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## Compensation for Victims of Crime: Trends and Outlooks

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*I. Introduction*

Modern day western society has only recently begun to pay attention to the plight of the innocent victims of crime. Statutes have been enacted to provide financial compensation to a victim, his dependents or someone responsible for his maintenance, for the suffering and losses that invariably follow from acts of violence. The two basic aims of compensation have been identified as the need to sustain public trust (in that societies core values should be protected) and the desire to demonstrate a concern for individual rights and well being.<sup>1</sup> In this paper I shall examine the historical outlook on these compensation programs, the anti-victim prejudices that existed then and now, and how compensation has developed in light of these factors.

An examination of the justifications behind compensation will reveal why society is no longer directing all of its attention to the criminal and his rehabilitation, and diverting some of the public purse towards the victims. Along with this comes an examination of the costs of the programs and the arguments against compensation. Nova Scotia's possible motives for enacting this legislation are also examined.

The alternatives of restitution, tort-law, insurance and welfare programs are also examined in order to determine the relationship that exists between them and compensation.

The general framework of the Canadian Legislation and its present effectiveness is tested with particular reference to the Nova Scotian statute.

Finally comes an examination of Great Britain, probably the single most influential country in the field and one of the forerunners in compensation legislation.

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\*LL.B. (Dal.) 1983.

1. Law Reform Commission of Canada, Working Papers 5 & 6 (October 1974).

## *II. Historical Perspective*

Societies treatment or emphases on the victim has shifted dramatically as time wears on. Schafer<sup>2</sup> identifies three distinct stages, the “golden age”, the “decline of” and the “revival of” the victim.

During the early “golden age”, the victim played a key role in the criminal process and emphasis was placed upon the victim. Primitive people showed a belief in justice for the victim. In Hammurabi’s code (c. 1728-1686 B.C.) it was the victim and not the offender, who was considered first. Criminals were treated harshly in ancient Babylon, often losing life and limb to the satisfaction of the victim. Every victim had an inherent right to restitution or retribution, although social status was a key variable in determining the degree of retaliation available.

The victim’s “deline” came about as the state gradually pushed the victim into the background of the criminal/tort proceedings. The victims rights to carry out personal vendettas against the criminal were gradually eliminated and replaced with a system of state fines and state punishment. The Draconian code (621 B.C.) effectively shifted the responsibility for punishing the offender from the victim to the state. Solon’s code went one step further and established a system under which any citizen (not just the victim) could bring an indictment against the criminal. Gradually the communities’ power exceeded that of the individual and the government began to claim more and more of the victim’s restitution.

A sharpening of the division between tort and criminal law took place and by the twelfth century in England; practically all of the fines were remitted to the Kings treasury and punishment which was administered by the King’s officers. At this point the victim was stripped of any financial compensation and the common law even went so far as to forbid any effort whatsoever by the victim to receive restitution from the offender.

By the nineteenth century, the victim’s status had sunk to such a low level that Jeremy Bentham asked:

Has a crime been committed? Those who have suffered by it either in their person or their fortune are abandoned to their evil condition. The society which they have contributed to maintain,

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2. Schafer, *Victimology: The Victim and his Criminal* (Virginia: Reston Publishing Co., 1977).

and which ought to protect them, owes them an indemnity when its protection has been ineffectual.<sup>3</sup>

There were also rumblings about what was perceived by many to be the inequitable treatment of the criminal and his victim. While the offender was housed and fed at great public expense, the victim was left to pay his own medical and other expenses.

There is no doubt that today, the main emphasis is still on the offender. A multi-million dollar industry revolves around the criminal: his capture, processing, incarceration and rehabilitation. However, due to the work of people such as Margery Fry<sup>4</sup> it appears that we are entering an era where the victim will be regarded as something more than a mere pawn to be utilized in the court room chess game.

New Zealand was first off the mark in 1964 when it enacted a specially state funded program designed to compensate victims of violent crime.<sup>5</sup> Great Britain and other countries soon afterwards enacted legislation of their own.

Canadian legislation in the area began in 1967 with Saskatchewan and has continued along in a haphazard fashion. On May the twelfth, 1981 Nova Scotia finally proclaimed its statute, thus leaving Prince Edward Island as the only Canadian province or territory without a function compensation scheme.<sup>6</sup>

### *III. Anti-Victim Bias*

One may justifiably wonder why these compensation plans have been so slow in getting off the ground, especially when compared to other welfare programs such as workmen's compensation.<sup>7</sup> This was probably due to the fact that crime victims have been and still are, misunderstood, ostracized and blamed for their own misfortune. Upon hearing of a crime people automatically tend to look for

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3. Edelhertz & Geis, *Public Compensation to Victims of Crime* (New York: Praeger Publishers, 1974) at 8.

4. *Id* at 10. Margery Fry was an English magistrate and social reformer.

5. *Criminal Injuries Compensation Act*, Act No. 134 of 1963. See Edelhertz, *supra* note 2 at 238 for a discussion of the New Zealand statute.

6. Alberta: S.A. 1970 c. 75; British Columbia: S.B.C. 1972 c. 17; Manitoba: S.M. 1970 c. 56; New Brunswick: S.N.B. 1971 c. 10; Newfoundland: S. Nfld. 1968 No. 26; Northwest Territories: Revised Ordinance of 1976 c. C-23; Nova Scotia: S.N.S. 1975 c. 8; Ontario: S.O. 1971 c. 51; Quebec: S.Q. 1971 c. 18; Saskatchewan: S.S. 1967 c. 84; Yukon Territory: Consolidated Ordinances of 1976 c. C-10.1.

7. *Nova Scotia Workmen's Compensation Act*, S.N.S. 1910, c. 3.

an explanation for the crime in the victim's behaviour. A blaring example of this kind of attitude would be the treatment bestowed on a typical rape victim. Whether in court or behind her back she is often accused of provoking the rapist, either by her flimsy clothing, her tantalizing mannerisms or the expensive perfume she is wearing. She will be accused of not resisting strongly enough, or of resisting too strongly. Why was she on that street, and at that time of the night? She was probably asking for it anyway?

We have even gone so far as to romanticize the criminal, and the daring and debonair lives they lead. Legendary figures such as Jesse James, Billy the Kid, and Bonnie and Clyde readily spring to mind. T.V. programs and movies focus on the plight of the criminal, his victimization by society and his daring exploits, as these are the kind of movies that are more likely to succeed at the box-office. Movies such as "An American Tragedy", "Looking for Mr. Goodbar", and novelists such as Agatha Christie consistently utilize the theme of the "deserving victim".

A whole field of criminology has even sprung up around the victim who gets what he deserves:

The contribution of the victim to the genesis of crime and the contribution of the criminal to the reparation of the offence are the central problems of victimology.<sup>8</sup>

Thus victimology studies have concentrated almost exclusively on the extent of involvement of victims in their own undoing, to the total exclusion of the consequences of victimization.

Very difficult issues of causation arise in this field, often pointing to subtle questions of degrees of involvement. No doubt victims sometimes do precipitate their own doom and often they lead less than angelic lives. However, as is demonstrated later in this paper, the Compensation Boards are well aware of this fact and often callously reduce awards at the slightest hint of victim fault or wrongdoing. The danger in this, is that the victim may be penalized merely for being at the wrong place at the wrong time, with characteristics (wealth, youth, old age, defencelessness, female, a minority) that attract a potential criminal.

Much of the social discrimination and psychological suffering that victims are put through could and should be avoided or at least minimized. This anti-victim attitude that seems pervasive throughout much of society may be a result of using the victim as the

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8. Schafer, *supra* note 1 at 3.

scapegoat for a large percentage of crime. It is easier to blame the victim for his own misfortune than to fault other parts of the system which threaten our ingrained beliefs that the world is just and fair.<sup>9</sup> Unfortunately, the present legislation in even the most progressive districts, will only compensate the victim for "pain and suffering" resulting from the criminals actions, not the guilt and anguish experienced when friends, neighbours, family and government display ambivalent and negative reactions towards the victim.

If properly utilized, compensation could provide a much needed step in the direction towards a much more humanitarian approach in dealing with victims.

#### *IV. Justifications and Rationals*

Why should crime victims be singled out as a group which should be compensated? Why not take it one step further and compensate people struck by lightning, or any other identifiable group of people always ready and eager to jump on the government candy wagon?

Compensation has most commonly been advanced either as a right to which the victim is morally entitled, or as a natural extension of existing welfare principles. Some would find a legal duty on the part of the state, and others merely see it as a political play designed to attract votes.

##### *1. Legal Duty*

One of the first champions of the legal duty theory was Jeremy Bentham. His reasoning behind the concept was that society has forced its law enforcement apparatus on the public via the social contract and in so doing has undertaken to protect them from crime. Thus, when a crime has been committed, society has failed in its duty to defend the victim. Another angle on this theme is that society has created crime and criminals indirectly through its ghettos, inadequate education and housing, and general abuse and discrimination.

However, it is doubtful that compensation can be justified merely on the basis of legal duty. Even a police state similar to Orwell's Big Brother could not possibly hope to prevent the majority of violent crimes. Society is simply too complex and violence has the capacity to erupt so suddenly that prevention is just not realistic in most instances.

9. Barkas, *Victims* (New York: Charles Scribners Sons, 1978).

## 2. *Moral Duty*

Often words such as “sympathy”, “charity”, “humanity” or “welfare” are tossed about when the discussion turns to society’s moral obligation to victims of crime.

Advocates of the moral duty theory see compensation as a natural extension of the welfare state and the desire to help those who suffer through no fault of their own. Analogies have also been made to other welfare programs such as workmen’s compensation and unsatisfied judgment statutes.<sup>10</sup> The basic purpose of much of these social service plans is to distribute the risks of the inevitable accident or injury from the individual, to some larger group of society that could much more easily bear the costs and sometimes also shares in the benefits of the particular activity.

As crime seems to be an unavoidable facet of our daily lives, and in view of the many social welfare programs that are presently in operation, the failure to recognize the special claims of this group would seem to have been a gross oversight on the part of our legislators:

If there is a widely recognized hardship, and if that hardship can be cheaply remedied by state compensation, I should have thought that the case for such a remedy was made out, provided the practical difficulties are not too great.<sup>11</sup>

Criminal injury can be potentially devastating for a victim. The alternatives to compensation are practically non-existent, and it would seem in the best interests of “justice” and consistency that the welfare system be extended to encompass victims.

## 3. *Benefit to the State*

Often, the typical victim of today has nothing to gain and everything to lose by reporting the crime to the police. This has led to clear patterns of massive non-reporting by victims.<sup>12</sup>

Furthermore, a victim’s characteristics play an integral part in whether or not a complaint will be forwarded to the police, and

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10. Kirkham, *Compensation for Victims of Crime*, (Alberta: Institute of Law Research and Reform for the Province of Alberta, 1968). Note: discussion of workmen’s compensation and unsatisfied judgments at 14-17.

11. Galaway & Hudson, *Perspectives on Crime Victims* (Toronto: C. V. Mosby Co., 1981) at 416.

12. *Id.* at 45 Note: A 1976 study revealed up to 50% non-reporting on certain types of violent offences.

victims also react to their own and reasonably accurate estimate that nothing will come of their report.

If the offender is in fact apprehended and brought to trial, the victim is subject to the manipulation of the criminal justice system.<sup>13</sup> In order for the victim to participate in the prosecution of the criminal offender, he must be willing to withstand the time and income losses, and various other minor problems often associated with the cumbersome court process. Small wonder that many victims would see their role in court as somewhat like that of an expectant father in a hospital lobby “necessary for things to have gotten underway in the past, but at the moment rather superfluous and mildly bothersome.”<sup>14</sup>

An efficiently performing compensation scheme would in fact provide the victim with much more of the attention that he requires, lead to increased crime reporting, and presumably better enforcement and detection of crime. Along with this might come a restoration of the individual victim’s faith in society generally and also supporting the fundamental purposes of criminal law.<sup>15</sup>

The appeasement of the public and the political benefits that flow from this type of action is not so much a benefit to the state as it is a benefit to the politicians. Rather than being a stated rationale, this may appear as a hidden motive behind the legislation. It would just not be good policy for an elected official to be seen as antagonistic to the interests of compensation for innocent victims of crime. However, the danger with a purely political motive for enactment of this type of legislation is that the program will be manipulated in order to achieve the desired ends, and then discard it until it is required again. By reporting the big crimes and awards in the paper the voter will hopefully be kept complacent, as justice appears to have been done.

#### *V. Arguments Against Compensation*

The arguments against compensation basically boil down to one overriding factor: money. Where it is felt that these victims are no different from any other victims of adversity in society, the prevailing attitude is that they should not be given preferential

13. *Id.* at 52. Article by Knudten “What Happens to Crime Victims in the Justice System”.

14. *Id.* at 64.

15. Law Reform Commission, *supra* note 1 at 17.



treatment by the rest of the community. There is also the fear that fraudulent and undeserving claims will be put forward.

However, this paranoia about a budgetary crisis seems to be unsubstantiated when we look at the costs incurred thus far by the legislatures.<sup>16</sup>

YEAR	ADMINISTRATION COSTS (\$)	TOTAL PAID (\$)
<i>Ontario</i>		
71-72	100,637	399,811
72-73	193,144	615,413
73-74	205,317	730,401
74-75	259,073	726,880
75-76	306,090	899,785
76-77	394,496	1,410,812
77-78	427,533	1,629,896
<i>Saskatchewan</i>		
71-72	24,071	30,216
72-73	26,044	57,529
73-74	19,329	181,408
74-75	18,010	139,290
75-U6	17,054	122,956
76-77	19,924	166,464
77-78	37,616	175,843

Also in effect for the benefit of the provincial governments is a cost-sharing program whereby the Federal Government has undertaken to contribute up to 50% of the awards granted by the boards (net of any recoveries) up to a maximum of 10 cents *per capita* of the particular province.

This cost-sharing scheme, coupled with the present anti-victim attitudes that exist, and the statutory restrictions placed on the awards have all combined to make the present costs of crime compensation almost trivial in comparison to other legislative expenditures (For example the cost of incarceration).<sup>17</sup>

16. Burns, *Criminal Injuries Compensation* (Vancouver: Butterworths & Co. Western Canada Ltd., 1980).

17. Eg. *Annual Report of the Commissioner of Penitentiaries for 1966* (Ottawa: Queens Printer, 1966) reports the total outlays for goods and services required by penitentiaries for the year at \$54.7 million. McNeil and Vance, *Cruel and Unusual* (Deveau and Greenberg Publishers, 1978): see chapter 13 generally for cost figures. Note: The cost of incarceration is very much dependent upon which variables are included as an expense. (Eg police, courts, prisons) And the statistics can easily be manipulated to arrive at correspondingly high, or low figures in computing cost per prisoner per year.

### *VI. Nova Scotia's Commitment So Far*

Several factors require examination in order to determine what the real rationale of any legislature is in enacting this type of legislation.<sup>18</sup>

The fact that need is not a visible criterion in the Nova Scotian statute seems to indicate an acceptance of state responsibility. However, it is also quite clear that the legislature will not permit the victim to recover anything that they might possibly perceive as a windfall from his victimization. Section 26<sup>19</sup> empowers the board to make any deductions with respect to any money received by the victim as a result of the offence. The form which must be filled in by all applicants requires that the victim fill in an extensive list of any benefits received, and copies of the applicant's personal income tax returns may also be required (presumably as an aid in calculating lost wages, and not in determining actual need).

The funding provided to the various Canadian Boards thus far seem to indicate a real commitment to the scheme.<sup>20</sup>

A frequent lament of the compensation boards is that only a low percentage of eligible claimants ever get around to making applications. In Great Britain, it was estimated that the highest percentage of eligible victims that ever applied was 19%.<sup>21</sup> This may be due to a variety of factors, such as ignorance of the existence of the system, participation in the offence or expectations with respect to the size of any possible awards.

Ontario has a comprehensive attack on the problem of educating the public. Posters and brochures are displayed in Hospital wards and lounges across the province and the police are provided with wallet sized cards to distribute to victims, informing them of their "right" to apply, and how to proceed in the matter.<sup>22</sup> Even through the practical difficulties of effectively educating the public may be great, it is still an attainable goal with time and persistence.

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18. Burns, *supra* note 16 at 132.

19. *Compensation for Victims of Crime Act*, S.N.S. 1975, c. 8.

20. Burns, *supra* note 16.

21. *Criminal Injuries Compensation Board Report*, Eleventh Report (Great Britain, 1978).

22. *The Eleventh Report of the Ontario Criminal Injuries Compensation Board* 1980 at 5.

## VII. Alternatives

### 1. Restitution

Restitution requires that the criminal court order that the offender compensate the victim (financially or otherwise) as part of his sentence. There are two basic types of restitution: "punitive" and "pure".

Punitive restitution requires the personal performance of the wrong-doer, and in theory is equally burdensome for all criminals, regardless of their individual characteristics. This is accomplished by requiring that the offender undertake manual labour or pay fines in proportion to his earning power. In the latter instance the fine would be determined not by actual harm but by the offender's ability to pay. This type of restitution places an emphasis on the deterrent, reformatory, and rehabilitative effect of punishment. However, this system has the potential for allowing large scale inequities and discrepancies between similar cases and I doubt whether this system *standing alone* would be acceptable.

The point in pure restitution is not that the offender deserves to suffer, but rather that the victim deserves to be reimbursed for his suffering.

The conflict between the two systems is one of the underlying objectives. However, this need not imply that one must be accepted to the total exclusion of the other. But merely that different types of restitution are appropriate for different types of criminals.

The possible advantages of a properly managed restitution system appear to be significant. First, the victim would receive monetary compensation at the expense of the criminal and not the state. Psychological desires for revenge might be appeased to a certain extent, and restitution would also provide a much needed incentive for the victim to report the crime.

Secondly, the criminal might benefit from a much more meaningful form of punishment. Rather than merely "sitting on ice" the offender would be given a vehicle for alleviating the anxiety and guilt often experienced after the offence. This in turn would build his self-esteem by righting his wrong. Marketable working skills might even be acquired along the way and this would hopefully lead to a reduction in recidivism rates. White-collar crime and large scale theft would no longer pay as any stolen goods would either be returned or paid for. Restitution would also allow for a

self-determinative sentence, under which the worker would know that the length of his confinement is in his own hands.

Cited as disadvantages and problems of restitution:

- (1) insufficient deterrent to crime.
- (2) advantage given to rich criminals.
- (3) inappropriateness for victimless crimes.
- (4) Canadian constitutional issue as to the division of criminal and civil proceedings.<sup>23</sup>

In view of the seemingly high recidivism rates in our prisons,<sup>24</sup> it seems unlikely that restitution could be less of a deterrent than the prisons.

The wealthy would not be given any advantage under a punitive restitution scheme or some other combination restitution, criminal sanction program.

Restitution is inappropriate with regard to victimless crimes. But these offences raise issues of their own as to the appropriateness of any criminal sanction in the vast majority of these "crimes".<sup>25</sup>

Restitution today seems to take place mostly prior to police involvement, less often at the police and prosecutorial levels in the form of plea-bargaining and sometimes at the judicial level.<sup>26</sup> The Criminal Code has provisions which allow a judge to order restitution as a condition of probation<sup>27</sup> or as a term of sentence in relation to illegally obtained goods.<sup>28</sup> The Supreme Court of Canada dealt with this latter issue in *Felensky*.<sup>29</sup> This case involved embezzlement of company property by an Eaton's employee. The court ordered that the employee return the goods or their value as there was no dispute whatsoever over the quantum of damages.

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23. Law Reform Commission *supra* note 1 at 11.

24. *Annual Report of the Commissioner of Penitentiaries* (Ottawa: Queens Printer, 1959) at 14 (general recidivism rate of 82.88%, and a penitentiary recidivism rate of 46.41%). For the more modern and somewhat disguised rates see: *Penitentiary Statistics 1975* (Ottawa: Statistics Canada, 1978) *Correctional Institutional Statistics, 1974* (Ottawa, Statistics Canada, 1976).

25. Chambliss, *Criminal Law in Action* (Santa Barbara: California: Hamilton Pub. Co., 1975) at 1-15. McNeil and Vance, *Cruel and Unusual*, (Deveau and Greenberg Publishers, 1978) at chapter 13.

26. Burns, *supra* note 16 at 9.

27. *Criminal Code*, R.S.C. 1970, c. C-34, s. 663(2)(e).

28. *Id.* sections 653, 665, 388(2); See Burns *supra* note 16 for an in depth analysis of these sections.

29. (1978), 86 D.L.R. (3d) 179 (S.C.C.).

However, the court still echoed the traditional belief that the criminal courts should not be used to enforce civil obligations, except in the most blatant of cases, such as this one.

Restitution is in itself, an important and complex area of the law calling for a detailed study of its viability and ramifications. Because of its disadvantages, it could never be utilized as a complete and just alternative to compensation. Whereas Margery Fry, and the Law Reform Commission of Canada saw compensation merely as a supplement to restitution, it seems that in light of present trends and the real practical difficulties encountered with restitution, compensation is the real *prima donna*, and restitution a scarcely seen stand-in.

However, this is not to conclude that restitution should always be denied the lime-light. The possible benefits to the victim, taxpayer and criminal seem to cry out for attention. Restitution may have a larger role to play, especially when dealing with property offences. This is an area left untouched by compensation schemes and a program which could utilize the advantages of each to complement one another seems to be a realistic and attainable goal.

## 2. Insurance

Private insurance does not appear to be a realistic alternative to compensation. The costs for the individual are so great and the chances of being a victim so small that it would not be economically viable for potential victims to insure themselves. Insurance does not lend itself well to awarding damages for non-pecuniary suffering, and it is the failure of insurance to meet the needs of victims of violence that has led to state intervention in the first place. However, it is worthwhile to note that insurance is presently being used (by those who can afford it) to cover property damages flowing from crimes.

## 3. Tort Law

Almost every crime has a corresponding tort, but in spite of this it still seems that the tort rights of victims are illusory. Victims seldom pursue their rights in a tort action<sup>30</sup> for several possible reasons:

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30. Linden, *The Report of the Osgoode Hall Study on Compensation for Victims of Crime*, (Toronto: Osgoode Hall Law School, 1968) at 21 where the report finds that only 1.8% of those surveyed recovered any damages by way of a civil action.

- (a) the criminal has no money or has it hidden and is thus “judgment-proof”.
- (b) the victim has to make a substantial outlay of cash for a lawyer and run the risk of losing in court.
- (c) litigation is time consuming.
- (d) court awards are often conservative and unpredictable.
- (e) must first apprehend the offender.
- (f) others may feel the victim is trying to profit from his victimization.

Compensation has several distinct advantages over tort law in that it allows for periodic awards without setting a fixed total amount at the time the award is made<sup>31</sup> and it allows for interim compensation awards based on financial need while the hearing is pending.<sup>32</sup> Subsequent action may also be brought to increase or decrease the award<sup>33</sup>, whereas awards at common law are made once and for all. Section 31(1)<sup>34</sup> expressly leaves open the possibility for a victim to proceed by tort as well, subject to the section 31(2)<sup>35</sup> board rights to subrogation. Looking at the scheme as a whole one might validly draw the conclusion that compensation was intended to be utilized as a replacement of the empty right to bring a tort action.

#### 4. Welfare

Most victims will have some of their expenses already covered by various social welfare schemes.<sup>36</sup> It would seem that compensation would be a proper extension of the welfare system in order to cover gaps in the existing programs or to help those unfortunate enough who happen not to be covered.

#### VIII. Canadian Legislation

Eleven out of the twelve provinces and territories now have very similar compensation schemes which are in force and operating.<sup>37</sup>

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31. N.S. Act, *supra* note 19, 5.28.

32. *Id.* s. 17.

33. *Id.* s. 22(1).

34. *Id.*

35. *Id.* Ontario recovered \$9,788.42 by subrogation during its 79.80 fiscal year.

36. Osgoode, *supra* note 32 at 27: Other appropriate welfare schemes; Unemployment Insurance, Workmen's Compensation, Canada Pension Plan, M.S.I.

37. *Supra* note 6.

### *1. Eligibility and Conditions*

Victims, persons responsible for the maintenance of a victim or a victims' dependents may generally make an application.<sup>38</sup> With the exception of Ontario,<sup>39</sup> every jurisdiction relates the concept of "victim" to certain offences found in the Criminal Code. The schedule of offences are comparable for all of the provinces but of the approximately 49 listed offences, only half are ever drawn upon and an even smaller group of "core" offences take up the vast majority of applications.<sup>40</sup> Good samaritans are also covered in the legislation if they incur injuries while assisting a peace officer or while preserving or attempting to preserve the peace.<sup>41</sup>

Necessary casual connection between the offenders conduct and the applicant's injury is a prerequisite to every claim, and there are often problems establishing the necessary link.<sup>42</sup>

The application must be filed within one year of the injury unless the board gives permission for an extension,<sup>43</sup> but none of the jurisdictions require that the victim be a resident of that province, yet the injury must have taken place in that region.

### *2. Types of Awards*

Under the enactments, lump sums, periodic payments, or combination of both types may be awarded<sup>44</sup> for:

- (a) expenses actually and reasonably incurred or to be incurred as a result of the victim's injury or death;
- (b) pecuniary loss or damages incurred by the victim as a result of total or partial disability affecting the victim's capacity for work;
- (c) pecuniary loss or damages incurred by dependents as a result of the victim's death;
- (d) pain and suffering;

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38. N.S. Act, *supra* note 19.

39. Ontario S.O. 1971, c. 51., s. 5(a) refers to "a crime of violence constituting an offence against the Criminal Code (Canada), including poisoning, arson, criminal negligence, and an offence under s. 86 of that Act but not including an offence involving the use or operation of a motor vehicle other than by means of a motor vehicle."

40. Burns, *supra* note 16 at 33.

41. N.S. Act, *supra* note 19, s. 6(1)(b)(c).

42. Burns, *supra* note 16 at 46-66 for a discussion of some of the finer points on causation.

43. N.S. Act *supra* note 19, s.7.

44. *Id.* s. 27.

- (e) maintenance of a child born as a result of rape;
- (f) other pecuniary loss or damages resulting from the victim's injury and any expense that in the opinion of the board it is reasonable to incur.<sup>45</sup>

This listing may be divided into two groups: Non-pecuniary (pain and suffering) and pecuniary (everything else). As is usual for any statute this language is subject to interpretation, and sections identical to these have been extensively interpreted in other provinces.<sup>46</sup>

### 3. *Restrictions and Deductions*

Every application is subject to minimum and maximum limitations and no application will be entertained or awarded unless the total value of the grant is over one hundred dollars. Maximum awards for lump sum payments are \$15,000 to any individual except good samaritians, who are exempted from these constraints.<sup>47</sup> A compensable injury includes actual bodily harm, mental or nervous shock, and pain and suffering.<sup>48</sup>

Under section 26, the Board shall deduct from any award granted, practically any benefits it feels appropriate to do so, and the application form sets an extensive list of possible benefits that will be accounted for.

The applicant is also required to "co-operate fully with the Board" and will probably be expected to undergo a medical examination and testify under oath at the hearing.<sup>49</sup>

The victim's behaviour at the time of the commission of the offence and subsequent to it, is a decisive factor in determining the amount, if any, to be awarded. The Board "shall consider and take into account any behaviour of the victim that directly or indirectly contributed to his injury or death."<sup>50</sup> This broad wording gives the Boards considerable latitude in rendering a decision. The Ontario Reports supply an adequate number of examples as to what constitutes an unworthy victim. There are numerous instances where claimants have had their awards reduced or denied because

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45. Burns, *supra* note 16.

46. N.S. Act, *supra* note 19, s. 8.

47. *Id.* s. 28 sets out maximum lump and periodic awards while s.28(7) exempts good samaritians from these restrictions.

48. *Id.* s.2(1)(d).

49. N.S. Act, *supra* note 19, s. 25(2).

50. *Id.* s. 25(1).



of: failing to report to the police within a reasonable time, participation in criminal conduct, membership with the underworld, homosexuality, drunkenness, family disputes, immoral conduct, imprudent behaviour. There seems to be no limit to the circumstances and instances that a board might designate as relevant. But they usually look for circumstances involving illegal, immoral or imprudent behaviour, as defined by the board members themselves.

#### 4. Administration and Procedure

The N.S. Board presently has three out of an allowable five possible members, with a full-time investigator and a secretary rounding out the present staff appointed to administer the scheme.<sup>51</sup> After the claimant has filed his application a hearing will be held, at a place and time to be determined by the Board, and a notice is sent out to the claimant. The Board presently uses the N.S. Civil Procedure Rules as the rules of procedure for the hearing.

Any "statement, document, information or matter" whether or not it is given under oath or is inadmissible in a court of law is admissible as evidence.<sup>52</sup> The Board also relies heavily upon the investigator's report, police information and the doctor's report. A conviction of a criminal offence is conclusive evidence for the purposes of the hearing that a crime was committed<sup>53</sup> and section 12(6) provides protection to an accused and the testimony he gives at the hearing. Section 12(7) seems to suggest that the accused may be required by the Board to give evidence at the hearing under oath or face a contempt of court charge if he refuses to testify. The Act does not explicitly state what standard of proof the claimant must live up to in order to succeed, however, all the Canadian jurisdictions have utilized a balance of probabilities test.<sup>54</sup>

Judicial review may be obtained on questions of law in N.S. as in Ontario. *Re Sheenan*<sup>55</sup> and *Re Fregean*<sup>56</sup> demonstrate that board

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51. *Id.* s. 4(1). The present members of the N.S. compensation board are: Mr. David J. Waterbury (Chairman), Mr. Robert H. Bruce (Vice-Chairman), Dr. Bension Auld (Member).

52. *Id.* s. 12(4).

53. *Id.* s. 12(5).

54. *Morris v. Attorney General of N.B.* (1975), 12 N.B.R. (2d) 520 (N.B.C.A.).

55. (1973), 3 O.R. 508 (Ont. H.C.).

56. (1973), 33 D.L.R. (3d) 278 (Ont. H.C.). See also *Foholko v Criminal Injuries Compensation Board* (1983) unreported (NSCA).

decisions are clearly not infallible. The *Sheenan* case involved board discrimination against an inmate of Kingston Penitentiary. As to the issue of causation the Ontario High Court held that the behaviour which "contributes to the injury" within the meaning of the act must be relevant behaviour related to the incident causing the injury, and the mere fact that Sheenan was an inmate did not "contribute" to his injury *per se*.

### *IX. Great Britain*

As a brief overview of a system that has been effectively functioning for almost sixteen years and has acted as a leader in this area let us look to Great Britain.

The British scheme is based on two fundamental points. First, that claims for compensation should be determined by a judicial or quasi-judicial body, and second that remuneration should be payable only in deserving cases and on an *ex gratia* basis only, subject to variation at any time.<sup>57</sup>

Unlike Nova Scotia, all of the members of the British Board must be legally qualified and board decisions are not subject to appeal or ministerial review, but an appeal may lie to an Appellate Tribunal of Board members.

The British Board publishes comprehensive annual reports dealing with the fiscal years volume of applications, the working and administration of the scheme and the awards granted. It is particularly interesting to note the costs of the British scheme and the trends that seem to be developing there. The total compensation paid out under the British statute from its inception (August 1, 1964) up until the last available report (March 31, 1978) has only been £50,526,013 and that is for a nation of 55,901,000 people.<sup>58</sup> However, over 50% (£26,260,582) of the total awards have been paid in the last three fiscal periods alone (75-76, 76-77, 77-78). Even after accounting for the influence of inflation and the cost of previously ordered periodic payments that are continuing through these later periods, one may note an increasing generosity of the Board and a greater public awareness on the behalf of the British as to the schemes utility and existence.

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57. *Criminal Injuries Compensation Board, Fourteenth Report* (Great Britain, 1978) at 33.

58. *The World Almanac and Book of Facts 1981* (New York: Newspaper Enterprise Assoc. Inc., 1980).

The cost breakdown for 1977-78 was:

<i>Compensation Paid (77-78)</i>		<i>Size of Awards (77-78)</i>		
England	£ 8,072,616	under 100	1319	9.4%
Scotland	£ 1,706,523	100-399	7582	54.0%
Wales	£ 327,374	400-999	3491	24.8%
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Total	£10,106,513	1000-4999	1399	10.0%
		5000-and up	261	1.8%

The total amount awarded in sums over 5000 was £2,999,454 representing 29.6% of the total compensation for that year. The highest award of the year was £65,000 to a 15 year old youth who was attacked, kicked in the head and is now permanently confined to a wheelchair.

Thus it seems that the compensation Board has effectively taken root in Britain, and is giving increased recognition to the plight of the victim.

### *X. Conclusion*

Society has once again returned to a point where it acknowledges that victims of crime, do deserve recognition for their suffering. However, we are still a long way from the victim rights of Hammurabi's day, nor would I advocate them. Nonetheless, compensation merely seems to be the first cautious step towards a long over-due acknowledgment of society's duty to its forgotten victims. When one looks at the consequences of violent crime, the physical and mental scars that last a lifetime, one might justifiably wonder why it took so long for government to take appropriate action.

We have seen that the present criminal justice system holds next to no "justice" for the victim, and other than a few obsolete provisions in the Criminal Code, makes no pretence that it does. Even the general principles of sentencing presently utilized by the Canadian Courts,<sup>59</sup> do not take into account victim needs.

The alternatives to compensation are presently much more appealing in theory than in practice. Restitution seems to hold great potential, but mostly by way of saved taxes and possibly as a means of constructive penal therapy. Insurance (and sometimes restitution)

<sup>59</sup> *Eg. R. v. Grady* (1973), 5 N.S.R. (2d) 264 (N.S.S.C. A.D.).

has been left to indemnify victims of property offences and there seems to be little likelihood that compensation will ever extend into the area. All the more reason that some type of restitutional system be implemented to cover (as much as it feasibly could) property offences. Insurance is expensive, and most often affords protection for those who would be most able to bear the losses, rather than those who are really hit hard by these type of offences.

The Boards are given wide discretion in applying the schemes, and this is sometimes noticeable through the anti-victim bias that appears periodically through their decisions. The notion of *ex gratia* allows for a considerable degree of flexibility, especially when attempting to unravel an often times overly tangled web of criminal-victim relationships and subtle issues of causation.<sup>60</sup> Nonetheless, an injury is no less an injury merely because it was precipitated.

The Canadian compensation schemes are remarkably similar due to the influence of the Federal government. Thus far the costs have not been burdensome even in the most progressive of countries and the only major distinction between Nova Scotia and other jurisdictions in the overall lack of public awareness and efforts to remedy the situation.

Other programs such as counselling centres and telephone hot lines might also have a valuable role in attempting to round out the non-financial requirements of victims along with the more tangible aspects of compensation.

Compensation is a step in the right direction, but hopefully we will see a refinement and growth in the area which might in turn lead to, or coincide with a changing emphasis in our criminal justice system. In today's rapidly developing world, "no man is an island" and we must seek to develop a more comprehensive system under which the goals of humanitarianism and justice are held out as commendable aspirations, even if never fully attainable.

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60. Schafer, *supra* note 1, at chapter 2 "Criminal-Victim Relationship as a Crime Factor".