is taught. Now, save by outright anarchists, whose views I shall, unfairly given their interest, simply put aside, it is not denied that private rights must rest on a public law framework.² Negligence as private law indeed turns on the role of the courts, and that the courts can have a role is in the end a matter of coercion by the state, but in this negligence is akin to all private rights. However, it is vitally important to acknowledge that negligence rests on public law in an additional sense.

Though it would be possible to create a voluntary market of first party insurance against accident, and though such a market, if constructed on the foundation of a uniform, adequate system of what I shall persist in calling social security, could, despite inequality of income, satisfy standards of protection from want acceptable in liberal democratic society (Harris et al. 2002: 449-61; Campbell 2015), we do not do this, and the law of negligence is a matter of the courts determining the scope and content of liability which is imposed as an alternative to a voluntary market. The third party liability insurance system takes its shape from this foundation. In the UK, payment of the overwhelming majority of the costs of the personal injury system is, in fact, literally imposed on common citizens by compulsory liability insurance or public provision against liability, but this is theoretically less important than the fact that liability is an imposition by the courts. What is more, as a very valuable collection of papers edited by Professors Arvind and Steele ((eds.) 2012)³ has made abundantly clear, the legislature and the executive are intimately involved in making the personal injury system work in numerous other ways, by, for example, dovetailing social

security and tort compensation, setting the discount rate and publishing the Ogden Tables, providing evidence about claims to insurance investigators, trying to criminalise fraudulent claims, regulating the conduct of claims intermediaries, etc. Arvind and Steele's collection makes it undeniable that the absence of a general official review of the personal injury system does not follow from an absence of state action. It follows from an absence of awareness of what the state is doing.

In a very remarkable chapter of a *Festschrift* for Professor Hugh Beale on his retirement from the Warwick Law School, Professor Andrew Burrows (2015) has given an account of one important instance of state support of the personal injury system.⁴ As the common law Law Commissioner between 1994 and 1999, Burrows played, it would seem, the major role in bringing about the increase of damages for non-pecuniary loss in *Heil v Rankin*.⁵ Though no precise quantification of the cost of this increase to date is available, it must be very considerable, running into billions. I will not consider the merits of this increase, for whilst, as I would abolish the personal injury system, it is obvious that I believe it was wholly unjustifiable, I equally accept that, once one has swallowed the existence of that system, *Heil v Rankin* was 'eminently sensible' (Lewis 2001: 101). Indeed, *Heil v Rankin* can be criticised⁶ for doing rather less than the Law Commission had argued should have been done in the *Report* on non-pecuniary loss which led to the case being arranged (Law Commission 1998a).⁷ I want instead to address the process by which this major coercive redistribution of the wealth of almost every UK citizen, about which Burrows has been very frank in his *Festschrift* chapter, was brought about. He makes it clearer than it was made in the *Report* on non-pecuniary loss itself (ibid.: para. 3.165)⁸ that the litigation, if this is the right word, which became *Heil v Rankin* was arranged, in what

we will see he calls an example of ‘a close working relationship between the Law Commission and the judiciary’ (Burrows 2015: 47), with the highest levels of the judiciary before the *Report* on non-pecuniary loss was published:⁹

Support [for using the Court of Appeal to secure the uplift] had been obtained in advance of publishing [the *Report* on non-pecuniary loss] from Lord Woolf MR and the Lord Chief Justice Lord Bingham. After meeting with [the Commission], Lord Woolf raised the matter on the Law Commission’s behalf with the Judges’ Council; and Lord Bingham CJ wrote to the Law Commission [confirming that it would be] ‘possible for the Court of Appeal to hear a number of different appeals on quantum in personal injury cases [and for the Court] to be invited to rule in favour of ... a general increase’. With that support, the Law Commission was confident that a way would indeed be found to bring the cases before the Court of Appeal, although, as a fall-back position, we did recommend legislation should the courts fail to make the recommended increase (Burrows 2015: 45-46).

I have nothing in substance to add to the opinion I formed about *Heil v Rankin* at the time, that by ‘avoiding the hazards of public accountability, the Court of Appeal, in an act of retrospective legislation which barely bothered to masquerade as a judgment’ had effected a major change in the law in a way which amounted to a ‘public scandal’ (Harris et al. 2002: 442). But, of course, my opinion was in a very important sense wrong, for there was no such scandal. Burrows’ chapter is extremely enlightening on how it is that the working of the personal injuries system can be understood in such a way that this could be the case.

What Did *Heil v Rankin* Do?

During his term as a Law Commissioner, Burrows led, as part of the Sixth Programme of Law Reform, the most extensive official examination of the law of personal injury since the Pearson Commission (Law Commission 1995b: 26-27).¹⁰ This resulted in four *Reports*: on psychiatric illness (Law Commission 1998b), on medical expenses

and collateral benefits (Law Commission 1999b), on wrongful death (Law Commission 1999a) and, of most interest to us here, the *Report* on non-pecuniary loss. (To these must be added a *Report* on structured settlements and refinements of lump sum payments (Law Commission 1994b) produced under the previous common law Commissioner, Professor Jack Beatson, as he then was). Perhaps the most significant of the recommendations reached in all these *Reports* was that, as the conventional tariff for non-pecuniary loss in serious injury cases had markedly fallen behind inflation, it should be increased by at least 50% but not more than 100% (Law Commission 1998a: para. 3.110(1)). Serious injury was defined as an injury for which the conventional non-pecuniary loss award alone would be more than £3,000 (*circa* £4,750 in 2015 values), and awards between £2,001 and £3,000 would also be increased by tapered additions capped at less than 50% of then current awards (*ibid.*: para. 3.110(2)).

To one, like myself, who assumed that the result of such a recommendation would be a draft Bill at the end of the *Report*, the line taken over the possible implementation of this recommendation was striking. The recommendations of the previous *Report* on structured settlements had been brought into law by legislation before the *Report* on non-pecuniary loss was published, mainly by The Damages Act 1996,¹¹ and the *Report* on non-pecuniary loss did contain a draft Bill in respect of its other main conclusion about the role of the jury in personal injury cases (Law Commission 1998a: appendix A). But no draft Bill was produced in respect of the increase to non-pecuniary loss awards, and instead a range of mechanisms for bringing about that increase was extensively reviewed (*ibid.*: paras. 3.111- 3.170). The idea of juries doing this was ruled out (*ibid.*: paras. 3.114-3.117), in line with a

general argument that the role of juries in assessing damages should be further reduced (ibid.: Pt IV). A Compensation Advisory Board, a body of a sort then generally called a quango which probably would now be called an independent advisory agency (ibid.: paras. 3.114-3.129), and a tariff amended by Act of Parliament (legislative tariff) (ibid.: paras. 3.130-3.139), were rejected, as was putting on a statutory footing the appellate courts' power to increase the tariff (ibid.: paras. 3.166-3.170). What was left was using what the *Report* on non-pecuniary loss claimed was the appellate courts' power to uplift the tariff by 'normal decision-making' (ibid.: para. 3.140), and it was recommended that that power should be exercised (ibid.: paras. 3.140-3.165). Though it did substantially less than the Commission had recommended, making no increase in regard of non-pecuniary loss awards below £10,000 and limiting the tapered addition to awards above £10,000 to a maximum of 33% of then current awards, *Heil v Rankin* was the result of this recommendation.

The Commission's opinion that the course of action which led to *Heil v Rankin* constituted normal decision-making by the courts was endorsed in the case itself. The important *dictum* of Lord Scarman in the House of Lords' judgment in *Lim Poh Choo v Camden and Islington AHA*,¹² to the effect that an uplift such as that on which the Court of Appeal was engaged in *Heil v Rankin* was properly a legislative matter, was distinguished on the basis that no *change* to the law was being made:

So far as a change of the law is concerned, we of course endorse the approach of Lord Scarman. But, in considering whether the level of the awards of damages for non-pecuniary loss is too low, there is no change in the law involved even if we come to the conclusion that a change in the level is required. The court is doing no more than considering the adequacy of the level of current awards by applying existing principles and, in so far as they are inadequate, bringing them up to date. Lord Scarman is not suggesting that this is not an appropriate topic for the consideration of this court ... We emphasise this because we have no

intention of seeking to involve ourselves with matters of policy-making which are more suited for Parliament than for the courts. We do have to concern ourselves with current standards within our society and economic conditions, but only so far as the performance of our duty to set the level of damages makes this necessary. We are not contravening the wise advice that the courts should seek, when possible, to avoid becoming involved in determining broad questions of social and economic policy.¹³

Vitaly importantly, this view seems also to have been the view of the Government. I shall refer below to comments Burrows made on the position as his term at the Commission drew to an end. In those comments he refers to the Government's response when asked about its plans to implement a number of the *Reports* published whilst he was a Commissioner. Having indicated a willingness to legislate in respect of some of these *Reports*, and undertaken to assess the impact of doing so, the Lord Chancellor's Department then said:

This assessment is only concerned with those *Reports* which recommend legislation concerning eligibility for damages and the size of damages awards. It will not consider [the *Report* on non-pecuniary loss], in which the Law Commission offers opinions of which the courts are free to take such account, if any, as they choose in the assessment of damages. This is an area of law which is in the courts' independent sphere and where the Government has no plans to legislate.¹⁴

As was pointed out at the time (Harlow 2002: 10), were this uplift regarded as a legislative matter, this attitude should have been criticised as a quite indefensible instance of executive use of the judiciary to avoid Parliamentary scrutiny. One would have thought the uplift defensible only if it was an instance of normal decision-making by the courts.

How Was What Was Done in *Heil v Rankin* Done?

Two preliminary points should be made about the claim that litigation of the sort brought about in *Heil v Rankin* was normal decision-making within the courts' independent sphere which did not effect a change in the law.

First, an adequate understanding of *Heil v Rankin* has to begin with the recognition that, as a matter of procedure, the last thing that could be said of it was that it was normal. The Master of the Rolls read the single judgment, to which each member of the Court had 'contributed',¹⁵ of a specially constituted Court of Appeal of five, the Master of the Rolls sitting with three Lords Justice of Appeal and a High Court judge. A 'selection' of eight cases, of which *Heil v Rankin* was but one, were joined,¹⁶ and interested other parties, such as the Association of British Insurers (ABI), the Association of Personal Injuries Lawyers (APIL), the Eagle Star Insurance Co, and the Government in the form of an official amicus, were allowed in various ways to intervene.¹⁷ Argument was entirely confined to (1) whether the Court of Appeal was the appropriate forum for uplifting non-pecuniary loss damages; (2) whether an uplift inevitably with retrospective effect breached the European Convention; and, the answers to these questions being yes and no respectively, (3) what the uplift should be. Though applied to the joined cases, the decision about the uplift was stated in the most general terms, being intended to effect all personal injury cases.¹⁸ A belief then held by all professionally involved in personal injury litigation that the Law Commission's recommendation was about to be given some important effect by some means had led to a great many cases throughout the court system being placed on hold.¹⁹ The judgment uniquely (Lewis 2001: 101) included a graph which, though markedly defective (Bennett 2000: 130), was intended to give general

guidance. In completely confident anticipation of an uplift, the Judicial Studies Board held itself in readiness to revise its *Guidelines* for the assessment of non-pecuniary loss damages,²⁰ and the revision appeared less than four months after the judgment was handed down (Judicial Studies Board 2000).²¹ It is preposterous to regard this as procedurally normal litigation. As a matter of procedure, it was what we might, following Professor Harlow, call ‘surrogate legislation’, being a case in which ‘the bipolar, adversarial nature of the lawsuit had been demolished’ and replaced by ‘procedures ... reminiscent of Parliamentary Private Bill procedure’ (Harlow 2002: 11).

Secondly, it is undeniable that the Law Commission saw litigation such as was arranged in *Heil v Rankin* or legislation to this effect as, if I might put it this way, functional equivalents. The recommended uplift was to be brought about and the point was to adopt the quickest way of doing so. Given the role in the setting of levels of general damages for personal injury which the Court of Appeal has come to assume,²² this meant comparing the speed with which the desired uplift could be brought about by either that court or by Parliament, and this exactly the way they were considered as alternatives in the *Report* on non-pecuniary loss (Law Commission 1999a: para. 5.10). In a passage of the last *Annual Report* of the Commission to which he contributed, drafted just as the Court of Appeal was hearing *Heil v Rankin*, Burrows reviewed the position thus:

we recommend that ... increases would be best achieved by the higher courts exercising their powers to issue guidelines in a case or series of cases. However, if the increases recommended are not achieved within a reasonable time (for example, three years), legislation should be introduced to implement our recommendations. The Government has made it clear that it will not itself consider this *Report* as it concerns an area of the law which is in the courts’ independent sphere, where the

courts can take such account, if any, of the Commission's views as they choose and where the Government have no plans to legislate ... At the time of writing, the Court of Appeal (sitting as a five judge court headed by the Master of the Rolls) is hearing eight joined appeals for the purpose of considering the Law Commission's recommendations as to the levels of damages for non-pecuniary loss (Law Commission 2000: para. 23).

In his *Festschrift* chapter, Burrows was able to expand on his thinking about the relationship between legislative and judicial reform of the common law, and it is worth quoting some of these fascinating comments at length:

Perhaps oddly for a former Law Commissioner, I have never been a great fan of legislative reform of the non-criminal common law. Indeed, my years at the Law Commission merely served to reinforce my legislative scepticism ... the vagaries of the legislative process mean that whether time is found legislation depends almost entirely on whether one can fit one's law reform within the political imperatives of the day and has little, or no, relationship to the quality of, or necessity for, the reform proposed ... At root my approach may rest on a belief that our judges are to be trusted on developments in the common law in a way that our politicians should not be.

This legislative scepticism means that, for example, I think judges should be very wary of leaving possible reform of the common law to the legislature[. I am very critical of] arguments that, because the legislature has not enacted some reform, it is the intention of Parliament that there should be no reform of [the relevant common law]. The truth is that there is a myriad of reasons why Parliament may not have legislated on a matter and it is incorrect to regard [this] as necessarily reflecting a considered choice.

The upshot of this is that, while we at the Law Commission did not achieve fully what we had hoped in terms of the precise level of increase, the decision in *Heil v Rankin* was a triumph in terms of the methodology of law reform. It showed what could be achieved by a close working relationship between the Law Commission and the judiciary. I am convinced that, had we waited for legislation, we would still be waiting ...if like me, you trust judges and have some scepticism about legislation in relation to English private law, there are alternatives ... reform of the common law can be achieved by the judges, even in areas where it might at first sight seem that legislation is the only way forward (Burrows 2015: 50).

Some Criticisms of What Was Done in *Heil v Rankin* and of How It Was Done

I have but one criticism of *Heil v Rankin* which I believe to be novel. But in order to make it I must situate it amongst criticisms more than adequately made by others, which I will be very brief in reviewing.

Even to those, like myself, who have every sympathy with Burrows' criticism of Parliamentary law-making, the question immediately arises of the justification for Burrows, not merely criticising Parliament, but stepping into its place in the sense of himself effectively passing legislation which Parliament would not. No amount of criticism of Parliamentary procedure gives Burrows a mandate to do this. It does not even speak to the issue whether he had such a mandate, and Burrows' justification of his methodology of law reform is in this sense a mere *non-sequitur*. I will not attempt to examine the institutional position that, as a matter of fact, did give Burrows the power to legislate. I will simply say that this power is democratically unjustifiable for all the reasons set out by *inter alia* Harlow (2002: 10-12). One, of course, feels very awkward saying this, but the fault surely is that of Burrows himself, for, as the late Mr. Weir (2000: 638) unforgettably put it, the Law Commission's conduct was constitutionally 'impertinent', and the Court of Appeal's complicity with it 'astonishing'.²³

This procedurally illegitimate process was, in large part as a consequence of this illegitimacy, substantively incompetent. Though, as I have said, the set of *Reports* produced under Burrows (and Beatson) was the most extensive official examination of the law of personal injury since the Pearson Commission, they were not at all a comprehensive review of the operation of the personal injury system even in the Pearson sense. Those *Reports* were overwhelmingly of a 'black-letter' character and,

in keeping with Burrows' approach in his academic work, in which the defence of tort (Burrows 1998b: 122-26) is based on granting only a very small role to the social sciences in the discussion of legal issues generally (Burrows 1998c: 112-14), they completely avoided consideration of the issues central to the compensation debate. Ignoring these issues was essential to *Heil v Rankin*, and its consequent indefensibility on any of the grounds of distributive justice which do not go away just because they are ignored have all been discussed by Professor Lewis (2001, 2016). To his discussion it is necessary only to add that, even were the steps taken in *Heil v Rankin* defensible, as those steps were taken in the way they were, it was impossible to implement the transitional provisions necessary to make such implementation other than a shock, particularly, given the nature of what actually was done and the way it differed from what the Commission had recommended,²⁴ to the NHS (Bennett 2000: 133).

The combination of democratic unaccountability and extremely limited scope of inquiry that characterises the Law Commission's input into *Heil v Rankin* follow from a central feature of the case which itself constitutes a ground of its unacceptability. The handing down of *Heil v Rankin* involved a really quite extraordinary number of people. Leaving aside the role of the Law Commission itself, the consideration by a Court of Appeal expanded to five of eight actions involved more than sixteen parties, including insurers, local authorities and health services, the cases of which were presented by twenty eight counsel. I have mentioned that interventions from a range of interested private parties such as insurers and legal professional groups and from the Government were allowed. But even so, this represented a very highly restricted group all taking variants of the mainstream position about the personal injury system

based on the disregard of the fundamental issues of the compensation debate. We might call this the position of the personal injury cognoscenti.

Despite some insight into the process provided in Burrows' (2015: 45-46) *Festschrift* chapter, how this group was precisely assembled remains essentially unknown and will always remain so. But that it was a closed group of personal injury cognoscenti bound to reach a decision in line with perpetuation of the personal injury system was all too apparent to those who watched the spectacle of *Heil v Rankin* at the time. As a group it is open to the criticism which Professor Atiyah (1997: 173) levelled at the Law Commission itself: it was 'far too closely wedded to the system and its underlying value structure ... to be able to bring to bear the independent scrutiny the system needs'. Burrows' scepticism about private law reform through legislation constrained by political imperatives can have purchase only if the implicit claim that Burrows is himself (in consultation with others) competent to identify the public interest and to legislate for it is accepted. Argument over this is pointless. 'It should be obvious enough' that the views informing *Heil v Rankin* are themselves political in the sense that they are 'inevitably partial and depend upon the perspective through which accident compensation is viewed' (Lewis 2001: 111), and that Burrows' implicit claim to legislative competence is wholly unacceptable.

Compensation and the Common Law

The criticisms of *Heil v Rankin* which I have just briefly reviewed seem to me to be overwhelming. Even were this not so, I do not think it can reasonably be said that those criticisms do not have very considerable force, and perhaps the most remarkable feature of Burrows' *Festschrift* chapter is the utter sanguinity with which he views his

achievement, which is undisturbed by any consideration of these criticisms. Whilst part of this sanguinity must follow from the little or zero weight Burrows places on the issues raised in the compensation debate, it principally follows from his belief that the Commission and the Court of Appeal were not involved in legislation at all but in normal decision-making, which indeed would make those criticisms otiose. It is essential to ask, then, what is normal decision-making in this context? The initial answer to this question is, of course, quantification of compensation, but it will be shown that this is a very misleading answer.

As in innumerable other tort and personal injury cases, the judgment in *Heil v Rankin* begins with a reference to the duty to compensate and a citation of the *dictum* of Lord Blackburn in *Livingstone v Rawyards Coal Co*, which I will cite despite its extreme familiarity:

where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong.²⁵

And, as again in innumerable personal injury cases, further citation of almost equally familiar authority, this time that of Lord Pearce in *H West and Son Ltd v Shephard*, then supports the recognition that getting at ‘that sum’ in regard of non-pecuniary loss is, not merely difficult, but ‘essentially artificial’:²⁶

The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum.²⁷

Rather than dwell on the case law of this doublethink it is better to go straight to the horse’s mouth. For what is there really to add to what Lord Donaldson wrote in his

foreword to the first edition of the then Judicial Studies Board's *Guidelines* on the award of non-pecuniary loss:

Paradoxical as it may seem, one of the commonest tasks of a judge sitting in a civil court is also one of the most difficult. This is the assessment of general damages for pain, suffering, or loss of the amenities of life. Since no monetary award can compensate in any real sense, these damages cannot be assessed by a process of calculation. Yet whilst no two cases are ever precisely the same, justice requires that there be consistency between awards (Judicial College 2015: ix).

One cannot go on in this way. It is not good enough to acknowledge that the compensation of non-pecuniary loss is impossible and therefore artificial and then justify what one is doing on the basis that one actually is compensating it.²⁸ *Heil v Rankin* exploits the possibilities opened up by the slovenliness of thought that is at the heart of personal injury law, indeed is essential to making the personal injury system possible, of treating payment for non-pecuniary loss as compensation when it is nothing of the sort. The issues have been discussed at interminable length in the compensation debate, and in one sense I have nothing to add to my previous criticism of non-pecuniary loss awards as 'essentially fruitless and arbitrary' (Harris et al. 2002: 438). But it should be emphasised that it is *because* they are fruitless, i.e. do not compensate, that they are arbitrary, for in principle there is no actual compensatory basis on which they can be calculated. This is why they have to be assessed as 'conventional' awards.

However, doing this inevitably runs into serious difficulty. It will be recalled that the last sentence of the previously quoted passage from Lord Donaldson's foreword to the *Guidelines* was 'Yet whilst no two cases are ever precisely the same, justice requires that there be consistency between awards' (Judicial College 2015: ix). As there is no compensatory basis for awards, quantum cannot be derived from the

application of compensatory principles to the facts of a case and so the minimum of consistency between cases without which non-pecuniary loss could not survive has to be entirely based on determining with which cases the instant case should be classed so that the award will be of the same arbitrary quantum.

Obviously the simplest way to do this is to place such awards on a schedular basis, as with the Criminal Injuries Compensation Scheme, or even better to move to social security payment of administratively allocated benefits. It should be remembered that it was not to restrict provision against want in industrial injury and ‘non-employment cases’ that the emergent British welfare state considered the abolition of the ‘action on the case’ (Departmental Committee on Alternative Remedies 1946: para. 25). This was done with a view to expanding such provision (ibid.: paras. 19-108).²⁹ It is the present author’s principal criticism of the personal injury system that the goal of full compensation makes rational and just social security provision for incapacity impossible (Harris et al. 2002: 453-61).³⁰ But maintaining the illusion that specific claimants are being compensated on an individual basis³¹ requires the squandering of the great expense of running the personal injury system as a system of litigation and settlement.

Even within this context, were the classification of cases normally done by actual legal argument in the sense of contested comparison of the facts of decided cases, this would itself be an impossible task which would place an unacceptable strain on the costs of litigation. In this situation, the post-war availability of Kemp and Kemp (1954-56)³² and the emergence of a personal injury cognoscenti able to predict awards which they know will not normally be challenged if they fall within a certain penumbra, have been essential to the continuation of the UK personal injury system.

And, of course, since 1992, the judicial bureaucracy has itself taken a major role in ensuring consistency by publishing its *Guidelines* (Judicial Studies Board 1992). The publication of these *Guidelines* must be added to the ways in which the state plays a direct role in supporting the so-called private law of the personal injury system. Legal advice about non-pecuniary loss quantum based on application of these guidelines is of the same nature as the administrative allocation of benefits.

One of the paralysing defects of the compensation debate has been that those critical of the personal injury system have allowed those who defend it to claim the justification of using the formal law. Though the empirical consequences of the personal injury system may be allowed to be partially or even wholly questionable, and, as I have said, in academic debate those consequences are rarely defended, it is assumed that courts adjudicate on the basis of the law of negligence pursuing the common law goal of compensation. But those critical of the personal injury system should follow the advice of the Reverend Hill not to let the Devil have the best tunes and insist that this assumption is unfounded.³³ What the courts do when they give awards for non-pecuniary loss, though it may console, or be the sort of thing that should be done for those in such unfortunate positions, etc., is unconnected with compensation and therefore with the principles of the common law adjudication of private law. The claim that non-pecuniary loss payments are compensatory is necessary to make it possible that those payments be made through the operation of the private law, and that it has successfully served this function, whilst it does not justify the claim in logic or policy, unarguably has given the claim great significance. I have already put forward my view that it is wholly unacceptable to claim that *Heil v Rankin* was normal decision-making by the courts. But the reason this could possibly

be claimed is that, in a sense, it *was* normal decision-making, because this abnormal form of decision-making is normal in the sense of being perfectly common. This is the sort of thing courts making non-pecuniary loss awards do all the time: we have seen Lord Donaldson describe it as ‘one of the commonest tasks of a judge sitting in a civil court’ (Judicial College 2015: ix).

Without at all going into the constitutional law or legal philosophy of the matter, this paper, and the arguments made by others which it recapitulates, rest on a commitment to a distinction between adjudication and legislation in a strong separation of powers. The political virtue of legislation understood in this way is that it seeks to institutionalise democracy; the virtue of adjudication is that it seeks to institutionalise the rule of law based on respect for legality. If the personal injury system is judged as an attempt to institutionalise compensation for non-pecuniary loss, then it is an utter failure, because it does no such thing. It is a claim to be applying principles of compensation which makes a mockery of those principles. The most important aspect of this is that, if respect for legality had the place ascribed to it in Dicey’s constitutionalism, then such respect should be a very strong reason for abolition of the personal injury system. The great sense in Dicey is that there are some improving government actions that can be done only at such a cost to legality that they should not be done. Dicey has had to be ridiculed in order to allow the administrative law of the welfare state to greenlight actions of precisely that sort (Campbell 2010: 507-31). The public/private hybrid of the tort of negligence is judicial law-making by the courts which is the equivalent of much administrative law-making by the government, that is to say, in an important sense not the making of law at all, except that, because it is legislated in court, negligence achieves what one

would have thought very difficult by being generally much poorer, despite the normally infinitely higher quality of those doing the law-making.

Non-pecuniary loss awards do not display the blatant absurdity characteristic of appellate reasoning over the extent of negligence liability, but this is for the bad reason that they entirely abandon quantification of compensation and substitute for it consistency of conventional awards; i.e. they abandon common law reasoning. Of course, were this done fully self-consciously, it would be a good thing. That non-pecuniary loss awards are schedular or in effect are benefits should be recognised. In my opinion, such recognition would lead to no payments for non-pecuniary loss (which are, after all, fruitless) being made, and so to the personal injury system effectively being abolished. But if such payments were made, they would be paid as benefits, with the courts' role being judicial review of administrative action. But this is precisely what is not done.

Burrows' degree of unconcern at the criticisms which have been made of *Heil v Rankin* is, then, justified by the fact that, to the personal injury cognoscenti, the distinction between adjudication and legislation which informs those criticisms is most unfortunately naïve. The positive law of non-pecuniary loss quantification may be understood to be based on compensation, but when the cognoscenti say compensation in this context they understand it to mean a conventional award unrelated to compensation. I believe I can explain how most academic commentators are able to maintain this contradictory understanding. They are unaware of the contradiction because they know nothing of the quantification of personal injury damages and of damages for non-pecuniary loss in particular. Their lost years are the time they did not spend on studying personal injury quantum or the empirical

consequences of the personal injury system. They actually believe that a tort award normally compensates.

I do not, however, purport to explain how the personal injury cognoscenti can maintain the contradiction inherent in their use of the rhetoric of compensation to describe something they in a strong sense know is nothing of the sort as they turn to their *Guidelines* and their Kemp and Kemp to assist them in the settlement of an acceptable conventional award. But I do to criticise this understanding, for all the reasons reviewed in this paper and for the further reason to which I hope to have drawn attention: awarding damages for personal injury requires the abandonment of legality in the award of compensation as a principal virtue of common law adjudication.

Confusion worse confounded: *Simmons v Castle*

In 2012 in *Simmons v Castle*,³⁴ the Court of Appeal again took the *Heil v Rankin* approach towards setting damages for personal injury. Burrows does not mention this case, nor the related *Review of Civil Litigation Costs* by Lord Justice Jackson (2009a), but *Simmons* very clearly illustrates the procedural consequences of *Heil v Rankin* and so must be considered here. In its general nature if not in its detailed form, *Simmons* was an inevitable development from *Heil v Rankin* if one accepts the *Heil v Rankin* approach. And, *mirabile dictu*, what was done in *Simmons* was even more questionable than what was done in *Heil v Rankin* itself.

In *Simmons*, the County Court awarded a claimant injured by the defendant's admitted negligence £20,000 general damages and £2,730 special damages, which, with interest, amounted to a total award of £24,712. After the claimant was given

leave by the Court of Appeal to appeal against quantum, the parties settled on terms which maintained the award *pro tem* but allowed that it might be varied if the claimant's medical condition deteriorated so as to cause further pecuniary loss. The County Court had declined to make any such provisional award. The Court of Appeal was asked to give consent to this settlement. I shall return to this settlement, but it was far more important that the Court took the opportunity to announce that, from just over eight months hence,³⁵ general damages would be uplifted by 10%.³⁶ Though this was not intended to affect *Simmons* itself, had it done so, this uplift would, of course, have meant that £22,000, not £20,000, would have been awarded.

One not forewarned by experience of *Heil v Rankin* would be disorientated by what was done in *Simmons* and particularly by how it was done. But whilst again the full story will never be known, if so forewarned, that story appears to be to considerable extent familiar. In November 2008, Sir Anthony Clarke, the then Master of the Rolls, after consultation with his brethren and with the Ministry of Justice, asked Lord Justice Jackson 'To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost' (Jackson 2009b: para. 2.1). Sir Rupert's *Final Report* appeared in December 2009 and *inter alia* recommended that general damages should be uplifted by 10% (Jackson 2009a: 463 (recommendation 10), 465 (recommendation 65(i))). *Simmons* was handed down on 26 July 2012 and at that time it was known to the Court,³⁷ and indeed throughout civil litigation practice, that certain other of Sir Rupert's recommendations were to be brought into force by legislation³⁸ on 1 April 2013, as indeed they were.³⁹ The effect of *Simmons* was to bring this uplift about, the eight months' delay being intended to

make the uplift simultaneous with the legislative implementation of these other recommendations.

I will postpone discussion of the question which will immediately strike even the reader aware of *Heil v Rankin* of how it was that such a recommendation could result from a review of litigation costs (Lewis 2016: 55). But, the recommendation having been made, a Court of Appeal even more conscious after *Heil v Rankin* of its role in setting the level of damages sought to implement that uplift. In a brief review of essentially the position previously examined in this paper, the Court of Appeal described a system in which the Judicial College would issue its *Guidelines* and those *Guidelines* would be based on pronouncements by a Court of Appeal which itself had ‘not merely the power, but a positive duty, to monitor, and where appropriate to alter, the guideline rates for general damages in personal injury actions’.⁴⁰ After *Heil v Rankin*, one can hardly call this a constitutional innovation, but, as we will see *Simmons* makes particularly clear, it nevertheless is an arrogation by the judiciary of a properly legislative function that is prejudicial to the democratic aspiration of the British constitution and to the integrity of common law adjudication.

It is impossible to be clear about why the settlement had to be approved by the Court of Appeal,⁴¹ but, even if one allows that this was necessary in this case, it would normally be the work of a single Lord Justice of Appeal on papers. However, the Court in *Simmons* could hardly have been more distinguished: Lord Judge CJ, Lord Neuberger MR⁴² and Maurice Kay LJ. Such a bench found the adjudicative task which was the pretext for its assembly in no way daunting, and the settlement was approved as follows: ‘There is no reason not to approve this settlement’.⁴³ Despite the three judge bench set to this task, the cast of CB de Mille proportions assembled for

Heil v Rankin was reduced to a size which calls Samuel Beckett to mind; indeed the Beckett of *Not I*, as no actual action occurred. The parties themselves took no part for the rather good reason that no hearing at all took place and so the Court was not even addressed by counsel. But the Court found this acceptable as it did ‘not seem to us to be appropriate, let alone necessary, for us to be so addressed’.⁴⁴ All was utterance as the single judgment of the Court of Appeal was handed down by Judge CJ.

I have argued that, viewed as procedure, it is preposterous to regard *Heil v Rankin* as normal decision-making by the courts. Valuable conventions about the way one can criticise judicial statements would deny me the even stronger language which would be needed to respond to any judicial claim that *Simmons* was decision-making of this sort. It is fortunate, then, that no such claim was really made. The ritual incantations of, in this instance, *H West and Sons Ltd v Shephard*⁴⁵ and *Wright v British Railways Board*,⁴⁶ were briefly performed,⁴⁷ but it was admitted that what was somewhat misleadingly called the ‘set of facts’⁴⁸ in *Simmons* was ‘no doubt ... an unusual basis on which to rest a judgment or to adjust guidelines’.⁴⁹ Those facts were not any facts relating to the interests of the nominal parties but were ‘the forthcoming change in the civil costs regime initiated by Sir Rupert Jackson’s reforms’.⁵⁰ That *Simmons* was legislation in all but name and that, therefore, the uplift it brought about cannot be claimed to be the outcome of common law reasoning about compensation of a calculable, non-pecuniary loss, seems to me to be conceded, albeit almost silently. I certainly would be put at a loss to argue against a claim that *Simmons* was normal decision-making by the courts because I do not see any intellectually serious way in which such a claim could be made.⁵¹ I shall, however, now turn to the reason for the uplift.⁵²

That *Simmons* was, in effect, a *Practice Direction* (albeit a *Practice Direction* of more significance than much primary legislation) was rather hammered home when, two months after *Simmons* itself, a sort of appeal was heard by the same Court and Judge CJ handed down a single ‘further judgment’ which was reported as a *Practice Note*.⁵³ The insufficiently clear statement in *Simmons* itself about when the uplift was to take effect⁵⁴ was rendered more precise in the *Practice Note* when the Court said that *Simmons* was to apply to ‘the very large number of actions in the future’⁵⁵ in which ‘judgment was given after 1 April 2013’.⁵⁶ The Court of Appeal had thought that this delay would avoid the difficulties about the absence of transitional provisions which it noted had beset *Heil v Rankin*.⁵⁷ It is, with respect, difficult to understand why the Court thought this could entirely be the case, for, of course, what it said in *Simmons* put those advising current or prospective litigants effectively under an obligation to consider whether to seek to draw things out until after, or, from the other perspective, draw things to a close before, 1 April 2013. It therefore is in one way most unsurprising that the ABI would have wished to apply to have the Court of Appeal reconsider whether the uplift should apply only ‘to cases where the claimant’s funding arrangements had been agreed after 1 April 2013’.⁵⁸

What, nevertheless, is most surprising is that the ABI actually could make any such application, the procedural possibility of which I cannot purport to fully explain.⁵⁹ Though, to be precise, the ABI made two applications, one in its own name and one in the name of the defendant, these were effectively one application made by the ABI which, as argued, did not even refer to the merits of the defendant’s liability, and neither claimant nor defendant appeared, nor were their interests represented.⁶⁰ The Court heard submissions from the ABI expressive of the position of those who

would in the first instance have to pay for the uplift, and from APIL and the Personal Injuries Bar Association (PIBA), taking the position of those wishing to claim the uplift. The proceedings (one is at a loss for an apt term) were reported in the *Practice Note* were a sort of inquiry into a general policy based on evidence submitted by interested parties, comment on the wisdom of which procedure is supererogatory after what I have said of *Heil v Rankin*. That this was not litigation but rather a further exercise in what Harlow called surrogate legislation is, it is submitted, flatly undeniable, and, as with *Simmons* itself, the particular feature added to *Heil v Rankin* by the *Practice Note* is that this is not really denied:

So far as procedural matters are concerned, there is no suggestion by APIL or PIBA that it is not open to ABI to make their application, at least through the respondent, Mr Castle. In our view, the court does have jurisdiction to entertain ABI's application (and, indeed, PIBA's proposal). It would be surprising if that were not so, as the effect of our earlier decision was, and was intended, to affect the outcome of a very large number of actions in the future, in which Mr Simmons and Mr Castle, the only parties to these proceedings at that time, had no interest, and were not represented. Accordingly, if, in reaching our decision, we failed to take relevant matters into account to the detriment of one group of future litigants, it would be wholly unjust if someone representing that group was unable to ask us to reconsider our decision. It seems to us clear that there is jurisdiction to entertain ABI's application, in the light of the very exceptional nature of the exercise we were carrying out, namely giving guidance as to future practice rather than laying down any general principle of law, in a case where the parties were not represented, and no prior notice had been given to potentially interested parties.⁶¹

Executive, Legislature and Judiciary in *Simmons v Castle*

The background to the Master of the Rolls asking Lord Justice Jackson to conduct his review was the great public concern that changes to the funding of civil, and particularly personal injury, litigation begun by the Woolf reforms, which, of course, were expressly intended to further access to justice, had badly failed to control the

costs of a process which had become, in the opinion of Lord Woolf himself, ‘now far too expensive’.⁶² This expense was not only generally indefensible but encompassed, indeed fairly could be said to be characterised by, charging practices described as ‘nothing short of scandalous’ by Mr Jack Straw when Lord Chancellor (Jackson 2009b:ch. 1, para. 1.3). The size of the problem⁶³ was conveyed in comments by Professor Ian Scott QC (Hon), General Editor of the *White Book*,⁶⁴ quoted by Sir Rupert in his *Preliminary Report*:

I do fear that the profession to which I belong has lost its soul and is far too preoccupied with making money. Further, I think it is capable by its actions of killing the goose that has laid the golden egg. Another thing I feel strongly about is the shocking squandering of scarce court resources on refereeing of disputes about costs (ibid.: ch. 3, para. 5.50 n. 104).

Sir Rupert summed up his own view of the ‘cherry picking’ of claims which he seemed to see as the most objectionable specific issue in this way:

Having worked in the legal profession for 37 years, I have a high regard for my fellow lawyers, both solicitors and counsel. The fact remains, however, that lawyers are human ... work tends to follow the most remunerative path. In my view, it is a flaw of the recoverability regime that it presents an opportunity to lawyers substantially to increase their earnings by cherry picking. This is a feature which tends to demean the profession in the eyes of the public (Jackson 2009a: ch. 10, para. 4.19).⁶⁵

We have seen that the eight month delay in implementing the decision in *Simmons* was intended to make that implementation simultaneous with other of Sir Rupert’s principal recommendations which were to be brought into force by statute. These recommendations were to abolish or limit the use of the various innovations in charging practices, such after-the-event insurance, conditional fees, contingency fees and (aspects of) Part 36 Offers, by which, to use the term very broadly, the ‘success fee’ had been introduced in the period since Woolf. But though the use of specific charging arrangements was to be, if I might put it this way, reduced (and I shall refer

to these of Sir Rupert's recommendations as the 'reducing' recommendations), Sir Rupert, in his own view and in light of the consultation he had undertaken, had 'no objection in principle' to lawyers 'reasonably' adjusting their fees dependant on whether their client was not, or more importantly was, successful. He therefore proposed to allow the continuance of the success fee whilst, for example, outright abolishing some forms of conditional fee agreement (Jackson 2009a: ch. 10, para. 4.20). Though recognising that prior to Woolf 'many people [had] regarded it as an anathema for lawyers to have a financial stake in the outcome of litigation which they were conducting', Sir Rupert maintained that 'this was no longer the case' (ibid.: ch.10, para. 1.8).

I have mentioned that Sir Rupert's review was established after discussions amongst the judiciary and the Ministry of Justice, and it was essentially his reducing recommendations that the Ministry had consulted upon (Ministry of Justice 2010: sec 2)⁶⁶ and had obtained legislation for when *Simmons* was decided. The task facing the Court of Appeal as it understood it⁶⁷ was to take the step necessary to complement the imminent statutory implementation of Sir Rupert's recommendations 7, 9, 14 and 94 (Jackson 2009a: 463, 464, 470)⁶⁸ by judicially implementing recommendations 10 and 65(i) (ibid.: 463, 468).

What became The Legal Aid, Sentencing and Punishment of Offenders Act 2012, Pt 2 received substantial debate in Parliament. A major theme, perhaps *the* major theme, of this debate⁶⁹ was concern about the effect of the reducing recommendations on changes brought about by Woolf which undoubtedly had increased the amount of personal injury litigation and so could, as was claimed by Mr Andy Slaughter, the then Shadow Minister for Justice who led the opposition to the

Bill,⁷⁰ be said to have worked ‘in the main part very well [having] created a viable market in legal services and permitted access to justice for millions since it was introduced’.⁷¹ This debate was, of course, limited in nature, with the fundamental question whether the personal injury system is so bad that extending access to it, i.e. making it work better, would actually cause a welfare loss,⁷² not being broached. But, within such confines, Mr Slaughter was concerned that the Government’s proposed way of ameliorating the effect of the reducing recommendations might not work because the uplift was insufficient: ‘To make up for part of those losses, the Government plan a 10% increase in damages for pain, suffering and loss of amenity. Simple maths should be sufficient to show that that will not make up for all losses’.⁷³

There is no doubt that Sir Rupert saw an uplift of 10% as a vital part of ‘a coherent package of interlocking reforms’ (Jackson 2009a: i, 462) which ‘should be accepted or rejected as a package’,⁷⁴ the role of the uplift effectively being to provide a ‘*quid pro quo* for loss of success fees’ (Anon 2012). After deciding upon his reducing recommendations, Sir Rupert believed that:

The follow-on question which arises is whether any measures and, if so, what measures ought to be taken to assist claimants to meet the success fees which they will have to pay in successful cases out of damages or other sums recovered ... The measures which I propose are [that] In order to assist personal injury claimants in meeting the success fees out of damages, I recommend that ... The level of general damages for pain, suffering and loss of amenity be increased by 10% across the board (Jackson 2009a: ch. 10, paras. 5.1-5.3).

Sir Rupert proceeded with his reducing recommendations only because he was of the opinion that the uplift would leave hardly any claimants net worse off, and indeed would leave most better off. In reaching this opinion, Sir Rupert placed a heavy reliance on the advice as he understood it of Professor Paul Fenn, very arguably the

UK's leading economist studying civil procedure, who was an 'assessor' for Sir Rupert's review (Jackson 2009a:ch. 10, para. 5.4), and Sir Rupert believed himself to be confirmed in his opinion by further analysis by Professor Fenn after the publication of Sir Rupert's *Final Report*.⁷⁵ It is essential to put this concern about whether claimants would be worse off in context. The purpose of the uplift was to ensure that the fund out of which defensible success fees, if I can put it this way, could be paid would effectively be maintained (Jackson 2009a: Executive Summary, para. 2.4).⁷⁶ The uplift was not at all intended to remain with claimants but to finance personal injury litigation.⁷⁷

I am obliged to insist at this point that, though it is in any case impossible to claim that a quasi-legislative 10% uplift can be ascribed to compensation of a calculable loss, a justification of that uplift explicitly in terms of the financing of litigation is, *satis superque*, evidence that we are not at all dealing with common law adjudication of compensation. In its *Consultation Paper* on implementing Sir Rupert's recommendations, the Government itself seemed to concede this:

adjustments to the level of general damages have hitherto been regarded as a judicial issue for the courts rather than the Government, and the general question of whether damages are currently too low is properly a matter for the judiciary. [But an] increase in the level of damages which is expressly made for the purpose of assisting claimants to meet their costs liabilities rather than for the purpose of compensating them for the injury that they have suffered would represent a fundamental change in the nature of the general damages award, and could create a precedent for calls to depart from the compensatory principle in other circumstances (Ministry of Justice 2010: paras. 97-98).

This concession, made apparently without any awareness of *Heil v Rankin*, did not, to my knowledge, receive further Government consideration of sufficient substance as to itself require discussion here. This is as it may be. But the Government's apparent

concession was, however, mentioned in the *Practice Note*,⁷⁸ and it is regrettable in the extreme that nothing of any greater substance in defence of this position was said even by the Court of Appeal.

I do not want to discuss the substantive merits of Sir Rupert's recommendation of an uplift, those merits, if the discussion is framed within a basic acceptance of the personal injury system and the success fee, turning on a complex analysis of the detailed incentives provided by alternative charging arrangements.⁷⁹ I want to ask why the question about the effectiveness of the *quid pro quo* raised by Mr Slaughter and seen as essential by Sir Rupert himself received no more full consideration by the Government or in Parliamentary debate. The Government's response to Sir Rupert's *Final Report* began by taking the line which was to become familiar of noting (not entirely accurately) his felicitous phrase about his recommendations being a package of interlocking reforms (Ministry of Justice 2011: para. 40). But though it was made clear that the Government intended to implement the reducing recommendations through legislation, the uplift was treated as one of a number of 'associated measures' in the interlocking package and nothing was said about how it was to be implemented (ibid.: para. 7). In line with the way it was envisaged it would be implemented, the uplift was not in the legislation as introduced,⁸⁰ and in Committee debate of that legislation Mr Slaughter was concerned about this or, more precisely, about the possibility that there being nothing in the Bill meant that the uplift might not materialise:

A 10% uplift sounds good, but there is nothing in the Bill about it; it will be dealt with elsewhere. The mechanisms for doing that have to be absolutely clear and transparent so that there will be a 10% uplift on whatever the [general damages without the 10% are]. I hope that the

Minister will address that when he has the opportunity, because we do not have anything on that at the moment.⁸¹

Mr Slaughter received the following assurance from Mr Jonathan Djanogly, Parliamentary Under-Secretary of State for Justice, who had signed the Government response to the *Final Report*:

Let me also address the 10% uplift in general damages ... Not all the measures in the package of reform require primary legislation ... The senior judiciary has agreed to look at how to take forward the increase in general damages for non-pecuniary loss, such as pain, suffering and loss of amenity in tort cases, by 10%.⁸²

Though, of course, this will not have been the only channel by which Mr Djanogly became aware of the position of the senior judiciary, he will have benefitted from Sir Rupert's own response to the Ministry of Justice *Consultation Paper* on the *Final Report*, which said the following about the 'Method of achieving the adjustment':

The *Consultation Paper* states at para. 97: "adjustments to the level of general damages have hitherto been regarded as a judicial issue for the courts rather than the Government". I agree and have not included this item in the list of reforms requiring legislation. It will be recalled that in so far as [the *Report* on non-pecuniary loss's] recommendations for increasing personal injury damages were accepted, those increases were implemented by means of a guideline judgment handed down by a five member Court of Appeal, presided over by the Master of the Rolls: see *Heil v Rankin* ... The same procedure could be adopted for implementing any future increase in the level of general damages (Jackson 2010: para. 4.3).⁸³

In sum, Sir Rupert, and so therefore the senior judiciary, and the Government from the outset intended to introduce the reducing measures by legislation and believed the interlocking uplift could be obtained by a *Heil v Rankin* manoeuvre, which indeed it was in *Simmons*. Parliamentary scrutiny of this was essentially only of whether the uplift would take place and whether it was enough. In justification of the

already mentioned absence of counsel in *Simmons*, the Court of Appeal described this process of implementation thus:

unlike in *Heil v Rankin*, we have not been addressed by counsel on the issue of increasing the level of general damages. It does not seem to us to be appropriate, let alone necessary, for us to be so addressed. Quite apart from the points already made, Sir Rupert consulted widely before publishing his *Interim Report* and before publishing his *Final Report*, and the Ministry of Justice subsequently consulted on Sir Rupert's main proposals, and they have also subsequently been debated in (and out of) Parliament. Unusual though we accept that it is, it seems clear to us that there would simply be no point in incurring expense and time in going over ground which has already been well trodden in order to debate a point which will only involve future judgments and is part of a coherent package, the rest of which has already been brought into law.⁸⁴

Two categories of recommendation made by Sir Rupert are elided here, though distinguishing them is, or would have been, essential for anything approaching democratic debate of his recommendations overall.

The Woolf reforms addressed a situation in which it was perceived that access to justice was seriously inadequate. One result of those reforms was a wholly questionable (even to those supportive of the personal injury system) expansion of personal injury litigation involving charging practices that gave rise to the gravest concern. Having been asked to address this situation, Lord Justice Jackson made recommendations which, though intendedly interlocking and to be accepted or rejected as a package, fall into two categories. One is the category of reducing recommendations, intended to abolish or restrict the use of the success fee, understood widely, which was at the heart of the charging practices in question. This category of recommendation was largely implemented by legislation following extensive consultation and debate, as the Court of Appeal claimed in the passage just quoted. At the heart of the other category, not to be implemented by legislation but by a

‘judgment’ of the Court of Appeal, was the 10% uplift. The purpose of this uplift was to ‘compensate’ claimants denied use of the success fee, but this is in an important sense a very misleading way of putting the point, for the purpose of doing this was to provide a *quid pro quo* for the loss of the success fee, and the *quid pro quo* would, of course, therefore end up in the hands of the legal profession!

In my opinion, whilst there was overwhelming public support for the reducing recommendations, there would have been no such support for measures intended to give back to the legal profession what the reducing recommendations had taken away. How will we ever know whether I am right (until another *Heil v Rankin* is called for, and not even then if the *Heil v Rankin* approach to legislation is taken again)? The purpose of this paper is to challenge the inevitable consequence of treating damages in this way: the undermining of both the democracy of proper legislative procedure and the legality of proper adjudication of common law compensation. But I am obliged to further point out that *Simmons*, in response to conduct by the legal profession that the then Lord Chancellor described as scandalous, placed, by democratically inadequate means in which the senior judiciary played a central role, a heavy monetary impost on the citizens of the UK in support of a system which is of incontrovertible benefit to none save the legal profession (and related intermediaries). Though I acknowledge that, like *Heil v Rankin*, *Simmons* has led to no public scandal, what it did is also, in its way, scandalous.

Conclusion: The Cognoscenti and Democracy

In this paper I have recapitulated the criticisms made of *Heil v Rankin* as judicial legislation and to these I have tried to show that what has been the main response to

these criticisms, amplified by Burrows in his *Festschrift* chapter, that *Heil v Rankin* was not judicial legislation at all but merely normal decision-making by a court, is quite wrong. The full extent of the mischief of *Heil v Rankin* emerges in that it is, not only incompetent and illegitimate legislation, but a complete distortion of common law adjudication of the private law of compensation. Proper legislative and legal reasoning were abandoned by a band of legal cognoscenti at the centre of which was the Law Commission in order to effect a very important legislative alteration in the law which that cognoscenti thought desirable but did not think could be obtained through Parliament. In *Simmons v Castle*, every objectionable procedural feature of *Heil v Rankin* was exaggerated.

And though this paper principally is a criticism of the procedural aspects of *Heil v Rankin*, it should not be forgotten that objectionable procedure may well lead to objectionable results. Burrows (2016: 47) concludes the discussion of *Heil v Rankin* in his *Festschrift* chapter by telling us that ‘I am convinced that, had we waited for legislation, we would still be waiting’. I myself think this may well have been so, but not only because of the shortcomings of Parliamentary procedure. For Parliament may not have done as Burrows thought fit for a reason he does not consider. There is, in my opinion, no prospect whatsoever of a legislative debate which properly canvassed the fundamental issues, not to speak of a new *Pearson*, leading to the uplifts made in *Heil v Rankin* or in *Simmons* because they are a gross waste of resource which are bound to have pernicious consequences. We will never know as it is the very point of Burrows’ way of proceeding to avoid the inconvenience of such debate.

The main specific topic which occupied the late Ronald Coase, the most important post-war writer on regulatory theory, over his very long and distinguished

career, was broadcasting policy, and the only book in the sense of a substantial monograph he published, until he added a second in the year before his death at the age of 102 (Coase and Wang 2012), was on the BBC (Coase 1950). Evaluating ‘the really important argument ... that a monopoly was required in order that there should be a unified programme policy’ (ibid.: 191) so successfully made by John, later Lord, Reith, Coase said the following:

This argument is powerful and on its implications it is no doubt logical. Its main disadvantage is that to accept its assumptions it is necessary first to adopt a totalitarian philosophy or at any rate something verging on it (ibid.).

If one accepts the existence of the personal injury system then, as I have acknowledged, *Heil v Rankin*, or even the Law Commission’s proposals, seem eminently sensible. The main disadvantages of doing so are that one has to abandon rational criteria for evaluating economic and legal policy formulation and abandon legality in common law adjudication, all in defiance of the democratic aspiration of the UK constitution.

Both the programme policy and the monopoly of the BBC have, of course, been very much modified since the heyday of Lord Reith. But though its revenue can be sustained only by an immense act of criminalisation,⁸⁵ the BBC is an acme of transparency and accountability by comparison to the process which led to the triumph celebrated by Burrows. My ability to understand that process is far greater than that of almost everyone else who is paying for that triumph, and I do not purport to understand it. Leaving aside the undeniable degree of controversy which attends the maintenance of the personal injury system, the particular degree of confidence in one’s grasp of the correct policy needed to arrogate to oneself the power the Law

Commission has exercised is breath-taking, and lamentable to those who place a value on democracy. British democracy, however, certainly is subject to the defects Burrows claims. But, bearing Churchill's wisdom in mind, is it legitimate to turn to a certainly far less democratic alternative which it is almost beside the point to note was markedly partial in its approach and as a result has certainly favoured a sectional interest? The Law Commission, it appears, entertained no doubt.

Conflict of interest

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Notes

- ¹ The thinking of the Committee exemplifies the shortcomings of the current debate. Though centrally concerned with the amount of fraud which the personal injury system produces, the Committee does not inquire into the nature and consequences of third party liability but advocates tactics, such as raising thresholds for legal aid, which are intended to limit claimants' ability to exercise rights which, in the absence of such an inquiry, the Committee acknowledges them to have. Such tactics are an indefensibly unjust *ex post* attempt to defray the consequences of

what are, no matter how inadequately defined, *ex ante* rights. The only just course is to define these rights adequately *ex ante*.

- ² Though it is wholly tangential to my concerns here, to avoid misunderstanding I should say I intend this claim to apply to Beever (2011). For though Beever is right to say that a social ontology of obligations should have at its base private law duties and rights between citizens, he entirely allows those citizens to covenant to each other that they will acknowledge a state which enforces those duties and rights.
- ³ Lewis' (2012) paper in this collection summarises his career's work leading the effort to capture the role of the state I am trying to convey.
- ⁴ Since this paper was drafted, Burrows' views on the desirable relationship between courts and legislature which are discussed in this paper was made the theme – Legislation and the Role of the Judiciary - of the 2016 Annual Conference of the Society of Legal Scholars convened under his Presidency.
- ⁵ [2001] QB 272 (CA).
- ⁶ This was the overwhelming theme of comment on *Heil v Rankin* by those giving personal injury advice, e.g. Bennett (2000: 136) concluded his note on *Heil v Rankin* in the *Journal of Personal Injuries Law* with a quotation from Horace: 'The mountains heaved in labour. They gave birth to a ridiculous mouse'.
- ⁷ A *Consultation Paper* had been issued three years previously (Law Commission 1995a). An earlier *Report* (Law Commission 1994a) which conveyed the results of a survey, commissioned under Beatson and published under Burrows, of views about the satisfactoriness of damages awards, played an important role.

- ⁸ Burrows (1998a) is the fullest statement of Burrows' views on legislative and common law law reform at the time he was a Commissioner. These views are largely conventional, but with hindsight one can detect hints (ibid.: 216-17) of the later 'methodology' of law reform.
- ⁹ The *Report* on non-pecuniary loss was published on 15 December 1998. The judgment in *Heil v Rankin* was handed down on 23 March 2001.
- ¹⁰ The *Report* on structured settlements to which reference will be made below had been produced under the Fifth Programme (Law Commission 1995b: 21).
- ¹¹ c 48. Section 1 gave the Lord Chancellor a power in his executive capacity to adjust the assumed rate of return on structured settlement investments similar to that canvassed for various executive bodies in respect of non-pecuniary loss in the *Report* on non-pecuniary loss. The role of the structured settlement was extensively revised by the provisions for periodical payments made under The Courts Act 2003 s 100 (c 39).
- ¹² [1980] AC 174 at 189C (HL(E)):
- We are in the area of "conventional" awards for non-pecuniary loss, where comparability matters. Justice requires that such awards continue to be consistent with the general level accepted by the judges. If the law is to be changed ... it should be done not judicially but legislatively within the context of a comprehensive enactment dealing with all aspects of damages for personal injury.
- ¹³ *Heil v Rankin*, n. 5 at [46]-[47]. The Court of Appeal seemed also to think it was obliged to distinguish the views of Lord Hutton in *Wells v Wells* [1999] 1 AC 345 at 405F (HL(E)) but, with respect, those views were in support of measures such as those taken in *Heil v Rankin*.

- ¹⁴ HC Deb (1998-99) vol. 337, col. 503WA (9 November 1999).
- ¹⁵ *Heil v Rankin*, n. 5 at 288A.
- ¹⁶ *Ibid.* at [31].
- ¹⁷ *Ibid.* at [7].
- ¹⁸ *Ibid.* at [31].
- ¹⁹ *Ibid.* at [6].
- ²⁰ *Ibid.* at [84].
- ²¹ The latest edition is Judicial College (2015).
- ²² *Heil v Rankin*, n. 5 at [4]-[5].
- ²³ These judgements were repeated in the 10th edn. (Weir 2004: 638), where the Court's 'deference' to the Law Commission was further described as 'perplexing' (*ibid.*: vii).
- ²⁴ Following on, of course, from what had been done in *Wells v Wells*, n. 13.
- ²⁵ *Heil v Rankin*, n. 5 at [22], citing *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 (HL(Sc)).
- ²⁶ *Heil v Rankin*, n. 5 at [23].
- ²⁷ *Ibid.*, citing *H West and Son Ltd v Shephard* [1964] AC 326 at 364 (HL(E)).
- ²⁸ I put to one side the immense difficulties of quantifying damages for loss of earnings and expenses, conceding for the purposes of argument that these are in principle quantifiable as compensation, though I do not in fact believe that they are. Burrows plays an important role in dealing with this problem as he is involved in the compilation of the Ogden Tables.
- ²⁹ See further Sir William Beveridge (1942: paras. 258-64).

³⁰ I am honoured that since this paper was drafted my opinion has received the fullest response in Beever (2016: 22-23).

³¹ In the highly instructive case of *Wise v Kaye* [1962] 1 QB 638 (CA), the claimant suffered brain injuries so catastrophic that she was reduced to a state of permanent unconscious immobility, a ‘living death’ in which she was ‘deprived of every faculty, except the bare capacity [with medical assistance] to breathe and to digest enough food to maintain her body’ (ibid. at 654, 652). The approach to quantifying losses of this nature taken in the earlier *Benham v Gambling* [1941] AC 157 (HL(E)) was found to be ‘invidious ... undesirable and as a matter of proof well-nigh unattainable’ (*Wise v Kaye, loc cit* at 649), but it was, with respect, replaced with speculation not one whit superior. The trial court’s award of £17,400 based on general damages of £15,000 (*circa* £300,000 now) was upheld essentially because, as Diplock LJ put it, ‘I should not be prepared to say that the sum of £17,400 awarded by the judge or for that matter an award of £50,000 or £100,000 was wrong’ (ibid. at 663). The award was made despite it being impossible for the claimant to personally receive any benefit at all from it (ibid. at 653-54, 656-59). This is compensation only in the very special sense described in the main text.

³² Kemp and Kemp is now available in continuously updated looseleaf and electronic versions.

³³ The Reverend Rowland Hill (1744-1833), best known, of course, as the successful advocate of the penny post, appears to be the source of this (variously recorded) advice.

³⁴ [2012] EWCA Civ 1039, [2013] 1 WLR 1239.

³⁵ Ibid. at [13], [20].

³⁶ I shall exclusively concentrate on personal injury, though a purely formal argument for the extension of the uplift to non-pecuniary loss awarded in other torts which is traceable to Lord Justice Jackson had, by the time the Court of Appeal had finished with the matter, been further extended to contract!

³⁷ *Simmons v Castle*, n. 34 at [7].

³⁸ Legal Aid, Sentencing and Punishment of Offenders Act 2012, Pt 2 (c 10). The Royal Assent was given on 1 May 2012.

³⁹ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 8) Order 2013, Note as to Earlier Commencement Orders (SI 1127/2013).

⁴⁰ *Simmons v Castle*, n. 34 at [12].

⁴¹ Ibid. at [2].

⁴² When a sort of appeal from *Simmons* which will be discussed below was considered, Lord Neuberger had become President of the Supreme Court but nevertheless still served as a member of the, as it were, reconvened bench.

⁴³ Ibid. at [5]. It was mere surplusage that the Court added that the £20,000 ‘seems a correct figure’ and the £2,730 ‘also appears to be right’.

⁴⁴ Ibid. at [17]. This absence of counsel will be further discussed below.

⁴⁵ n. 27.

⁴⁶ [1983] 2 AC 773 (HL(E)).

⁴⁷ *Simmons v Castle*, n. 34 at [8], [9], [18].

⁴⁸ Ibid. at [15].

⁴⁹ Ibid. at [16].

⁵⁰ Ibid. at [15].

⁵¹ I do not, of course, deny that such a claim has been and will be made, indeed variants on it are to be found throughout the various consultations made in the course of the formulation and especially of the implementation of Sir Rupert's recommendations.

⁵² In consultation, Sir Rupert and the Government received much opinion that damages for non-pecuniary loss had in any case fallen behind inflation, and this *Heil v Rankin* argument for an uplift undoubtedly was also influential (Jackson 2009a: ch. 10, para. 5.6). The way this general sentiment was used to elide a number of important difficulties in Sir Rupert's recommendations was, with respect, the intellectually weakest part of his *Final Report* when assessed on, as it were, its internal criteria.

⁵³ [2012] EWCA Civ 1288, [2013] 1 WLR 1229 at 1243-52.

⁵⁴ *Simmons v Castle*, n. 34 at [2].

⁵⁵ *Practice Note*, n. 53 at [18].

⁵⁶ Ibid. at [19].

⁵⁷ *Simmons v Castle*, n. 34 at [13].

⁵⁸ *Practice Note*, n. 53 at [2].

⁵⁹ Ibid. at [3], [19]. CPR r 52.17 was forcibly but, with respect, unconvincingly affirmed in an attempt to suppress the obvious and obviously highly unwelcome possibility that allowing these applications would set a precedent for anyone with a

colourable interest disappointed in the outcome of future litigation on any matter to make a similar application.

⁶⁰ *Practice Note*, n. 53 at WLR 1243C.

⁶¹ *Ibid.* at [19].

⁶² HL Deb (2010-12) vol. 718 col. 1166 (25 March 2010).

⁶³ Sir Rupert's terms of reference (Jackson 2009b:ch. 1, para. 2.1) did not encompass a general assessment of the overall social costs and benefits of the litigation undertaken but focused so far as possible solely on legal costs.

⁶⁴ Professor Scott continues as a General Editor of the *White Book*, a colleague of its now Editor in Chief, Lord Justice Jackson.

⁶⁵ An admirable evaluation of the general issue raised by the charging practices may be found in Jackson (2009a: ch. 10, para. 1.10).

⁶⁶ The Government's response to the Lord Justice Jackson's *Final Report* in light of this consultation was Ministry of Justice (2011).

⁶⁷ *Simmons v Castle*, n. 34 at [7]. A very informative review of the overall position at the time between the *Practice Note* being handed down and the legislation coming into force was provided by the Hon Mr Justice Ramsey (2013), who played the leading judicial role in the first two years of the implementation of Sir Rupert's reforms.

⁶⁸ The primary legislation Sir Rupert anticipated would be needed to implement these measures was specified (Jackson 2009a: 472).

⁶⁹ This Act is a perfect example of the deplorable practice of putting all sorts of measures into a single piece of primary legislation in a way that is bound to rob the

legislation of coherence and integrity, and measures described in the short title other than the Pt 2 reforms received more extensive debate than Pt 2 itself.

⁷⁰ Mr Andy Slaughter, MP for Hammersmith, had, for twenty years prior to entering the Commons, been a Barrister with a specialism in personal injury.

⁷¹ HC Deb (2010-12) vol. 534 col. 1021 (2 November 2011).

⁷² Written in the earliest days of Woolf, Harris et al. (2002: 449) observed that: ‘It is very hard to conclude that a system which cannot be made to run *better* without imposing a welfare loss is other than indefensible’.

⁷³ HC Deb (2010-12) vol. 534 col. 1022 (2 November 2011). I cannot forebear pointing out that, in the Government consultation over Sir Rupert’s *Final Report*, a response was made that ‘a 110% increase was needed to bring [general damages into] line with the EU and the US’ (Ministry of Justice 2011: para. 136).

⁷⁴ *Practice Note*, n. 53 at [28].

⁷⁵ Jackson (2010: 19): ‘if the whole package of recommendations in the *Final Report* is implemented, far more than 61% of all PI claimants will benefit as a result of the reforms and far fewer than 39% will lose out as a result of the reforms’. The then Senior Costs Judge Mr Peter Hurst also signed Sir Rupert’s response.

⁷⁶ In personal communication, Professor Fenn has told me that he believes that the reducing recommendations and the 10% uplift have not in fact been balanced *ex post* due to the unforeseen consequences of the Government’s fixed cost reforms, and the subsequent increase in success fees recovered from claimants. In my own opinion, for which I must stress that Professor Fenn is not responsible (save by

providing some of the information on which my opinion is based), the likeliest result as we stand has been to make the success fee even more of an abuse.

⁷⁷ Hence Sir Rupert was seriously concerned that when the uplift was not used to pay a success fee, this would represent an unjustifiable windfall to claimants (Jackson 2009a: ch. 10, para. 5.6). His concern was an important theme of subsequent consultation and debate prior to the legislation (Ministry of Justice 2010: para. 99).

⁷⁸ n. 53 at [23].

⁷⁹ For whatever my opinion is worth, Sir Rupert's *Review* is very admirably clear-sighted and frank and it is at least as authoritative as any other 'official' consideration of the issues since *Pearson*. Its recommendations amount to a highly perceptive fix necessary to keep the Heath Robinson contraption going in light of the unintended, though entirely predictable, indeed predicted, results of the last fix. Nevertheless, profound dissatisfaction remains amongst the senior judiciary, including Sir Rupert himself, and further reform is in the air (Jackson 2016). But these latest proposals make the schedular or otherwise administrative nature of the whole exercise even more clear.

⁸⁰ HC (2010-12) Bill 205 (21 June 2011).

⁸¹ PBC Deb (2010-12) col. 483 (13 September 2011).

⁸² PBC Deb (2010-12) col. 491 (13 September 2011).

⁸³ Sir Rupert went on (Jackson 2010: paras. 4.4-4.8) to reject 'a possible refinement' of the uplift proposal suggested by the Government which obviously would have interfered with the interlocking package.

⁸⁴ *Simmons v Castle*, n. 34 at [17].

⁸⁵ The facts are, I think it fair to say, scarcely credible. In 2012, 193,049 persons were proceeded against for non-payment of the license fee (*circa* 12% of all proceedings in the Magistrates' Courts!) and 164,932 convictions resulted: HL Deb vol. 749 col. WA300 (28 November 2013). In 2012, 51 persons were imprisoned for non-payment of fines arising from non-payment of the license fee: HC Dec (2014-15) vol. 761 col. 870WA (5 March 2014).

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