

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository:<https://orca.cardiff.ac.uk/id/eprint/2945/>

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Lewis, Richard Kurt 2001. Increasing the Price of Pain: Damages, the Law Commission and Heil v Rankin. Modern Law Review 64 (1) , pp. 100-111. 10.1111/1468-2230.00311

Publishers page: <http://dx.doi.org/10.1111/1468-2230.00311>

Please note:

Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies. See <http://orca.cf.ac.uk/policies.html> for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.



Increasing The Price Of Pain: Damages, The Law Commission And *Heil v Rankin*

*Richard Lewis**

Five judges in a specially constituted Court of Appeal have decided in a conjoined appeal, involving eight test cases,¹ that damages for pain, suffering and loss of amenity (PSLA)² must be increased. Claims for non-financial loss must be revalued. But the changes *Heil v Rankin*³ makes are by no means as radical as some feared, and others hoped. This is because, firstly, the case only affects the small minority of personal injury claims which involve serious injury; and secondly, even in the most extreme of these cases, it increases damages only by a third, and in most of the affected cases the increase will be a great deal lower than this. The overall effect is to boost damages by much less than was wanted either by the influential claimants'

* Cardiff Law School. I am grateful to several colleagues at Cardiff for their comments on an earlier draft of this article and, in particular, to David Campbell, Ken Oliphant and Richard James.

¹ Although there was some difficulty in gathering together representative cases, eventually they included, at the top end of the scale, children suffering from cerebral palsy, and at the bottom end of the scale, whiplash injuries. Appearances were made by 12 juniors and an equal number of silks, including one who appeared as an *amicus curiae* instructed by the Treasury Solicitor. Written submissions were received from the Association of Personal Injury Lawyers, the Forum of Insurance lawyers, the Association of British Insurers, the Eagle Star Insurance company, and the Iron Trades Insurance Company.

² This abbreviation, used consistently in *Heil*, is less familiar to academics than the term non-pecuniary loss. Practitioners frequently use the term general damages to mean PSLA even though, strictly, this includes all items of loss which cannot be specially pleaded, and therefore includes future financial loss. Although many may regret the increasing use of acronyms, at least there might be less misunderstanding between academics and practitioners if PSLA is commonly adopted.

³ [2000] 3 All ER 138, [2000] 2 WLR 1173, [2000] PIQR Q187.

lobby⁴ or by an “impertinent”⁵ Law Commission which recently reported on the matter. The extra money now demanded of insurers can be found relatively easily. The case will remain of importance for some time to come for both sides of personal injury practice feel that they have reached a stalemate in this particular battle. No further litigation is now planned.⁶

According to the court, the reasons for the increase are that it is “fair, reasonable and just,” it accords with the view of society as a whole, and it results in “proportionate” awards which take into account not only changes in economic circumstances but also the impact of awards upon society. Future levels are to be adjusted in line with the rise in the Retail Prices Index, and further appellate consideration will not be necessary unless the awards again become significantly out of line with the standards identified. To the casual observer, these views appear eminently sensible. However, the judgment and, more particularly, the earlier Law Commission report leave this reviewer with a sense of unease. Certain perspectives upon the tort system, and the criticisms which have been made of it, seem to have been entirely forgotten. This note, in a polemical fashion, tries to restore a little of the balance.

It does so by emphasising the disproportionate importance of PSLA in the award of damages, and the failure of students and others to appreciate what the tort system in practice actually achieves. It notes that PSLA is a major cause of the excessive cost, inefficiency and injustice of the tort system. It casts doubt upon surveys purporting to justify an increase in damages for pain and suffering by

⁴ See the Association of Personal Injury Lawyers response to the Law Commission Consultation Paper No 140 on non-pecuniary loss, and its submission made to the Court of Appeal in *Heil’s* case.

⁵ The Law Commission Report No 257, *Damages For Non-Pecuniary Loss* (1999) is so described by Tony Weir, *A Casebook On Tort* (9th ed 2000) (Sweet and Maxwell, London) 636.

⁶ Although none of the claimants applied for permission to appeal when the Court of Appeal judgment was handed down, two of them later did seek leave from the House of Lords. However, from information supplied to the author by the relevant firm of solicitors, Russell, Jones and Walker, the appeal is not now being pursued because of concerns about the costs and the risks involved.

reference to the popular will. It reminds readers of criticisms of tort based on distributive justice arguments, and it contrasts these with the corrective justice perspective which determined not only the scope of the Law Commission review of the law of damages, but also the proposals for reform it put forward. It concludes that the decision in *Heil v Rankin* is not as obviously in the public interest as the rhetoric of the judges or the Law Commission would have us suppose.

Calculating The Limited Increase In Damages

The Law Commission proposed a large increase in damages for PSLA. A wide range of cases would have been affected. It suggested that awards over £3,000 should be doubled or increased at least by half.⁷ By contrast, *Heil v Rankin* makes no change in damages for non-pecuniary loss assessed at, or below, £10,000;⁸ but where such damages would have been £150,000, as in the case of tetraplegia or severe brain damage, the amount is to be increased by a third to £200,000; and between £10,000 and £150,000 there is to be a progressive increase from 0 per cent to 33 1/3 per cent so that, for example, in the middle of the range, an award of £80,000 is to be increased by 17 per cent to about £95,000.

At the end of its judgment the court even included a simple graph indicating the approximate level of increase. This unique appendage to a law report can make the calculation look easier than in fact it is, and a mathematical formula has since been published to enable the new level of damages to be set.⁹ Lawyers traditionally have been amongst the least numerate of professionals, and suspicious of anything other

⁷ Report, above n 5, at para 5.6. For injuries between £2,001 and £3,000 it recommended a tapered increase of less than a factor of 1.5 so that an award of £2,500 should be uplifted by 25 per cent.

⁸ This threshold was suggested by the Forum of Insurance Lawyers at p 45 of their submission to the court. It would cut out of the system almost all claims presently processed under the “fast track,” being for amounts below £15,000 in total, including financial loss.

⁹ Somewhat surprisingly, the author could find no other instance of the use of a graph in a UK judgment. For the mathematical formula see Levene and Vaughan, “Making *Heil v Rankin* Work” [2000] *Quantum* (April 18).

than words within which to encompass ideas and rules.¹⁰ However, in recent years the increasing ability of personal injury practitioners and judges to understand and use the information provided to them by accountants and actuaries has fuelled important developments in tort law. For example, spread sheets and discount rates are not quite the mysteries they once were, and structured settlements have broken the mould of awarding damages only in the form of a lump sum.¹¹ In the same financial vein, litigation based on the real rate of return from investment in equities as opposed to gilts has been a major focus of concern.¹² The graph used in *Heil v Rankin* to update awards compared with past values is thus symbolic of the closer relationship being drawn between personal injury law and the wider financial world.

Within four months of the judgment the increase in damages was reflected in the new edition of the Judicial Studies Board guidance on assessing damages for non-pecuniary loss,¹³ a book to be “packed in every judge’s lunchbag.”¹⁴ We may not have a statutory cap on damages as exists in parts of the USA¹⁵ and Australia,¹⁶ nor do we

¹⁰ This is so even in tax cases. See eg Beldam LJ in *Smith v Schofield* [1992] STC 249.

¹¹ R. Lewis, *Structured Settlements: The Law And Practice* (1993) (Sweet and Maxwell, London).

¹² *Wells v Wells* [1999] AC 345, [1998] PIQR Q56.

¹³ Judicial Studies Board, *Guidelines For The Assessment Of General Damages In Personal Injury Cases* (5th ed 2000) (Blackstone Press, London).

¹⁴ Weir, above n 5, at 637.

¹⁵ For a review of the imposition of such limits on damages in the USA see Sanders and Joyce, “Off To The Races: The 1980’s Tort Crisis And The Law Reform Process” (1990) 27 Houston LR 207. See also the Law Commission Consultation Paper No 140, *Damages For Personal Injury: Non-Pecuniary Loss* (1995) paras 3.62 – 3.64.

¹⁶ See Mullany, “A New Approach To Compensation For Non-Pecuniary Loss In Australia” (1990) 17 Melbourne Univ LR 714, and the Law Commission Consultation Paper, above n 15, paras 3.29 – 3.32. By contrast in Canada a judicial rather than legislative limit of \$100,000 was imposed by the Supreme Court in a trilogy of cases, the most notable being *Andrews v Grand Toy Alberta Ltd* [1978] 2 SCR 229. The limit was later increased to take account of inflation so that by 1999 a ceiling

yet have a formal table of compensation based upon a percentage assessment of disablement as is being developed within the European Union,¹⁷ but the informal brackets within which PSLA damages are to be assessed are becoming increasingly detailed. They provide further ammunition for an attack on the rhetoric of tort law. It is increasingly difficult to assert that a subjective individualised system of justice is being employed to return the claimant to anything even approaching the pre-accident position. No matter that it is the index finger of a concert pianist that has been lost, she will get only a little more than the £9,500 PSLA specified in the book. Of course, she may also be entitled to a large sum for loss of earnings, but the judge will still be incapable of performing a digital transplant. PSLA is compensation in a very special sense; unlike damages for money lost and expenses incurred, it cannot provide an equivalent to that which has been destroyed. It is an artificial sum and, increasingly, it is mechanically assessed.

The Importance Of Small Claims To The Tort System

Although both the Court of Appeal and the Law Commission looked at the wider social and economic circumstances which related to the proposed increase in damages, there is one crucial fact which they either ignored or which escaped their attention. It is the foundation for a perspective upon personal injury claims which is of vital importance, and it is extraordinary that the Law Commission, in particular, failed to highlight this fact. Buried in the middle of its report is an acknowledgement that

in the region of \$265,000 had been established. See J. Cassels, *Remedies: The Law Of Damages* (2000) (Irwin Law, Toronto) 159. The limit is comparable to that specified by the JSB guidelines.

¹⁷ The author was one of few British representatives at a congress dealing with the rationalisation of medico-legal assessment of non-economic loss which was held in Germany, at the Academy of European Law at Trier, in June 2000. Chaired by a Member of the European Parliament, the congress received a report and drafted a proposal for an addition to the Fourth Directive relating to civil liability and motor insurance. Its objective is to produce “harmonised compensation” by adopting “a compensation scale, expressed in points, which would enable every Member State to assign a monetary value to the results of a medical assessment.” Cf the Law Commission’s abrupt dismissal of medical scoring in its 1999 Report, above n 5, at para 3.194.

two thirds of the total damages paid for personal injury are for non-pecuniary loss.¹⁸ Much can be made of this, together with the Commission's failure to cost its proposals for change.

Students of tort traditionally focus excessively upon liability issues, and spend little time examining damages. As a result they often completely misunderstand what the system in practice achieves. The 'missing' fact reveals that the main function of the tort system is not to provide for the future loss of income and care needs of those seriously disabled by accident or disease.¹⁹ Such especially needy claimants are relatively rare. Instead the system overwhelmingly deals with small claims, the great majority leading to damages of less than £5,000.²⁰ In these cases claimants suffer very

¹⁸ As found by the *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury* (1978, cmd 7054), chairman Lord Pearson, vol 2 table 107 (the Pearson report). Although the Law Commission notes the fact at para 3.38 of its report, it fails to give it the prominence it deserves.

The relative importance of PSLA is reduced by two factors. First, as revealed by the Pearson report table 108, the larger the claim, the lower the proportion that is paid for non-pecuniary loss. For claims over £25,000 in 1973 the proportion paid for non-pecuniary loss dropped to 48 per cent. This remains an extraordinarily high figure. Secondly, in more recent years it is likely that the proportion of PSLA has reduced because there has been an increase in the level of damages for pecuniary loss. However, there are no figures to illustrate this. Counteracting these two factors are other developments which have increased the importance of PSLA. For example, the effect of the Social Security (Recovery of Benefits) 1997 is discussed in n 23 below.

¹⁹ Future pecuniary loss was found in only 7.5 per cent of cases, and comprised only 8.3 per cent of the total damages paid in tort. See the Pearson report, above n 18, vol 2 para 44 and table 107.

²⁰ In 1995 the DSS estimated that half of the cases reported to it under the compensation recovery scheme were being settled for £2,500 or less. DSS *Memorandum of Evidence to the Social Security Select Committee* (1995) HC 196, para 40. Cf the figure of 37 per cent given 5 years earlier in H.C. Deb. Vol 166, col. 942 (February 7, 1990). £2,500 was the median figure in the survey of 81,000 cases receiving legal aid and closed in 1996 - 97 in P. Pleasence, *Report Of The Case Profiling Study, Personal Injury Litigation In Practice, Research Paper 3* (1998) Legal Aid Board Research Unit, p 40 fig 3.17. Similarly in evidence to the Law Commission in March 1993 the Trades Union Council noted that the average sum obtained in the 150,000 union-backed cases in 1991 was under

little, if any, financial loss. They make a full recovery from their bodily injury and have no continuing ill effects.²¹ They make no claim for any social security benefit as a result of their accident.²² In the minority of cases where benefit is claimed, PSLA is the only part of the award of damages from which no social security can be deducted.²³ This means that in a few cases the damages claim, in effect, is being made only for the non-pecuniary loss. In settlements in general the largest component by far is the payment for pain and suffering. The stereotypical injury is the minor whiplash which follows a low-speed car “shunt.” It is these type of cases which account for the extraordinarily high costs of the system compared to the damages it pays out.²⁴ If it had been wholly in public hands, tort would have been radically revised and then privatised some years ago.

£2,000. See also the figures for various years in D. R. Harris et al, *Compensation For Illness And Injury* (1984) (Clarendon Press, Oxford) 87.

²¹ Pleasence, above n 20, found that about three quarters of all successful claimants had fully recovered three years after their accident. Pearson, above n 18, vol 2 table 70 noted that 95 per cent of accident victims were back at work within six months of their injury. But Genn found that 39 per cent of victims suffering accidents in the last six years reported that they were in constant pain. See p 58 of Law Commission Report No 225 (1994) *Personal Injury Compensation: How Much is Enough?*

²² The Compensation Recovery Unit issues a nil certificate in 70 per cent of the cases where a compensator intends to make a payment. See R. Lewis, *Deducting Benefits From Damages For Personal Injury* (1999) (OUP, Oxford) para 14.05.

²³ Lewis, above n 22, para 13.33. As a result of the reforms made by the Social Security (Recovery of Benefits) Act 1997 the compensation awarded for PSLA has now been ringfenced so that no deduction for benefit can be made from that part of the award.

²⁴ The figures always bear repetition. The Pearson Commission, above n 18, estimated that the cost of operating the tort system amounted to 85 per cent of the value of tort payments distributed to claimants. See vol 1 para 256. The Lord Chancellor’s *Civil Justice Review* (Cm 394, 1986) estimated that the cost of the tort system consumed 50 to 70 per cent of the total compensation awarded in personal injury cases. See also Pleasence, above n 20 at 64, who found a damages to costs ratio of 2.27:1, and costs exceeding damages in 22 per cent of successful cases.

The ‘missing’ fact is thus of crucial importance in understanding the tort system, especially when its future is being debated and the relative priority of competing claims for compensation is being considered. It is also fundamental in making an assessment of the cost of any changes to be made. The extraordinary failure to focus on the relative importance of PSLA is perhaps a measure of how attitudes have changed since the post-Thalidomide era of the 1970’s when the role and future of the tort system as a whole was in question. Although our empirical understanding of the tort system has continued to improve, academics and law reformers are now less likely to address the fundamental issues exposed by the facts and figures.

Small claims thus constitute the everyday battleground over which insurers and claimants’ representatives fight. Their predominance is the reason why insurers have not been too dismayed by *Heil v Rankin*. Not only is there to be no increase in PSLA assessed at £10,000 or below, but also the tapered increase above that threshold figure is such that, at the lower end of the scale, the effect of the increase is negligible. Even at £30,000 - corresponding to the total loss of an eye - the increase in damages is less than £1,500. This is not enough to upset the course of settlement negotiations in the vast majority of cases.

Defendants were fearful of damages being increased in minor cases along the lines suggested by the Law Commission. According to the Association of British Insurers, the Commission’s proposals would have cost insurers between £500 and £1,000 million more per year.²⁵ That would be ten per cent of their total premium income for motor, employers liability and public liability, estimated as about £10 billion in 1999. Whereas it would have added 27 per cent to the cost of employers liability claims, only 8 per cent would have been added to the cost of motor vehicle insurance²⁶ (which predominantly reflects property damage costs rather than personal

²⁵ See Bacon and Woodrow, “Assessment Of The Possible Impact Of Reform Of The Law Of Damages For Pain And Suffering On UK Insurers’ Claims Costs” (February 2000), a report submitted to the Court of Appeal by the ABI.

²⁶ *Ibid.*

injury). About 168,000 claimants a year - perhaps a quarter of the total²⁷ - would have had their damages increased. With the much higher threshold set by *Heil v Rankin* at £10,000 only a few thousand claimants a year will now benefit, and the increase in their damages will be much less.

Justifying The Increase

Which Forum?

The Court of Appeal considered whether it was the appropriate forum for responding to the Law Commission's invitation to reconsider the level of damages, or whether the matter should be left to Parliament. It eventually decided that it was appropriate for the court to do so because it was doing no more than applying existing legal principles and updating them. It made what is becoming a ritualistic reference to the European Convention on Human Rights and rejected the suggestion that a retrospective increase in damages might fall foul of the Convention. The court again signified that it would not allow the Convention to dominate matters. It robustly stated that it was justified to hand down a judgment with retrospective effect because the possibility of change is one which insurers and others ought to foresee,²⁸ and the increase in damages was in the public interest because it provided fair, reasonable and just compensation.

²⁷ In the six months to the end of September 1998 the Compensation Recovery Unit was receiving notification of about 54,000 claims being made against compensators each month. R. Lewis, *Deducting Benefits From Damages For Personal Injury* (1999) (OUP, Oxford) para 14.07. This is an annual rate of about 650,000 a year. Thus the ABI figure of 168,000 claimants affected is roughly a quarter of the total. However, this does not take account of the fact that the annual figure includes all tort claims, not just those where the compensation was paid by a member of the ABI. In addition, these figures must now be revised upwards because the numbers of claims has continued to grow. According to information received by the author from the DSS, the total number of claims notified in the financial year 1999-2000 was over 716,000, a rise of ten per cent since the six months to the end of September 1998.

²⁸ Cf Bennett's concern about insurers' setting of premiums and access to reserves in "Personal Injuries: General Damages – Minor Increases Only" [2000] JPIL 129 at 135.

The Influence Of Surveys And Representations

The court decided that it was only appropriate to interfere with the level of damages if there was a clear need to do so. Although persuaded by the Law Commission report that there was such a need, it took a different view of the material upon which the Commission relied. In particular, it attached much less importance than the Commission to the surveys and empirical studies which had formed an important feature of its report, although the court emphasised that the level of damages must not be out of line with what society as a whole would view as being reasonable. The Commission relied heavily on four sources in order to justify increasing damages in more serious cases:

- A study it commissioned from the Office of National Statistics (ONS) concerning public opinion about the level of damages.²⁹
- Hazel Genn's 1994 general report for the Commission's damages project entitled "How Much Is Enough?"³⁰
- The findings of the Legal Aid Board Research Unit into the settlement of 81,000 legally aided personal injury cases.³¹
- The responses the Commission received to its Consultation Paper.³²

²⁹ Office Of National Statistics, *Omnibus Survey: Module 209 Compensation* (1998).

³⁰ Law Commission Report No 225 (1994) *Personal Injury Compensation: How Much is Enough?*

³¹ P. Pleasence, *Report Of The Case Profiling Study, Personal Injury Litigation In Practice, Research Paper 3* (1998) Legal Aid Board Research Unit.

³² Above n 15.

The first two studies were much criticised by the defendants in *Heil*,³³ and the Court of Appeal preferred instead to rely on the response to the consultation. This had strongly endorsed an increase in the upper level of awards. Although half of the respondents agreed that damages for minor injuries were not too low, the Law Commission reported that 74.5 per cent of them believed that damages had failed to keep pace with inflation and that more should be awarded to those suffering very serious injuries. As usual, these respondents were predominantly lawyers closely connected to the present system, most of them being personal injury practitioners. The counting of heads and assembling of percentages in relation to those who reply to Law Commission documents is not likely to report results which reflect the views of other than a cross-section of interested lawyers. It is not surprising that they are likely to carry weight and be acceptable to judges. However, these percentage opinions by no means necessarily reflect whether society as a whole would perceive the increase in damages as reasonable, and yet this was the key factor which the court continued to stress.

When it came to considering the empirical surveys, the court recognised that there were great difficulties in carrying out such work. However, it severely criticised the ONS survey for failing to draw sufficient attention to the fact that very substantial damages for pecuniary loss could be awarded in addition to that for PSLA. Interviewees were not told, for example, that the provision of aids and equipment, adapted accommodation, and holidays would be specifically covered in the award for pecuniary loss. Nor were they necessarily aware that, in the most serious injury cases, the award for lost earnings and the cost of care is likely to be many times the size of that for PSLA.³⁴ Similarly, the dissatisfaction found by Genn in her survey of

³³ The ABI commissioned a report from James Rothwell, an independent marketing and economic research consultant, which made detailed criticisms of the adequacy of the research upon which reliance was placed.

³⁴ Thus in one of *Heil* test cases, *Warren v The Northern General Hospital NHS Trust*, the Court of Appeal increased the damages by £40,000 but this amounted to less than 1.4 per cent of the total award of almost £3 million.

recipients of damages awards could be explained for reasons other than unhappiness about the amount given for PSLA.

With regard to the ONS attempt to seek views after trying to form a link between an increase in damages and the payment of insurance premiums, the court thought that the link had not been made sufficiently explicit and therefore the survey was unreliable. It also favoured the investigation of another link not pursued by the ONS. It would have liked to have seen what people would have said if a connection had been drawn between an increase in damages and the diminished resources which may then be available to the National Health Service (NHS) as a result.

The use of “vox pop” to justify changes in the tort system is fraught with danger. The use of simple, basic questions can produce predictable responses. It would be no surprise to find that people would award more compensation to those with serious injuries, just as they would have “the government” increase the wages of nurses, double the value of old aged pensions, and waive contributions to residential care. The difficulties lie, firstly, in trying to assess the extent to which they would pay to fund the increased payments once they realise it is they who are paying, and, secondly, in placing their proposals for increased expenditure in some order of priority. The formulation and scope of the questions depends upon the perspective from which the surveys are conducted. One major premise at the heart of the Law Commission series of reports on damages is that the tort system itself must remain in place. Its remit was to review the law of damages for personal injury but this did not allow for any wider review of the efficacy of the tort system as a whole. This crucial limitation is briefly mentioned at the beginning of a couple of its earlier reports.³⁵ In the middle of its report on PSLA the Commission notes that it could not recommend any trade-off with a new no-fault compensation scheme,³⁶ and later it acknowledges

³⁵ See eg Consultation Paper No 147, *Damages For Personal Injury: Collateral Benefits* (1997) para 1.7. “... in line with our terms of reference, our role in this review is not to advocate the replacement of the existing tort system but rather, assuming its continued existence, to recommend improvements to it.”

³⁶ Para 2.26 of Law Commission Report No 257, above n 5.

that its terms of reference prevent it from reviewing whether the tort system is justified on corrective justice grounds.³⁷ Indeed, the Law Commissioner most involved with the damages project has since written, in his private capacity, an extraordinary defence of the tort system as morally justified because it pins legal responsibility upon an individual for his conduct and deters wrongful behaviour.³⁸ The continued existence and efficacy of the law of tort is explicitly accepted by the Commission, and this is reflected in the construction of the surveys upon which it Commission relies.

To illustrate, let us consider questions which people might have been asked if a wider perspective on tort had been taken. These questions explicitly deal with relative priorities for expenditure. The likely responses to these questions are no less predictable than those asking whether victims should get more money, but they carry very different implications for the future of damages for non-pecuniary loss. The first question begins by explaining that more than two-thirds of accident victims who are so seriously injured that they are unable to work for more than six months are unable to claim any damages at all and, instead, must rely on social security benefits.³⁹ The remaining third are able to claim not only for their full financial loss but also for their pain and suffering. The question then to ask is: ‘When allocating further resources to accident victims, should more money be spent on those already able to claim damages by giving them more for their pain and suffering?’

Similarly, a second question, although taking a narrower focus, could still attack the priority now given to PSLA. It asks people to place in order of importance

³⁷ *Ibid* para 3.60: “... we accept a corrective justice conception and justification for tort law. As such we believe that the tort system’s damages rules should be developed in accordance with that theoretical perspective.”

³⁸ A. Burrows, “In Defence Of Tort” in *Understanding The Law Of Obligations* (1998) (Hart Publishing, Oxford) especially pp 122 - 6. This essay, in but a few pages, may reveal a little about the moral assumptions, and the extent of knowledge of the operation of the tort system in practice which may have influenced the Law Commission.

³⁹ Pearson Report, above n 18, vol 2 table 88.

the losses which they might choose to insure themselves against if they were to take out a policy against being involved in an accident causing personal injury. Which would they regard as the most important loss to insure against: an interruption in earnings; the cost of medical and other care; or PSLA? The inevitably low priority given to PSLA would be all the more apparent if it were explained that the premium to be paid would be more than doubled if it were to cover pain and suffering. It is clear that those who are knowledgeable about the risks of accident or illness, and seek policies to protect themselves against such eventualities, do not wish to pay much higher premiums for a type of loss for which money cannot easily provide a substitute. If it were left to market forces there would be little cover for PSLA.⁴⁰ This is not to say that some form of recognition of non-pecuniary loss is not wanted in an ideal world, but it is clear that lost earnings and out-of-pocket expenses come first and, for the great majority of accident victims, these are losses which are not being met. The tort system simply fails to meet these basic needs. This view - which exposes the law of tort as both extremely limited in coverage and yet extravagant in content - cannot be found in the Law Commission report or the Court of Appeal decision.

The Relevance Of Other Courts And Countries

Generally the Court of Appeal attached little importance to the value of awards in other jurisdictions and areas of law. For example, it gave less weight than did the Commission to the level of awards in Northern Ireland, which generally are double those found in the rest of the UK. It explained these higher awards as being linked to previous levels when juries had been used. On the other hand, the court was prepared to attach more importance than the Commission to awards in EU and EFTA countries. No reasons for this were given. Nor was there any justification advanced for dismissing the comparison with the level of criminal injuries awards, although this

⁴⁰ This is conventional wisdom among economists. See Priest, "The Current Insurance Crisis And Modern Tort Law" (1987) 96 Yale LJ 1521, at 1546 - 7. However, this is subject to attack from Croley and Hanson in "The Non-Pecuniary Cost Of Accidents: Pain And Suffering Damages In Tort Law" (1995) 108 Harvard LR 1787.

had been dealt with in detail by the Commission.⁴¹ Decisions of tribunals in employment and discrimination cases, and of courts in defamation and police liability cases were similarly thought irrelevant. Significantly, no mention was made by the court, and little by the Commission, of how compensation for the great majority of accident victims would be assessed: that is, no one noted the principles which a social security tribunal would employ.⁴² Of course, the difficulty with making comparisons is that for loss of enjoyment and injury to the senses there can never be a “right” figure. Examination of alternative compensation can expose fundamental issues concerning the role of tort law and its relationship to other welfare systems, and the court gave little time to it.

The Increase In Life Expectancy

In deciding to award more money only in cases of more serious injury, the court was much influenced by the increase in life expectancy which we now enjoy. It means that the effects of more serious injuries are endured for longer. The change is most apparent in cases of extreme injury. The life expectancy of paraplegics and tetraplegics, for example, is much greater than it was thirty years ago. Insurers countered the argument by noting that treatment and medication had also improved. Nevertheless, the court held that these fell far short of compensating the individual for the increased pain and suffering caused by permanent disabilities continuing throughout the increasing life span. Living longer as a collateral benefit was not discussed; instead longer life was equated with more pain and therefore more money.

Updating By Reference to Prices Not Earnings

According to Weir, the Law Commission report was unpersuasive: “While stating that there is no demonstrably right view on quantum, its proposal to increase

⁴¹ See paras 3.73 - 3.85 of Law Commission Report No 257, above n 5.

⁴² The Commission dismissed Atiyah’s criticism that its consultation paper had failed to examine social security payments. It boldly stated that they provided no useful guide because there was “no sense in which the social security system is designed to be corrective justice and therefore to be fully reparative.” See above n 5, para 3.71.

damages in line with inflation presupposes that the previous view was correct.”⁴³ But once a level is established, by what mechanism is it to be kept up to date? The court opted for a combination of the Judicial Studies Board guidelines and continued use of the Retail Prices Index to uprate past awards. Uprating by reference to tables relating to the rise in average earnings or to the rise per capita in the Gross Domestic Product was rejected. This was partly because the claimants had introduced these arguments at a late stage in the proceedings. Had the alternative indices been used, damages could have increased substantially. This is because, for example, between 1991-98 earnings increased by 30 per cent whereas prices rose only by 21 per cent.⁴⁴ However, it should be noted that the top end of the PSLA scale specified by the Judicial Studies Board exceeded this rise in prices for many types of injury. Atiyah long ago pointed out that, in relation to lost earnings, recipients of damages were frozen in time to the earnings levels applicable at the date of their settlements. They will not share the rise in the standard of living which will be enjoyed by the rest of us because of the anticipated increase in wages over prices (which has averaged two per cent a year since 1945). In that sense tort undercompensates accident victims. They have never benefited from the link Barbara Castle once forged between state pensions and earnings, a link later destroyed by the Thatcher administration.⁴⁵ The Court of Appeal decision to continue to use the familiar updating mechanism of the RPI was to be expected; any move away from it, even in the context of non-pecuniary loss, could have had wider implications.

The Inter-relationship Of Heads Of Damage

⁴³ Above n 5, at 636.

⁴⁴ Over the longer period between 1970 and 1999 average earnings increased by 1433 per cent whereas the RPI only increased by 794 per cent. That is, average earnings increased by 1.8 times more than the RPI. Similarly, according to the ONS, between 1971 and 1997 real household disposable income nearly doubled.

⁴⁵ Proposals for the link to be re-established came back to haunt the New Labour government at its party conference last autumn. See “Pensions Haggling Fails To Buy Off Rebels” *The Times*, 28 September 2000.

Although *Heil* is an important case, it is but one of many which mark the struggle between insurers and increasingly well organised and experienced claimants' representatives. The Association of Personal Injury Lawyers is an extremely effective body, and outshines its opposing organisation, the Forum Of Insurance Lawyers, as a pressure group and information resource. Its success reflects the fact that damages in serious cases are radically different from what they were thirty years ago. During that time maximum awards overall have increased by between 40 and 60 times. The assessment of financial loss is now far more sophisticated and detailed. Although this was highlighted recently by *Wells v Wells*⁴⁶ and the debate about the appropriate discount rate to apply to arrive at the multiplier, there have been many other improvements in damages assessments which are now accepted as common features of tort law. In particular, claimants obtain compensation for items of pecuniary loss which once would have been subsumed under the general heading of loss of amenity. Two examples, were given by the Court of Appeal in *Heil*: claims for special holiday arrangements, and claims for adaptation and improvement of the conditions in which the claimant now lives. If specific sums are allocated for these purposes there is a danger of double accounting. For example, the inability to take a normal holiday could be taken into account as an item of financial loss as well as figuring in the overall assessment of PSLA. The court recognised this danger. In addition, losses which now were pleaded as aspects of the financial loss claim rather than forming part of the claim for non-pecuniary loss could help account for the failure of PSLA to keep pace with inflation. Even though there had been this cross-over of certain items of loss, the court concluded that there should still be an increase for non-pecuniary loss in serious cases.

The Wider Economic Effects

Although the court was not directly influenced by the substantial rise in damages for pecuniary loss in recent years, it emphasised that it was concerned with the economic consequences of its decision upon not only defendants as a group, but also society as a whole. The effect on insurance premiums and upon who would have

⁴⁶ [1999] AC 345, [1998] PIQR Q56.

to pay was a matter of concern. It cited with approval Diplock LJ's view that: "To avoid fixing the scale at a level which would materially affect the cost of living or disturb the current social pattern is a factor, Benthamite no doubt in origin, in the empirical process by which the maximum/datum is determined."⁴⁷ Here, therefore, the court differed from the Commission which had attached little importance to these matters and had suggested that cost was irrelevant.

However, the court distinguished its task in assessing PSLA from its assessment of pecuniary loss. In cases such as *Wells* it suggested that the court is only required to make the correct calculation, and economic consequences are irrelevant. But in setting the level of PSLA the court was concerned with wider questions of social policy. In particular, for example, the impact upon the resources of the NHS was regarded as a relevant factor. NHS trusts are among those hardest hit by the *Heil* decision because clinical negligence claims are usually of a high value, being more likely to involve serious injury. For example, in Wales claims over £30,000 were expected to cost £17 million in the current financial year. If the Law Commission recommendations were implemented, a further £5 million would be required, a rise of 30 per cent.⁴⁸ Even taking into account the lower increases set by the Court of Appeal, it is clear that a more onerous burden has now been placed on the NHS. The court considered that it was in a position to appreciate fully the significant effect of its decision on the public at large and the NHS in particular.

⁴⁷ *Wise v Kaye* [1962] 1 QB 638 at 670. Objection to the relevance of cost was one of the main reasons why an appeal to the Lords was contemplated, as discussed in n 6 above.

⁴⁸ Outline submission for the respondent in the appeal of *Annable v Southern Derbyshire Health Authority*, one of the *Heil v Rankin* test cases. Actuaries for the NHS Liability Authority calculated that the costs for the NHS in general would rise by £133 million a year, almost as much as the £150 million cost of employing over 8,000 newly qualified nurses. Even without the additional sums for PSLA, damages for clinical negligence rose from £11 million in 1996 - 97 to £66 million the following year. They were projected to grow to £278 million in 1999 - 2000. This enormous increase is partly attributable to the revised multiplier resulting from the 3 per cent discount rate set in *Wells v Wells*.

Conclusion: The Distorted Lens Of Corrective Justice

Atiyah's criticisms of PSLA are well known, and require only a brief summary here. PSLA is a secondary form of compensation, incapable of precise assessment and less able than pecuniary damages to provide an equivalent to what has been lost. A "correction" cannot be made. It is compensation deserving a lower priority than that awarded for financial loss. Few other systems of compensation make provision for PSLA, almost nothing being available from either social security or private insurance. If left to market forces, people would not choose to purchase cover against such a loss. Atiyah's arguments based on distributive justice emphasise how poorly the majority of accident victims are treated because they are unable to claim in tort. He exposes the fault principle as completely inadequate to justify the comparatively generous payments provided to the few whilst excluding the many. A reallocation of resources is required. In order to afford extending the base of compensation there would have to be a limit on the payment of secondary compensation. "It is perhaps only in the most serious cases of long-term pain and loss of faculty resulting from major physical injuries that there is a good case for damages for non-pecuniary loss."⁴⁹

By contrast the Law Commission rely on its terms of reference to justify giving these distributive justice arguments little space. They do not figure at all in the Court of Appeal judgment. The result is that, almost without argument, corrective justice is accepted as the only lens through which tort law can be viewed. For the unsuspecting student the many deficiencies of tort are masked by a decision which produces "fair, reasonable and just" compensation supposedly corresponding to the wishes of society. The reliance upon empirical surveys and mathematical indices reinforce the

⁴⁹ P. Cane, *Atiyah's Accidents, Compensation And the Law* (6th ed 1999) (Butterworths, London) 142. Similarly Sugarman, "Serious Tort Law Reform" (1987) 24 San Diego LR 795, at 807. Of course, Atiyah radically changed his views as to how the revision in compensation might be achieved in *The Damages Lottery* (1997) (Hart Publishing, Oxford). The scope for increased use of private insurance, as suggested by Atiyah, is forcefully criticised in an excellent note by Conaghan and Wade in "From The Permissive To The Dismissive Society" (1998) 25 J Law and Society 284. Cf Burrows, above n 38.

correctness of the approach. Damages are increased and the tort system strengthened. *Heil v Rankin* improves the position of those able to establish liability as against those unable to do so.⁵⁰ It thus helps to entrench the tort system, making it increasingly difficult to revise radically the baseline and extend compensation for basic losses to those presently excluded. In this respect the decision is by no means the most significant case in recent years. However, the case also makes repeated claims to reflect society's sense of values. This article points out what should be obvious enough, that these claims are inevitably partial and depend upon the perspective through which accident compensation is viewed. This partiality requires that the explanation of law reform be in terms of the activity of moral entrepreneurs⁵¹ rather than the general social interest mysteriously given body and voice by both the Law Commission and the court in *Heil v Rankin*.

⁵⁰ Cf the reluctance of Lord Bridge in *Hodgson v Trapp* [1989] AC 807 at 823 to "add to the enormous disparity ... between the position of those who are able to establish a third party's fault as the cause of their injury and the position of those who are not."

⁵¹ See similarly Atiyah's criticism that the Law Commission "is 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." *The Damages Lottery* (1997) (Hart Publishing, Oxford) at 173.