COMPENSATION FOR VICTIMS OF CRIME

A Research Paper

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COMPENSATION FOR VICTIMS OF CRIME - OUTLINE

In its modern concept, the proposal for compensating persons who suffer bodily injury as a result of a criminal attack was first made in 1954 by Margaret Fry, a British sociologist. She aroused considerable interest in Great Britain and the proposal was strongly supported by the prestigious Justice Society, the Conservative Party, and a Working Party composed of Members of Parliament. Before the British Government could introduce the scheme, however, the Government of New Zealand passed the first Criminal Injuries Compensation Act, which was followed by the British scheme within a matter of months.

Outside of these two nations, the subject received little attention until quite recently. A Symposium appeared in the American Journal of Public Law in 1959, but this was virtually the corpus of published material on the subject for several years. With the passing of the British and New Zealand schemes, however, came a veritable flood of concern for the victim of crime and in the last four years a great quantum of articles have been published.

The jurisdictions of New York, Saskatchewan and Massachusetts have responded with statutes very similar in structure to that of New Zealand. Ontario and California have passed limited versions aimed at compensated private citizens injured while assisting in the course of law enforcement. California has also passed an amendment to the social security program which extends very limited welfare benefits to crime victims. Finally, New South Wales extended the historic remedy of restitution - i.e., the power of the criminal court to order the offender to compensate his victim - and made the remedy effective by means of a state-supported fund. There have also been similar proposals forwarded in many other jurisdictions and the matter has been the subject of private member's bills in both the Canadian Parliament and American Congress.

The subject is one which much stimulates the compassionate element of human nature. The anguish of innocent victims devastated by criminal violence and rendered unable to care for themselves or their families is one which arouses universal sympathy. It is therefore difficult to remain intellectually objective although I have made every effort to do so. What follows is an earnest attempt to deal with what is believed to be a very real social problem.

I. SHOULD THERE BE A STATE COMPENSATION SCHEME

A. JUSTIFICATIONS

That the victim of criminal violence should be compensated for his injuries is now vitually a universally supported principle. Of the some 100 articles and comments which I have read in the preparation of this paper, only 4 were opposed to such a scheme. Such rarely found unanimity with regard to the initiation of a new government venture is perhaps the clearest proof of the desirability of such a scheme. However, the unanimity of opinion has not always meant clear thinking of the subject. In their desire to assist the victim, some writers have advanced unconvincing arguments which make their case vulnerable. A cogent explanation must be advanced as to why the victim of crime should receive preferential treatment as opposed to, for instance, victims of other calamities. One author, in reviewing the California plan, has posed this theoretical problem with clarity:

> "In so far as crime is a product of society, the crime victim may be more deserving of society's care than victims of fires, floods, lightning or other disasters. However, society should not favor crime victims more than victims of structural unemployment, uncompensated automobile torts, poor education, non violent crimes, and other products of society. The major argument against a crime victim compensation, then, is that crime victims are no different from other victims and should not be singled out for special treatment. If California's present welfare system is adequate to care for other victims of society, no reason is apparent why it is inadequate for victims of criminal violence." [1]

To find rational justification for the scheme herein advocated is thus far more than academic exercise. It is therefore proposed to examine the various arguments which have been advanced in support of a compensation scheme in an attempt to discern the valid from the invalid.

1. The Historical Perspective

Throughout history all civilizations have necessarily been concerned with the relationship among victim, criminal and society. The primary concern of the

state has been to control anti-social behavior and the punishments adopted therefore have deterrence as their main objective. But previous societies had a second major goal — the compensation of the victim — a goal which has completely disappeared in modern times.

The historic concern for the victim is proven by the use of restitution, a method whereby the criminal could atone for his action by a payment to the victim.[2] Having made restitution to his victim, there was no further obligation to make reparation to the state for the breach of law and order. Aggression against an individual was regarded as a personal offence and restoration of that individual to his original position was the preoccupation of these early systems.

As society become more sophisicated, the concept of an offence against the public order gained acceptance. Thus in Anglo-Saxon England, an offender was often compelled to pay reparation not only to his victim, but to the King or the Barons as well, the latter payment compensating for a breach of the "King's peace". The avariciousness of the feudal monarchs and lords led to insistent demands for a greater portion of these fines until the injured persons right to restitution was eventually eclipsed.[3] The distinction between tort (an offence against the individual) and crime (an offence against the state) thereby became apparent in law. One can well imagine how fruitful the individual's civil action was after the over-lord had had the entire properties of the offender forfeited. Hence the victim, "who historically enjoyed the position of primary concern in retribution of criminal violence, has been required to assume a secondary role in the process of restitution of wrongs in the interests of peace, stability and social growth."[4] As Schaffer has said, "History suggests that growing interest in the reformation of the criminal is matched by decreasing care for the victim."[5]

The basic injustice of this position was the subject of attention by several reformers during the 19th century. A group of Italian penologists advocated the establishment of a state fund, derived mainly from criminal fines and

the profits of prison labour, the procceds of which would be paid to the injured parties. Their views, while receiving wide acclaim, were rejected but they did succeed in dramatizing the plight of the victim of crime.

It is perhaps simplistic to contend, as one writer does, that, "Because it has been the state which has preempted [the victim's] historic position, logically the state should on the basis of social legislation support the interests of the injuried victim."[6] Nonetheless, there is merit in the proposition that the victim of crime has been harshly dealt with by history and that this is in large part unjustifiable. This proposition has been analysed as follows:

> "The support of the victim's interest was abrogated at the point where the avaricious motives of the English rulers secured the change in criminal law from private to public processes. Enhancement of the feudal treasury became of paramount importance. Traces of those avaricious motives have now vanished. In their place have come valid social reasons for the public administration of criminal law. But these reasons do not support the continued exclusion of from the criminal law process of the victim's interest in redress. The exclusion is an irrational carry-over from the time when such an interest would have been in derogation of the feudal lord's financial interests. It is justified in theory by the argument that the victim's losses are vindicated in a public prosecution, and redress is reserved for a private civil recovery. However, when private civil redress is frustrated by the several factors noted above, and where in a criminal prosecution "the interest of the offender may not infrequently seem to be placed beofre those of the victim;" this argument fails. The solution put forward is that in order to return the interests of the victim to their historic position of equality with the humane interests of society, the state should provide for the losses a victim sustains." [7]

This argument is not *per se* a complete justification for compensating victims of crime. The rights of many citizens and groups have been changed over the years to meet the demands of a complex civilization and it is incorrect to contend that a privileged position enjoyed at one stage in history by a particular segment of the population should necessarily be preserved in the face of changing circumstances. That the victim of crime once enjoyed a more favorable place in society cannot by itself justify a claim to the restoration of that position. However, the historical argument does, I submit, carry considerable weight. In any

criminal act, there are three concerned parties — the criminal, the victim and the omnipotent state, whose duty it is to adjudicate between the parties with the public interest foremost in mind. Past societies have shown considerable regard for the victim and assisted him in making demands upon the criminal for restitution. Modern society has all but abrogated this right, substituting instead its own demands against the criminal. In so doing, it has drawn the conclusion that the public interest in the punishment and rehabilitation of the criminal is of paramount concern, and that a recognition of the victim's claim within the scope of the criminal administration would interfere with these interests. It is both just and humane that society should take full cognizance of the interests of the criminal, but in so doing, it has totally ignored the interests of the innocent victim. Not only is he denied assistance by the state in bringing his claim against the criminal, but he is positively hindered — by sentencing the criminal, the state usually eradicates whatever ability he had to pay his debt to the victim. This exclusion of the victim may be justifiable on the basis that it is in the best interests of the criminal and, consequently, of society as a whole, but this is the basis for a strong argument in favour of independent machinery to assist the victim. Surely our interests in the welfare of the innocent victim are equally as strong as in the culpable offender.

2. Mitigation of Revenge

Since the victim has virtually no chance of collecting compensation from the criminal through a civil proceedings, his entire satisfaction must come from the punishment of the offender. But "the assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society in its dealings with offenders increasingly emphasizes the reformative aspects of punishment."[8] Thus it is said that if the victim could look forward to compensation for his injuries, rather than the unmitigated pain and suffering which he must now face, then his desire for revenge would substantially

diminish. This would have the effect of reducing the number of offences motivated by revenge.[9] This argument is somewhat tenuous: it is impossible to know how many crimes of violence are motivated by revenge and even assuming that number to be large, it would seem that a common aspect of a revenge-crime would be spontaneity. The victim would respond instantaneously to his physical injuries, as a consequence more of suffering to pride and person than to pocket book. Nonetheless it is reasonable to assume that those revenge-offences which occur after a substantial time lag might well be reduced if the victim has received a pecuniary satisfaction as well as whatever mental peace comes with the state punishment of the offender.

3. Appeasement of the Public

It is said that compensation to the victim might appease the public as well as the victim, thereby diminishing the public out-cry for harsher punishment of the criminal. This would be in the interests of the public since it could result in a more humane treatment of the offender in keeping with the modern rehabilitative approach to criminology and penology. As expressed by Justice,

"Neglect of the interest of victims of violence has made a deep impression on the public and may stimulate in them a desire for revenge, and may diminish the amount of public support for an enlightened penal policy."[10]

I tended to regard this argument with some skepticism until reading the dissertations of the Honourable Ralph Cowan in the House of Commons. On two separate occasions,[11] the honourable gentleman spoke at length in support of his own motion favoring the

the creation of a criminal injuries compensation board to award compensation to the victims of crime. Both speeches were, in essence, diatribes directed at the "criminal element" in the population with frequent critical references to those persons who supported the reformative approach to criminology, such as the abolitionists. Rather than attempt to set out reasoned arguments in support of his motion, Mr. Cowan rested his case upon two facts: the wretched position in which many victims were left and the gentle treatment that many offenders received at the hands of the law. This gentle treatment was ill-conceived but nothing could be done to alter a pattern long established. Thus, reasoned Mr. Cowan, to make up for the gentle treatment of criminals let the state also give consideration to the plight of the victim.

Although several members of the parliament were quick to disassociate themselves from the reasoning behind this motion, while simultaneously expressing their support for such a scheme, it is perhaps not unreasonable to assume that Mr. Cowan represented a substantial segment of public opinion. It appears that this type of thinking was prevalent in New Zealand prior to the passing of the Crimir Injuries Compensation Act in 1963. B.J. Cameron, the Chief Advisory Office in the Department of Justice in New Zealand, once stated that the legislation was "prompted mainly by genuine humanitarian consideration", but continued:

> There is room to wonder, however, if action would have been taken quite so speedily if political motives had not also been present. The Conservative Government's progressive penal policy, and in particular its refusal to revive corporal punishment (abolished in 1941) despite a public outcry following a sudden increase of sexual offences, was generally supported by the Labour opposition. Nevertheless, there was widespread discontent at grassroots level and the charge was freely made that the Government was concerned to help the offender but paid no regard to his victims. The introduction of a bill establishing a compensation scheme for victims of offences, therefore, served the double purpose of doing something that was thought desirable on its merits and answering criticism of the Government's approach to penal policy. 12

If those people who presently seem ready to oppose attempts at penal reforms could be mollified by a victim compensation program, the role of the reformers of our penal system would be made easier and this is surely a laudible achievement. However, little stress can legitimately be placed on this argument; a question of how victims are to be treated should be completely divorced from how criminals are to be treated.

4. Improved Law Enforcement

Another justification is a forecast improvement in law investigation and enforcement.[13] This would be a result of several factors: victims will be encouraged to lay criminal charges and to volunteer evidence; citizens may be induced to assist in the prevention of crime;[14] additional information on what crime is costing its victims may lead to increased interest in preventative programs, particularly when the state is compelled to reimburse the victims for their costs.[15]

The first argument can be a two-edged sword. While victims will be encouraged to lay charges if such is made a prerequisite to the recovery of compensation, one of the foreseeable dangers is that the availability of compensation may have a negative effect on the victim's interest in assisting the state in prosecution of the offence. Since his satisfaction has been achieved by a money award, it is hypothesised by some that his desire for revenge will have been enervated, which will consequently diminish his willingness to press charges and

give testimony. But if safeguards are incorporated in the scheme to prevent a subsequent lack of cooperation, the existence of the scheme will probably encourage the reporting of criminal offences.

However, to suggest that a citizen who sees a crime in progress will be encouraged to intervene by the possibility of compensation for any injury sustained is surely to place too great an emphasis on the mercenary side of human nature. I suspect that a citizen placed in such a position, necessitating instantaneous reaction would be motivated by either altruism or fear for life and limb. Availability of compensation for possible injuries would have a minumum effect on either, if indeed he were even cognizant of such availability

Finally, the argument that if society actually knew what crime was costing its victims, it would take a greater interest in preventative programs would seem to be inconsistent with the British and New Zealand experiments with state compensation. These plans have been notable in the small budgets upon which the compensation boards have operated, indicating the collective pecuniary value of physical injury sustained as a result of criminal aggression may not be as high as commonly believed.

5. The State-Duty Theory

It is often said that the state has a legal "duty" to compensate the victim of crime. Of all the issues disputed by the writers on this subject, this is the most hotly debated. The state dut theory was probably first expounded by Jeremy Bentham:

> "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, and which ought to protect them, owes them, however, an indemnity, when its protection has not been effectual." 16

The reasoning of the advocates of this concept is as follows Individuals traditionally possessed the right of self-protection; that right has been abrogated by the state, which has substituted its law enforcement apparatus for the traditional one of self-help and has also collected tax dollars to support this apparatus; in so doing the state has undertaken the protection of the public against crime; when an individual is criminally attacked the state has failed its duty of protection and consequently should be liable for the results. "Since the state demands that its citizens go unarmed in the streets, it should not disown responsibility for lapses in the protection it affords."[17] Buttressing this line of reasoning are the additional arguments: that the state has allowed the social conditions which produce crime to continue to exist; that inherent risks in probation and parole produce additional responsibilities for criminal behavior; and that the criminal, where apprehended and convicted, is usually deprived by the state of his capacity to pay any civil judgment which the victim might obtain.

The opponents of this theory point out that while the state has regulated the right of self-help, it has continued to recognize self-defence in the proper circumstances. Such regulation has in fact reduced the incidence of violent crime and therefore has contributed to each citizen's security. Furthermore, the state never purported to give an absolute guarantee of protection, which is obviously an impossibility. The social and technical sciences have yet to equip law enforcement agencies with sufficient tools and knowledge to completely prevent crime. Nor have the citizens been

willing to allocate the necessary funds and powers. Thus the critics of this theory conclude that it is fallacious and dangerous:

> "Fallacious because we do not believe that the state has an absolute duty to protect every citizen all the time against other citizens: there is a distinction between compensation for the consequences of civil riot, which the forces of law and order may be expected to prevent, and compensation for injury by individual acts of personal violence, which can never be entirely prevented. It is true that nowadays the public generally are prohibited from carrying weapons to protect themselves, but it does not follow that the State has assumed the duty of protecting them everywhere and in all circumstances: the most it has done is to create an assumption that it will provide a general condition of civil peace. Dangerous because acceptance of public liability for offences against the person could be the basis for a demand for acceptance of liability for all offences against property." 18

The British Government categorically rejected the state duty argument,[19] as did New York,[20] but it appears to have been accepted in Saskatchewan.[21]

I would respectfully agree with the remarks of Robert Childr when he stated that, "Society cannot be charged with primary responsibility for crimes; that would deny freedom of will. Primary responsibility must ordinarily be assigned to the injuring criminal, and he should be required to repair the damage."[22] However, it is clear that primary responsibility is of little value to the victim, partly as a result of the states imprisonment of the offender. Childres thus contends that, "there are ... degrees of responsibility just as of causation, and the party next most responsible is surely the state...."[23]

It is certainly arguable that the state is under a duty to compensate a victim where the crime would not have occurred but for a direct and provable failure in police protection. "The gravamen of this argument is most akin to the reliance theory in tort law. That is where A places himself in such a position that B is forced to rely upon A for the provision of protection, A incurs a duty to protect B.

A similar provision exists in contract law."[24]

This duty has in fact been recognized in certain circumstances. Thus compensation is payable to a victim of a riot in England under the theory that the police forces ought to be able to prevent such occurrences.[25] In the United States, when a key witness in a prominent trial was murdered by persons unknown after the withdrawal of police protection, his dependents were allowed recovery in a negligence action against the City of New York; the New York Court of Appeals held that the City had breached a special duty owed to the deceased, which duty was created by actual or constructive notice of potential injury.[26] The Irish Government has, for 100 years, recognized an extensive liability to victims of crime under the general theory that "policing to maintain public order is a communal responsibility; so compensation for injury resulting from the breakdown of public order is considered likewise to be a communal responsibility."[27] Thus, when a failure in police protection is clearly a major cause of the accident, there is a strong argument that the state is under a "duty" to compensat the victim.

However, to advocate that in every crime the state is, after the offender, the "next most responsible party" and therefore liable for the damages if the party most responsible defaults, is surely going too far. State liability, in the sense of fault-responsibility, can, I submit, extend only to the limited number of cases where there is an actual failure in police protection. I reject the concept of a contract between state and citizen whereby the citizen forsakes his right of self-protection and pays tax dollars in return for a guarantee of complete police protection.

All proposals for state compensation hitherto put forward have allowed recovery to the victim whether or not there was any failure of police protection. The existence or non-existence of police negligence is not in the least relevant. It is therefore obvious that the state duty argument does not in itself justify victim compensation.

In addition to the breakdown of police protection, there is another convincing reason why the state should render assistance to victims of crime. In many cases the offender will be incapacitated from paying any civil judgment because of the sentence imposed by the state. Moreover, the criminal-debtor is extended the same protection, such as exemptions legislation, that any other debtor is afforded.

6. Need of the Victim

The most frequent justification put forward is that of basic public sympathy for the victim of crime. Since the victim is often placed in the position of possible destitution without any culpability on his part, society ought to step into the breach. The argument is expressed differently by different writers, but the meaning is essentially the same;

> "It must first be admitted that the present plight of the victim of crime is far from satisfactory. The victim's right to common-law damages for the tort of the criminal is all but negated by the general impecuniousness of the criminal. The end result is that in the vast majority of cases the victim must likely bear the cost of curing the injurious result of the crime and must be content with the emotional satisfaction that can be afforded by the punishment of the offender ... The community has a moral obligation to help those who are victims of misfortune, and to maintain a standard of well being for its citizens." 28

And in the words of another author:

> "The real and vital rational for victim compensation rests on a moral, realistic concern for the welfare of the injured citizen. Society has clearly admitted a collective responsibility for costs of sickness, industrial injury, and old age; it has in these instances developed a machinery of compensation. Our society compensates veterans injured outside our borders but not citizens victimized at home. Though the veterans may have been injured in defence of this society, the sick, the industrial injured, and the old are not incapacitated in defence of the society. Ecological isolation is difficult in a mobile society. Should not compensation costs for crime victims be likewise spread out among all potential victims; the state has a definite interest

> in protecting and maintaining certain standards of well being for all its citizens. Social legislation such as veterans compensation, workmen compensation, and a whole range of public welfare programs are the combination of democracy's conviction regarding responsibility for human welfare. Certainly common sense calls for grouping together for mutual protection through a system of shared risk in the area of victims criminal violence. This is one problem in social relationships which seemingly, in the light of man's ingenuity, should not have defeated him. This is one welfare gap that should be bridged. We cannot, in our abundance, do as our predecessors and plead poverty." 29

Thus the argument is based on a few immutable facts; criminal injury can be devastating to the victim, involving a loss of life or the ability to earn livelihood; the incidence of risks to the individual is not great and the populous cannot therefore be expected t insure itself; the chances of recovery in a civil action are extremely remote since the offender may not be apprehended and, if so, would likely be indigent.[30] These facts are so compelling to some that they rest their entire argument for victim compensation on them. For example, one writer has contended that "little would seem to be achieved by searching for some abstruce legal or social peg upon which to hang a compensation scheme." Rather, "the most satisfactory justification for such a scheme is a purely pragmatic one - that on humanitarian grounds the state should provide assistance to victims of crimes of violence, just as it helps the victims of other forms of misfortune."[31] And, as eminent a jurist as Rubert Cross has stated, "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 that practical difficulties were not too great."[32]

This argument carries a great deal of moral suasion, but when reduced to cold logic it raises a number of problems. If one bases the argument for compensation totally on the need of the victim, then one is applying the same criterion that is adopted in welfare cases. Logically the victim of crime should then be administered in the same manner as other welfare cases, receive the same subsistence income, and be forced to submit to a means test.[33] Why should the need

of the victim of crime be recognized to a greater extent then the need of other unfortunates of society, such as the poor or disabled? And even admitting that a victim of sudden external forces over which he has absolutely no control stands in a special category, how does one differentiate the victim of crime from the victim of accidents? Finally, if one can justify special recognition to the victim of crime, why is it that only victims who have suffered personal injury or death are considered compensible, when properly loss may be just as devastating in certain circumstances?

It is submitted that these important questions are all answerable and an attempt is made elsewhere in this paper to deal with them. The answer cannot, however, come exclusively within the framework of the "need" argument as the writers quoted above attempt.[34] The great public sympathy which the victim of crime engenders is certainly an important factor in the formulation of a state compensation scheme and is in fact the basic motivation underlying the advocation of such a program. While need alone cannot justify state intervention, "the desire for compensation to victims of crime may represent an example of what Mr. Justice Holmes called 'the felt necessities of the time,' a public sentiment no less persuasive for being imperfectly articulated."[35]

7. Existing Legal Analogies

Proponents of the scheme also find support in the "existing legal analogies" of workmens' compensation legislation, strict liability and unsatisfied judgment funds.

Workmens compensation represents a significant departure from the individualistic concept of fault liability. A motivation for such a departure lay in the recognition of the inevitability of industrial accident and the restrictions upon the right of injured employees to recover from their employer. And there is "a ready comparison between the employment conditions which stimulated the movement of workmens' compensation and the environmental conditions cited by the proponents of criminal violence compensation."[36]

A given amount of criminal violence can be regarded as inevitable in modern industrial society, and the victim of such violence is at least as frustrated in attempts at recovery as was the employee.

The basic purpose of workmens' compensation was risk-distribution, that is, to remove the cost of inevitable accidental injury from the worker, who could least afford it, and to re-distribute risk throughout the entire industry, where it could be easily borne as a cost of production. Similarly the basic purpose of victim compensation is to spread the loss throughout society.

However, there is one flaw in the analogy. The basic justification for workmens' compensation is that "since the employer benefits economically from the work of the employee, it is more just that the employee should bear the cost of the injuries than to impose the burden upon the worker."[37] There exists an essential nexus between the potential victims and the group which is to bear the loss. No comparable relation exists, however, between the public as a whole and a victim of crime. "There is no common undertaking in which the vic and the state were participating and as a result of which the injury occurred. Moreover, there is no measurable profit by the state from the endeavors of the victim as there is by the employee."[38] However, one proponent of the scheme has made the following attempt to provide the nexus between the state and victim:

> "One primary state interest is in the furtherance of social peace and tranquility. To this end laws have been created which limit the right of the citizen to unrestrained self-protection and vengeance. To the extent that the citizen abides by these laws, he is benefiting the states interest in social peace. It would unduly belabour the analogy to label the citizen an employee of the state. Nonetheless, the analogy between the relation based upon state benefit and the relation based upon employee-employer can be provided. In the one case, the benefit is increased law and order; in the other it has increased profits. If as a result of such a relation the citizen is injured by a socially inevitable criminal act for which civil recovery is frustrated, should he not also be entitled to statutory recovery based upon principles

> comparable to those supporting workmens' compensation? Since every citizen shares in the benefit of social peace, the justification for assessing everyone for the loss through the inevitable crime is apparently the cost of inherent failures in the system." 39

Notwithstanding this valiant attempt, it must be admitted that the analogy between victim and workmens' compensation is less than perfect. However, the analogy possesses considerable merit, particularly in the common application of the concept of risk-distribution.

The strict liability analogy is even more strained. When a culpable party cannot be found to redress an injury, the law in certain circumstances imposes strict liability on one party as an instrument of social control. The justification for imposing liability without fault may be that the actor was engaged in extra-hazardous activities which, even in the absence of negligence, create an undue risk to third parties (Rylands v. Fletcher), or simply that the actor is in the best position for bearing the loss (e.g. Manufacturers' Liability). A major policy consideration is that of "peril-control", which means that he who has control over an instrument capable of rendering great harm must be forced, by the use of strict liability, to take extra precautions in its use.

The relevance of strict liability to victim compensation lies in the applicability of the concepts of risk-distribution and peril-control. "Clearly, the state can more easily distribute the loss incurred by a victim. Also, requiring a state to do so would provide an incentive for it to improve its law enforcement system and its penal process so as to prevent further offences."[40]

Obviously the analogy is hampered by the lack of the sufficient nexus between the victim and the state. To term the state operation of the law enforcement machinery as an "enterprise" comparable to an individual's operation of an extra-hazardous activity is manifestly fatuous. However, the analogy does illustrate the steady erosion of the rugged individualism of the nineteenth century

by the extention of strict liability to meet the needs of a modern society.

The most applicable analogy is that of unsatisfied judgment statutes. "Here is perhaps the most direct effort consciously to provide for compensation when the party at fault is unable to pay."[41] This plan has many common characteristics to the victim compensation scheme herein advocated. The potential victims include virtually all members of society, whereas the offenders are a much smaller group in scope. The risk to any particularly individual is not large, but that a certain number of citizens will be severely maimed or killed is a certainty. Recovery is allowed directly against the fund if the actual wrongdoer is not apprehended. Deductions are made according to the proportion of responsibility of the claimant.

There are also differences, of course, between the two compensation schemes. Where the offender is known, a personal judgment must be obtained against him before recovery against the motor vehicle accident claims fund is allowed. This is eminently justifiable because defendants in motor vehicle claims are usually insured; the general impecuniosity of criminal defendants demands the exclusion of any such requirement in victim compensation. The main difference lies in the method of financing the respective schemes. The Unsatisfied Judgment Fund is financed by a special tax levied directly on those who comprise the group of potential offenders - the motorists. It is obviously impossible to define the group of potential criminal offenders, and since the group of potential victims comprise all members of society, the only feasible method of financing is by a tax from general revenues This conclusion is buttressed by the low cost of victim compensation.

The analogy between the unsatisfied judgment fund and victim compensation is so close that the probable reason the former was enacted long before the latter is the greater social need, due to the much greater frequency of motor vehicle accidents.

B. ALTERNATIVES TO A COMPENSATION SCHEME

Thus far I have been concerned with the issue whether state intervention in this area was justifiable, and have concluded that it was. Before completely endorsing such a program, however, it is first necessary to determine whether state intervention in the form of a compensation scheme is the best method of ameliorating the plight of the victim of crime. The two alternatives most commonly suggested are restitution by the offender and private insurance.

1. Restitution

At the beginning of this paper, a number of historical references were made to the victim-offender relationship and the conclusion drawn was that restitution was a common denominator of most ancient legal systems. The victim's claim to restitution was, however, eventually usurped by the state as it broadened its claims against the offender. The victim was, generally speaking, reduced to bringing a civil action in debt, which has been demonstrably ineffective.

The concept of restitution does still exist and a book[42] has been written comparing this institution in various countries throughout the world.[43] The author, Steven Schafer, has repeatedly adv ed the extention of the concept in order to give the victim of crime indemnification. He has made a particularly persuasive case by advocating that restitution can be used as one of the methods of dealin with a prisoner in the same sense as rehabilitation, treatment and corr tion. The offender, says Schafer, should be made to understand that he injured "not only the state and law and order, but also the victim; in fact, primarily the victim and through this injury the abstract values of society."[44] In the words of Margaret Fry: "To the offenders pocket it makes no difference whether what he has to pay is a fine, costs or compensation. But to his understanding to the nature of justice it may make a great deal of difference."[45] In many cases "payment to the injured party will have a stronger inner punishment value than a payment of a sum to the neutral state."[46] Thus it is

alleged that restitution may serve the best interests of both victim and criminal, and consequently society. It is notable that this viewpoint was adopted in a major White Paper of the British Government in the following terms:

> "It may well be that our penal system would not only provide a more effective deterrent to crime, but would also give a greater moral value, if the concept of personal reparation to the victim were added to the concepts of deterrence by punishment and of reform by training. It is also possible to hold that the redemptive value of punishment to the individual offender would be greater if it were made to include a realization of the injury he had done to his victim as well as to the order of society, and the need to make personal reparation of that injury." 47

A study has been done in the State of Florida[48] in an attempt to determine what effect restitution would have had on the rehabilitation of offenders. Although the research project was limited in scope, Schafer has concluded that it indicated that "the overwhelming majority of those who committed a form of criminal homicide wished they could make some reparation of the wrong they committed. Among those who were sentenced for aggravated assault, a much smaller proportion (slightly over one-half) feel obliged to do something for their victim while the others suggested that their debt w only to the state...."[49]

Critics of the proposal allege it would not be in the best interests of criminal justice;

> "The object of punishment by the state is the public good and the best punishment is that which is most conducive to the good of the public. But it is by no means true that the good of the public always coincides with the good of the injured person, and if we inflict punishment solely or mainly with the view to the interests of the latter, we are pretty certain to miss doing what is best in the interests of the former." 50

To this argument Schafer might well reply that restitution does not mean that the victims interests are "solely or mainly" given consideration. Rather the concept involves the best interests of both parties, the victim in obtaining redress for his injuries, and the criminal in being effectively rehabilitated.

A perhaps more weighty argument is that "if incarceration of offenders was effected to force restitution then criminal responsibility would be attaching, at least in some degree, according to the amount of damage done rather than the degree of fault or mens rea .... These solutions in a final analysis would amount to imprisonment for debt."[51]

The opponents also foresee evidentiary and procedural problems arising from the combining of civil and criminal liability in the same trial.[52]

The basic premise that restitution would have a rehabilitati effect on the criminal has been questioned by one writer in the following terms:

> "It is useless to hark back to the barbaric period and expect the criminal himself to make good the loss incurred by the individual victim of his misdeed. The single concept of settlement whereby the wrongdoer was subjected at one and the same time to a penalty and obligation to make compensation is no longer feasible. It was a simple principle which worked in a simple society, where family solidarity came to the assistance of the malefactor and alleviated his burden. Blood relations made contribution in return for peace and quiet to themselves. Nowadays criminal courts cannot be made collecting agencies for victims of crime, while only in comparatively few cases would the passing of a sentence benefitial to them help the criminal to reform and rehabilitate himself. Even if it were true that 'the origin of the present day fine is restitution' and that 'fines serve as a source of income to the state', it is absolutely impractical for any criminal tribunal to afford relief for the loss sustained by the injured party." 53

The Justice Committee has also spoken strongly against the broadening of restitution without radical reform of the present penal system. "Far from advancing the rehabilitation of the offender, compulsory reparation to the victim might goad the offender into committing further offences, especially if he considered the victim to be unworthy of compensation. There is also the possibility that an orde for compensation against an impecunious offender might encourage him to steal in order to meet his obligations to the victim."[54] Moreover, "as a mother of policy the State is concerned not only to punish offenders but to train them to be better citizens in the future. This policy is unlikely to be successful if the State, by compelling the offender to make full reparation, renders his return to society more difficult and burdensom than it is at present."[55]

It is not the purpose of this paper to adjudicate on the abov controversy. Restitution is in itself an important and complex subject calling for a detailed study into the effects on criminals and on the administration of justice. I am concerned with this proposal only insofar as it is advanced as an alternative to a state compensatior scheme and, whatever its merits, the restitution proposal cannot be a complete alternative to state compensation. It can be of no assistance whatever to the victim where the criminal is not apprehended (or acquitted) and this constitutes a distressingly large percentage of criminal offences. Moreover, where a convicted criminal was impecunious the state would have to pay a substantial portion of the award. No matter how large prisoners' salaries are made, they could not meet very large damage awards. Thus even if a restitution plan were to be adopted, a state compensation plan must exist contemporaneously. There is the further consideration that since the opponents of the restitution concept are many, it may never come to fruition. The needs of the victims of crime are urgent and it is preferable to assist them in the most expeditious way possible.

Furthermore, the two plans are not mutually exclusive. If it was later decided that restitution was desirable, it could be

superadded to state compensation by subrogating the state to the rights of the victim against the offender. In this manner, the needy victim could have a quick and sure remedy, whereas the rehabilitative benefits of the restitution program could be achieved at the state's expense. In any event it would not be in the interests of crime victims to await the results of a continuing dialogue over restitution. It is therefore submitted that restitution is not a realistic alternative to a state compensation plan.

2. Private Insurance

A second conceivable alternative to state compensation to victims of criminal violence would be private insurance.[56] Without engaging in a lengthy discussion of this viewpoint, it is submitted that three reasons in particular compel the conclusion that private insurance is not a realistic alternative to a state compensation scheme.

Firstly, "the chance of being the victim of a crime of violence is probably too slight for the individual citizen to bother to take out his own voluntary insurance policy."[57] That criminal attack will fall upon some members of society can be regarded as a certainty, but the risk to any particular individual is exceedingly remote.

Secondly, the economies of the situation are in favour of a universal, compulsory scheme. "Where a risk is common to all members of society, the administrative costs of large numbers of persons taking out individual but identical policies of insurance would be almost completely wasted. It is far cheaper for the individual and for society as a whole if the state organizes an insurance scheme to cover all its members .... The calculation of the annual cost of the ... risk to each person has been so low (six pence per head of population in England that it can be carried out of general taxation without the complication of special machinery to collect a special tax or contribution."[58]

Thirdly, it appears that "Adequate low cost private insurance is unavailable to many persons, particularly to those who are most likely to be victims of crime ...."[59] Premiums for loss-of-income insurance, in particular, are extremely high. Thus the benefits of private insurance would accrue mainly to those least in need, while failing to compensate those most desperate.

In fact, it has been the utter failure of private insurance to meet the needs of the victim of criminal violence that has necessitated state intervention into the field.

C. ARGUMENTS AGAINST A STATE COMPENSATION SCHEME

It has been previously noted that the proposal for compensating victims of crime has been met with a virtually universal chorus of approbation. Such unanimity is evidence that the arguments which have been forwarded against a state compensation scheme are not really very efficacious, and a closer examination of them supports this conclusion. Gerhard Mueller, the most vehement opponent of the scheme, has termed it "utterly absurd"[59a] and "too fantastic to be feasible"[60] but, neither he, nor his few supporters have succeeded in formulating convincing arguments which would give any legitimacy to such strong opinions.

It has been said that a victim compensation scheme would cost far too much to be tolerable,[61] but this argument does not apply to a scheme limited to compensating only personal injuries. The plans already in operation clearly demonstrate that a scheme which would does not compensate for property loss can be financed at a very tolerable cost to the public purse. For instance, the most generous plan of all, the British scheme, made awards of a total of only £ 880,833 in its first three years of operation[62] - and this in a nation of over 60,000,000 people. Excluding property damage also reduces the fear of fraudulent claims; it would be far more difficult for a person to fake personal injuries than property loss - particularly when each claimant may be subjected to an independent medical examination.

It has also been alleged that there is no basic justification for singling out the victim of criminal violence for compensation.[63] This basic question, which goes to the root of the matter, has been dealt with previously and it has been submitted that there are logical and persuasive reasons behind the proposal, reasons which are buttressed by the massive support which the proposal has met.

Some persons view the scheme as another example of "government paternalism,"[64] and thus oppose it for the same reason that all social security measures are opposed. Thus it is said that to support victim compensation as another aspect of social security could "lead us to an abandonment of all notions of individual responsibility and a resort to complete dependence upon government paternalism. The sociological decadence that could come from that kind of thinking might be far worse than the economic consequences."[65]

Such reasoning is, of course, antiquated and need not be seriously considered. Moreover, its applicability to victim compensation is obviously of a much lesser degree than to other types of social security measures.

On a more serious plane, the plan has been opposed because of the fear of the victim's responsibility for many of his own injuries amounting to "perhaps one-fourth of all violent crimes".[66] The incidence of victim responsibility is certainly cause for concern, but not a reason for refusing to assist the 75% of victims whose behaviour was impeccable. One may well imagine the social dislocation which would be caused if automobile insurance was abolished because many of the victims were themselves guilty of negligence. Rather, the problem is one of determining those cases in which a victim has been partially responsible for his own injuries and making appropriate reduction in the compensation award. Probably not all victim-responsibility will be detected, but this is surely an acceptable defect in the scheme - one which must be born to do justice to innocent suffering.

It has also been contended that compensating victims will have an undesirable effect on the crime rate in that victims will become more careless of their own safety and criminals more callous towards their victims. With respect to the former, it is submitted that it applies more to property damage than personal injury. One is unlikely to knowingly risk grievous bodily injury just because of the existence of a compensation scheme. The fear of criminals becoming more callous towards their victims is best answered by Rupert Cross:

> "The callousness of many criminals is notorious. Might it not become even greater, if they knew that their victims would get compensation from the state? That is not the kind of thing that can easily be proved or disproved by evidenc and I am relying on nothing more than intuition when I say that I doubt whether many criminals pay attention to the extent of the injury they inflict, or the misery they are likely to cause, when committing a crime of violence." 67

Another concern of the gainsayers is that the victim, if always compensated, will refuse to cooperate with the prosecution of the offence, "particularly so in those instances where the offender ma have refrained from opposing, or, indeed, he may have actually assesse it, the victim's claim for violent crime compensation. Witness what happens now in prosecutions of motorists in instances where the victim have been financially compensated by the insurer of the motorist. The incentive to see that the interests of criminal justice are served no longer lingers in the victim's mind."[68] But while this may be a danger, it is not a substantive argument against the scheme. It is simply a procedural matter, one of insuring that the victim does render cooperation as a condition of compensation, a matter discussed subsequently.

Finally it is said that the criminal trial might be prejudi by the compensation scheme. There is initially the psychological effec on the criminal court of a compensation award having been made. While this might not be large in the case of the judge, it might well influen the jury to know that another tribunal had already determined that a crime had been committed. But this is in essence a matter of procedure either the compensation hearing should be postponed until after the criminal trial is resolved, or the results of the compensation h

should be kept secret until the trial is completed. The procedural matter is considered in Part IV.

The second, and most dangerous psychological effect is that which would play on the mind of the victim. He might well regard his entitlement to compensation as contingent upon a conviction being obtained and this could influence his testimony, particularly where the compensation hearing had not yet been heard. In response to this very serious problem, the Board, or the Crown Prosecutor, must make it very clear to the victim that his entitlement to compensation is not conting upon a conviction - that it is up to the Board to satisfy itself on the balance of probability that a criminal offence has been committed and such decision will not be predetermined at the criminal trial. However even with this safeguard, there remains the inherent possibility of influencing the victim's testimony. It is submitted, however, that this danger is a tolerable one which must be borne. The victim of crime has long been prejudiced by the public interests in the criminal, as previously noted, to continue to delay the victim's claim simply because of the slight possibility of prejudice to his culpable attacker is surely to incorrectly weight the competing claims on the scale of justice.

Thus it is submitted that none of the arguments which have been hitherto propounded are of sufficient weight to cause serious concern. Some are limited in application to compensation of property damage; others are mere difficulties in administration which can be effectively dealt with. The basic weakness of the case against victim compensation and the minimum of difficulty which such a scheme will cau are perhaps further reasons for its adoption.

D. CONCLUSIONS

It is therefore submitted that compensation to victims of crime is a legitimate and desirable area for state intervention for the following reasons, of greater or lesser cogency:

1. Modern society has usurped historic prerogatives of the vic in recovering from the offender, and in failing to replace such prerog tives with alternate remedies has left the victim in dire straights.

2. Adequate compensation would mitigate the victim's desire for revenge, thereby reducing the crime rate and easing the strain on law enforcement agencies.

3. Compensation to the victim would appease that portion of pul opinion which, observing the unfortunate position of the victim, advocat harsher treatment of the offender.

4. Compensation would also lead to an improvement in law enforcement in that citizens would be encouraged to lay criminal charges volunteer evidence, and assist in crime prevention.

5. The state is under some duty to compensate victims where the offence results from failure in police protection. Also, by imprisoning the offender and extending him the protection of exemptions legisla the state often renders him unable to pay civil judgments obtained by the victim.

6. The position of the victim of crime is often one of utter destitution and arouses great public sympathy.

7. Existing legal analogies of workmens compensation, strict liability, and unsatisfied judgment funds for motor vehicle accidents have established many of the principles upon which victim compensation plans would be based.

8. Given the undeniable need of the victim of crime, and the persuasive reasons why his plight should be given special attention, there is manifest need for state intervention due to the complete lack of alternative remedies; moreover, no serious difficulty can be envisaged in a state compensation plan.

As stated by B.J. Cameron in commenting on the New Zealand pilot scheme:

> As to the desirability of the measure there has been no disagreement and there is likely to be none. Indeed such a chorus of approbation has gone up that one wonders why nothing was done long ago. The advantages of the act are twofold. There is the material benefit from the awards of compensation that may be made by the tribunal, and in addition there is the psychological effect on the community produced by the very fact that there is such a scheme in existence. While this aspect is of course impossible to measure it may well be of the greater importance. 69

II. WHEN WILL COMPENSATION BE AWARDED

There are four problems which must be resolved in order to specifically define the fact situations in which the compensation plan will be operative. Firstly, which particular criminal actions will be included within the scope of the scheme? Secondly, what criminal offences which would otherwise qualify are to be specifically excluded from the scheme for policy reasons? Thirdly, what injuries flowing from a given criminal act will be compensated? And fourthly, what demands will be made upon the victim himself as a prerequisite to recovery? These problems will be considered in turn.

A. DEFINITION OF "CRIMINAL OFFENCE"

1. Schedule or General Definition

Some conception of "criminal offence" must be introduced for the purposes of the scheme. One school of thought supports the incorporation of a schedule of crimes, while the other prefers to leave the matter less specific. The advantages of the former, adopted in New Zealand and Saskatchewan, are certainty and intelligibility. Justice supported this viewpoint for the following reasons:

> (a) it would reduce a number of occasions when an application to the courts to determine whether a claimant was a victim of a crime of violence would be necessary;
>
> (b) less time would be expended in arguing points of law during the adjudication of claims, and the scheme would be more intelligible to persons who might not be familiar with the more abstruse principles of statutory interpretation;
>
> (c) a schedule would have the principle advantage that the category of crimes of violence could be extended or restricted by Order in Council without destroying the main structure of the definition;
>
> (d) it would avoid the need to provide for the express exclusion of certain offences which might otherwise be included in a definition in general terms;

(e) it would help to reduce the number of fraudulent claims - which could never be entirely eliminated. Dishonest claimants would have greater freedom from detection if they could shelter under the vague words of a general definition.

(f) ... a schedule of specific offences would make it easier to reach a prompt decision on a claimant's eligibility for the benefit. 69

The advantage of leaving the determination of which particul crimes will give rise to compensation up to the board itself is maximum flexibility. The Harvard Law Review supported this approach:

> The British avoided one of the weaknesses of the New Zealand plan by not specifying an exclusive list of crimes ... Listing of crimes in advance is a specially undesirable for a new program, since not all potential causes of personal injury can be anticipated. Furthermore, listing would lead to persistent argument over the precise category for various crimes, a result alien to the spirit of the program. Of course, some catagorization may develop if the board comes to decide that claims arising out of certain types of crimes ordinarily require greater or lesser security. 70

One writer had advocated a compromise solution: no schedule would be attached to the act itself but the board would publish a list of specific crimes:

> A compensatory statute should provide a method for determining what crimes should be covered. As previously noted, this could be accomplished by using the term "crimes of violence" and letting the courts interprete as they see fit, or by specifically listing the crimes. It has been suggested that listing the crimes has the advantages of intelligibility, avoidance of interpretive litigation, and easy amendment. However, these advantages are probably illusory, since even with a list litigation will arise over the meanings of the included crimes, and amending the statute may prove to be no easy task. A better method is to have the compensation awarded by a special tribunal empowered to publish a list of specific "crimes of violence". In this way the agency immediately concerned could amend the list easily and yet provide a maximum of certainty and intelligibility. 71

In fact, the British Board made a plea in its First Report for a similar type of system. Doubting that a comprehensive list of offences which would justify a claim by the victim could ever be completed, the Board stated, "It may well be that a schedule of offences, with a discretionary power to the Board to award compensation in cases not specified in the schedule if they considered the justice of the case required it, would be the best solution. If we were to extend the scope of the scheme too far, we could be corrected by the Government."[71a]

In Canada Parliament is given the constitutional power over criminal law and the Criminal Code therefore defines all "criminal offences". Of course, there are many quasi-criminal offences defined in provincial statutes but these are necessarily regulatory and not cri in nature. Thus the necessity for a schedule is not so prevalent in Canada as it would be in other jurisdictions where there are a number o different statutes defining crimes. It is thus suggested that the scheme provide for compensation for injuries which are attributable to any act which is defined as a criminal offence by the Criminal Code. Such a limitation would exclude the quasi-criminal offences created by provincial and other federal statutes and will thus make the scheme narrower in scope than the British scheme. In the latter, for instance compensation has been awarded in the following cases:

1. An elderly woman was walking in a public park when she was knocked down by a cyclist, her skull was fractured and she died. The cyclist was convicted of riding a bicycle in the park contrary to a bylaw.

2. Three youths were sky larking in an escalator in a London underground. One of them caused a lady walking up the escalator to fall, and in effort to save her, the applicant himself fell and was injured. The youths pleaded guilty to charges under the bylaws. 72

Awards were made to the applicants in the above instances. However, these actions would not appear to qualify as Criminal Code offences and would not therefore be compensible in Canada. Exclusion of such minor offences is justifiable: for one thing, the scheme must be delimited to prevent recovery for mere accidents or non-criminal negligence; also, the civil action is likely to be more successful since the offender will obviously not be sent to jail, and would not normally be as impecunious as the average criminal offender. The definition of assault in the Criminal Code is extremely broad and should encompass most offences which ideally should be included within the scheme.

Conversely, allowing any offence in the criminal code as a basis for compensation would be very broad in that many non-violent crimes would be included. However, "personal injury may arise from a great variety of offences, including crimes against property, as well crimes against the person"[73] and it is thus suggested that the inclus of all Criminal Code offences subject to the specific exclusion of motor vehicle offences achieves the best combination of flexibi and certainty.

2. Relevance of Offender's Guilt

A second aspect of the definition of "criminal offence" for the purposes of the scheme is the relationship between the offender's guilt and the states liability for compensation. Is the victim's claim to be contingent upon a crime having been committed for which a conviction could be obtained? It is clear that a conviction will not be a prerequisite to recovery for if the offender is not apprehended, or if he is acquitted due to a flaw in the prosecution's evidence, the board must be able to award compensation if it is satisfied that a crime was committed. But there will be instances whe no crime is committed due to the absence of the requisite guilty mind, but where compensation is none the less desirable. If an offender had no mens rea due to insanity, lack of capacity (i.e. where he was below t age of criminal responsibility), drunkness, unconsciousness or some oth reason, meaning that no "crime" was committed, is the victim to be deni recovery? Injuries from these "non-crimes" were originally held as no

compensible in Great Britain. Sharp criticism of this decision resulted in a statement in the House of Commons by the Home Secretary: "It has not been the government's intention that injuries should be outside the scheme solely because they were caused by someone who, because of age or insanity or other condition, could not be held responsible under the criminal law."[74] Thus the test now applied by the British board in such cases is whether the board is satisfied on a balance of probabilities that: (1) The act which caused the injuries was done deliberately and not accidentally; and (2) If the act had been done by a person of full age, he would have been guilty of a criminal offence.

The deficiency in the British approach is that it provides for only those incidents where the "offender" is below the age of criminal responsibility. It is therefore suggested that either the New Zealand or New York approaches are preferable. Section 17(2) of the New Zealand statute states:

> For the purposes of this act, a person shall be deemed to have intended an act or omission notwithstanding that by reason of age, insanity, drunkeness or otherwise he was legally incapable of forming a criminal intent.

The New York statute includes this concept within the definition of crime itself. Section 620(3) provides:

> 'Crime' shall mean an act committed in New York State which would, if committed by a mentally competent criminally responsible adult, who has no legal exemption or defence, constitute a crime as defined in and prescribed by the penal law ...

3. Onus of Proof

Since the victim is assuming the role of claimant before the compensation board the onus of proof should be on his shoulders but it a question as to the degree of onus which he must discharge to entitle himself to compensation. In many cases, such as where the offenders were not apprehended, it may be exceedingly difficult to establish whether a crime has in fact been committed. The board may have to proceed solely on the evidence of the person claiming compensation.

Given the varying nature of circumstances in which crime can occur, and keeping in mind the basic purpose of the scheme, it is preferable to al the board to award compensation when they are satisfied on the balance probabilities that a crime has been committed. This may lead to some awards in undeserving or fraudulent cases but I suggest that the number of these will be far less than those meritorious claims which would be excluded by the application of the greater criminal onus. Section 202 of the Harvard Model Act states "The applicant shall have the burden of showing it more probable than not that he has satisfied the requirement of this act, except Section 202" (Section 202 provides that compensatio not be payable when the applicant has committed, provoked or aided in the commission of the compensible crime -- thus the victim does not have to disprove his own responsibility).

B. WHAT OFFENCES SHOULD BE EXCLUDED?

For policy reasons it is necessary to specifically exclude from the scheme certain types of crime which would otherwise be compensible under the above definition.

1. Property Offences

It has already been submitted that the definition of "crimin offence" for the purpose of the scheme should include all criminal code offences, which of course includes many crimes against property. This was felt necessary to prevent the exclusion of personal injuries which resulted from crimes mainly directed towards property. For instance, arson is directed at property but can easily cause substantial personal injury or death. Massachusetts has stated that to qualify for compensation the criminal action must involve "the application of force or violence or the threat of force or violence by the offender on the victim".[75] It is submitted that this definition is too restrictive and that the one previously advanced is preferable.

However, while property offences are to be included, propert damage should not be compensated, whether the damage results from viole or non-violent crime. This viewpoint is more conveniently elaborated under the section dealing with the types of injuries which will be compensible, infra.

2. Intra-family Crimes

A question which has been the subject of considerable controversy is whether crimes committed by one member of a family again the other should be included within the scheme. Most jurisdictions (Great Britain, New York, Saskatchewan and Massachusetts) have totally excluded all such offences; New Zealand's approach has been to include them but to preclude recovery for pain and suffering; Harvard's Model Act does not limit recovery in any way whatever.

In the White Paper introducing the British scheme the justifications put foward for excluding family offences are "the difficulty in establishing the facts and insuring that the compensation does not benefit the offender."[76] With regard to the first possibility Justice has pointed out:

> Many crimes of violence arise out of family disputes. Although the possibilities of collusive claims for compensation may be thought to be high, we do not think that this type of case presents any greater difficulty in establishing the exact circumstances of the offence then would exist in the case of an attack by a stranger of the victim in an isolated place. In both cases there would usually be no independent witnesses. In practice, complaints by a member of the offender's household would only be made in serious cases of unprovoked assaults. Furthermore, the fear of prosecution would deter people from making collusive claims. 77

It might be added that the necessity of laying a complaint and cooperating in the prosecution of the crime would virtually preclud any possibility of a collusive claim.

The second argument - the risk of benefiting the offender - is also unconvincing. In the case of serious crime, for instance, a jail sentence would preclude any chance of the offender sharing in the benefits. Moreover, it seems unjust to severely limit the amount of compensation payable to a victim simply because his assailant was a member of his family. An unexpressed reason which is probably in the minds of advocates of such a limitation is the presumption of substantial victim-responsibility. For instance, when a wife is assaulted by her husband there is often the suspicion that she had in some way or another, perhaps over a course of years, precipitated the beating. Such victim-responsibility would be extremely difficult to prove, and might tend to turn the compensation hearing into an unpleasant domestic history unless the board refused to investigate events other than those immediately preceding the commission of the crime. Although it is true that the family relationship increases the likelihood of victim responsibility, it is submitted that compensation should be payable to family victims. The existence of a close persona relationship between victim and offender "should not be equated with fault on the victim's part, and the implication that crimes motivated by personal antagonism are for that reason outside the sphere of publi responsibility is of doubtful validity."[78] Total exclusion of all family crimes precludes recovery for the child who is criminally beate by a deranged father just as it precludes recovery for the nagging wif The New Zealand prohibition of recovery for pain and suffering seems t be a reasonable limitation to adopt in view of the greater potential o victim-responsibility.

To prevent any benefit accruing to the offender, the board should be given a discretionary power of paying the moneys to the Public Trustee, to be released only when the Trustee was satisfied tha the victim/offender would not benefit from the award.

3. Motor Vehicle Offences

Most victims of motor vehicle offences already have some method of recovery against an insurance company (which is obliged to pay to the limits of the policy even when the defendent was in breac of a contractual condition and thereby avoided the policy),[79] or against the unsatisfied judgment fund (which can be sued directly when the real defendent is not apprehended).[80] However, there are circumstances wher a victim of a motor vehicle offence will be denied adequate compensatic for his injuries; for instance where the damage exceeds the limits of the insurance policy or the fund, as the case may be. This has led Saskatchewan into including criminal code driving offences (drunken, impaired, dangerous and criminally negligent driving) within the schedu to their act. New Zealand also allows recovery for such offences but both plans have provisions to prevent double recovery.

The British, New York and Massachusetts plans specifically exclude motor vehicle offences "except where the vehicle is used as a weapon, i.e. in a deliberate attempt to run the victim down,"[81] presumably because this type of motor vehicle offence would not be insurable.

It is a question of policy as to which approach is to be adopted. If it were decided that the Saskatchewan-New Zealand approach were preferable, a person injured by a driver committing the offence of "dangerous driving" could recover beyond the limits established by the unsatisfied judgment fund, whereas if only the provincial offence of "careless driving" was involved, there could be no such recovery. Recovery from motor vehicle offences seems somewhat inconsistent with the object of the scheme, which is to compensate for injuries caused by intentional crime. The Harvard Model Act thus adopts the British appro because "automobile cases ... cannot be handled effectively by the procedures of this act because of their number and unique nature."[82]

On balance it is suggested that the British approach of excluding all motor vehicle offences except where the vehicle has been used as a weapon is preferable.

4. Small Claims

The British scheme takes the position that "compensation wil be payable only where there has been an appreciable degree of injury: that is to say, an injury giving rise to at least three weeks loss of earnings or alternatively, an injury for which not less than fifty pounds compensation would be awarded."[83] All plans but New Zealand's have similar restrictions, although the British one is the highest. In New York and Massachusetts the minimum is one hundred dollars or two continuous weeks loss of earnings or support. Saskatchewan has the lowest minimum at fifty dollars. The Harvard Model Act adopts an unique approach: there is no minimum claim but the award is subject to a twenty-five dollar deduction, which is "designed to eliminate the mass of small claims, especially those resulting from minor brawls, which would require an expense and administrative burden out of proportion to their importance or urgency."[84]

One writer in supporting the minimum claim of one week's wages or fifty dollars contends that "the cost of checking the small claims would be the same as checking the larger ones and this would prove financially impractical. It would also place too heavy a work load on the agency."[85]

The converse view is that such a proposal may operate to encourage claimants to file inflated claims and that because most of th victims are from impoverished areas the loss of a relatively small amount of money to them would be a relatively severe blow.

It is suggested that a minimum claim should be adopted, at least in the beginning. After the board has set up its regular operation, it can suggest the dropping of the minimum if it concludes that hardship is being caused in particular cases and that it can administer the smaller claims with a modicum of dislocation. As to the precise figure which would be necessary to establish a compensible claim "there are arguments for making a standard very low, to the point perhaps where th

value of benefit is below the cost of processing the claim, and other arguments for making the standard high, to reflect the fact that the thrust of compensation is to avoid material disaster. The appropriat standard is probably to be found somewhere in between."[86] Although a figure will necessarily be arbitrary, I suggest one hundred dollars o two weeks loss of wages as a reasonable minimal claim.

C. INJURIES WHICH WILL BE COMPENSIBLE

Having defined the particular criminal offences which will a victim eligible for compensation, it is necessary to determine which injuries flowing from such criminal offences will be compensated.

1. Property Damage

It has been stated that "philosophically it is hard to draw any distinction"[87] between personal injuries and property damage. The Canadian Corrections Association has advocated the inclusion of fu compensation for property loss, plus such matters as loss of business during repairs.[88] However, it is submitted that there are compelling policy reasons for excluding property loss fro the scheme.

Firstly, "the far greater frequency of offences against property entitles the state to assume that owners will seek some protec through insurance. The same assumption cannot easily be made in the ca of crimes of violence since the victim's risk is more remote, and the r for personal protection through private insurance is less obvious in a civilized community."[89] In commercial enterprises the premiums can be borne as a normal business expense and passed on to the public as a whc For private citizens, the premiums are not unreasonable, unless the person has a great store of valuables, in which case it is proper to expect him to pay a greater share of insurance costs than his less fortunate neighbors. This is not possible, of course, with state compensation.

Secondly, a person might become careless with his property if he were assured state compensation for any loss sustained, whereas the same cannot be said of his person. A third reason would be the far greater opportunity and likelihood for fraud with respect to property claims.

The fourth, and probably most important, reason is that of cost. Governments are facing massive increases in expenditure to meet the needs of the industrial-welfare state and will quite properly revie with careful scrutiny any new spending program. One main argument on behalf of compensation to victims of violence is that a serious need ca be ameliorated at a low cost to the public purse. Restoration of prope losses would necessitate much greater expenditures to meet a much lesse need. The state would in effect be usurping a large portion of the private insurance industry, which, while having proven unable to adequately fulfill the needs of victims of crimes of violence, has provided reasonable protection againsi property loss caused by crime.

It has been said that, "criminally caused damage to property is never as disasterous as serious injury to the person. Property damage does not destroy a man's only indispensible asset, i.e., the ability to earn a living."[90] This is perhaps an overstatement since some property losses can be much more serious than some personal injuries, but it is surely true that "the community should be concerned more with loss of life and limb than with loss of property."[91]

Notwithstanding the proposal of the Canadian Corrections Association, the exclusion of property damage from a victim compensatio scheme has been almost universally supported[92] and is strongly recommended.

2. Definition of "Victim" and "Compensible Injury"

Assuming that a criminal offence within the scheme has been committed, it is necessary to consider the extent to which the scheme should compensate injuries flowing from that offence. This inquiry has two related aspects: firstly, when is a party to be regarded as a "victim" for purposes of inclusion within the scheme? Secondly, if it is determined that he is a victim, to what extent will he be compensated for injuries which are remote from the crime itself? These two matters are interwoven and will thus be considered conjointly

A few examples might serve to illustrate the nature of the problem:

> 1. V. is criminally assaulted and left prostrate on the highway by his attacker. Subsequently T, an innocent motorist, driving without negligence but failing to see V until the last possible instant, strikes V and causes him further injury. T also loses control of his automobile and strikes another motorist coming from the opposite direction, causing injury to both.
>
> 2. Three youths are sky-larking on an escalator in the London underground. One of them causes a lady walking up the escalator to fall, and in an effort to save her, the applicant himself falls and is injured. (An actual English case previously cited.)

In the first example can V recover for his injury sustained a result of being struck by T? V is an admitted victim of criminal violence, but are all his injuries compensible? And in both examples can T - a person with no direct relationship to the crime - be regarded as a "victim" and, if so, are T's injuries compensible. The familiarity of this type of example no doubt is a consequence of a legal battle which is presently raging over the subject of causation in Tort law. The problems presently dealt with spring from the pages of Wagonmound, Polemis, Novus actus interviens and the "rescuer" cases, and bring to mind those legal shibboleths of remoteness, directness and foreseeabili

It would certainly be advantageous if the whole labyrinthe could be neatly side-stepped with a simple definition for when the scheme would assume responsibility for a given injury, but unfortunately no simplistic approach has yet been discovered. In fact the schemes now in existence simply avoid the problem by throwing it on the shoulders of the board itself. The New York and Massachusetts statutes define "victim" to mean "a person who suffers personal injury as a direct result of a crime".[93] Thus any individual who suffers injuries which the board regards as a direct consequence of a criminal offence can claim compensation. However, no assistance given in determining when a given injury should be regarded as "a dire result" of a crime. Are the injuries suffered by T in the examples ab a "direct result" of the respective criminal offences? Furthermore, n definition is given which would assist the Board in determining the extent to which an admitted victim's injuries will be compensated. Are the injuries suffered from the automobile by V in the first example above "a direct result" of the crime? Or to take another example, suppose a victim of violence is so tormented by his injuries that he attempts suicide but merely succeeds in compounding his injuries. He is clearly a victim of crime, but will his injuries from the suicid attempt be compensated? Neither the New York nor Massachusetts statut offer assistance on this point.

The British scheme prescribes that to be compensible an inj must be "directly attributable to a criminal offence";[94] thus the initial step of determining who is a victim is skipped; every injury which is directly attributable to a criminal offence is to be compensated. This really reduces the two-fold inquiry to a single question but the problems faced are identical. Are the injuries suffered by the claimants in the foregoing examples "directly attributable" to the criminal offences? The British approach really leaves us no further ahead in the determination of this question. It is noteworthy that in the second example above the British board hel that the would-be rescuer of the lady falling off the escalator was entitled to compensation for his injuries.[95]

In other jurisdictions the injury must be "the result of" the crime (Saskatchewan and California) or have "resulted from" it (New Zealand). Presumably a wider range of victims and injuries will be compensible under these plans since the requirement of directness is deleted.

It can thus be seen that not a single scheme to date has attempted to define precisely when a claimant or an injury is too remote from the criminal offence to properly be a subject of compensation. Rather they have left the matter entirely up to the discretion of the compensation board.

Certainly the victim and injury must be sufficiently related to the offence that it can be said that no injury would have been suffered but for the offence; in other words the crime must be a sine qua non of the injury. It is also desirable to limit recovery to those crimes where the crime was a substantial sine qua non of the injury and this is what some legislators have attempted to do by the use of words necessitating directness. Perhaps the best attempt to define the requisite nexus between crime and victim is made by Justice.

> We have considered the question whether persons who are injured incidentally as the result of the commission of a crime of violence should be eligible for compensation, and although it would be difficult to formulate a clear distinction between direct and indirect victims, we think that compensation should be confined to the direct victims of violence. However, we would like to see the expression 'direct victim' given a liberal interpretation so as to include persons who can establish a close relationship between their injuries and the crime of violence, although they may not be the object of an attack in a grammatical sense. We do not think that a person should be ineligible for compensation merely because he is unable to show that his injuries were intended or foreseen by the offender. 96

A similar explanation could be given for the necessary nexus between crime and injury, that is, that all "direct" injuries be compensated, with "direct injury" given a liberal interpretation.

It must be admitted that no satisfactory definition of compensibility has been forwarded in this paper. But, the judicial determination of causation being more a matter of the application of experience than of logic, perhaps it is impossible to formulate any such definition. If this is the case, there is no room for improvement

on the scheme already in existence and the meaning of "victim" and "compensible injury" must be left to the discretion of the Board.

Before happily foreclosing this discussion of causation one further matter must be considered - the "egg shell skull" case. Suppose that an individual was the subject of a minor non violent assault (i.e. no actual contact), but suffered great emotional damage. Or suppose that the victim of a minor violent assault suffered immense physical damage as a result of his peculiar propensities. Of the directness of victim and injury to the crime there can be no doubt, but there may be some question as to the desirability of including such injuries within the scope of the scheme. The law of Torts provides a ready analogy in this regard. One requisite of negligence is the foreseeability of some injuries; if negligence is present then the defendant must compensate the "egg shell skull" defendent for all direc injuries, whether or not they were foreseeable. Applying this analogy to a victim compensation program would mean including a proviso whereby some injury, emotional or physical, must be a reasonably foreseeable consequence of the crime before any award can be made. The application of this proviso will be rare indeed since crimes from which some injury is not foreseeable would be exceedingly rare.

3. Dependents

Where a crime results in the death of a victim, his dependents must be eligible for compensation under the scheme. The only issue is with respect to the definition of "dependents" for the purposes of compensation. The words can be given either a broad definition so as to include every person who was in fact dependent on the victim, in whole or in part, for his support (an apprach adopted in New York), or the definition can be circumscribed to include only "relatives" (as in Saskatchewan and New Zealand), or specific relatives (as in Massachusetts). The latter is an obvious attempt to exclude the

"common-law wife" from compensation. I submit that moral judgments h no place in a scheme designed to relieve the economic suffering of a person whose provider has been the fatal victim of crime. Moreover, the result of failing to compensate such a person would be to force h to seek another similar relationship or become a ward of the state. I therefore submit that the New York approach is not only proper, but more in keeping with modern attitudes and mores.

D. BEHAVIOR OF THE VICTIM

The victim's behavior both at the time of the commission of the offence and subsequent thereto is a highly relevant factor in determining his entitlement to compensation.

1. Victim Behavior Leading to the Crime

It must be recognized that many crimes are partially motivated by the behavior of the victim. A study done in Philadelphia between 1948 and 1952 examined 588 cases of criminal homicides and concluded that in 266 of these cases the killing was precipitated by the action of the victim.[97] In an unpublished research project examining 46 cases of rape in Massachusetts it was found that: 20 of the victims had known the offender before the actual date of the crime; 5 had had previous sexual relations with the offender; 19 had been picked up voluntarily on a street corner or while hitchhiking 32 were met by the offender at a public amusement place, a street corner or cafe; and 31 had been drinking before the commission of the offence.[98] These studies show that behavior of the victim can be a substantial factor in causing a crime. Moreover, "the personality of victims may also be predisposing factors of victimization",[99] as some persons are obviously more prone to criminal attacks than others.

That victims are often part responsible for their own injuries must be taken into cognizance in determining the availability of compensation. One opponent of state compensation has used the existence of victim-responsibility as an argument against having a

victim compensation scheme at all. But surely the fact that a certai number of victims are in part responsible for their own injuries does not justify a failure to assist the deserving claimants. In the word of one writer:

> It is significant to remember that an injury resulting from violent crime is no less an injury because the offence was victim precipitated. Although precipitation may change the legal aspects, the factual situation remains unaltered. Many of us seem born victims, or society has made us such. If 25% of all violent crime is victim precipitated, it certainly is socially more meaningful to compensate the 25% in order to do full justice to the remaining 75% who are blameless than not to compensate at all. 100

In the words of another writer, "surely one should compensate the single masochist in order to do justice to the wholly blameless victim

However, difficulties arise from the fact that the "fault" of the victim can vary substantially in kind. On the one hand his conduct can be a direct and immediate factor in stimulating the criminal behavior of the offender - such as where the "victim" is the loser in a street fight commenced by mutual agreement. On the other hand, the victim's responsibility may be found in character traits and mode of life - such as the prostitute attacked on the streets even without immediate provocation on her part. There may also be circumstances which cause disagreement as to whether the victim should be partially blamed for his own injuries; for instance, those people who regard drinking as intrinsically evil would probably oppose compensating a respectable citizen injured in a barroom brawl, even if it could be shown that he was an innocent bystander.

If the victim's conduct has been a direct, immediate and culpable factor in stimulating the crime, then the assessment of his responsibility is relatively straightforward. The law of contributory negligence provides a ready precedent and deduction can be made according to the board's assessment of the degree of fault. It is clearly desirable to allow partial awards rather than to prohibit recovery in every case where some fault is found with the victim's behavior. The latter would be the Davis v. Mann principle and the

spectre of the beleaguered donkey, only recently eradicated from tort law by statute, would again be raised. Degrees of fault are infinitely variable and it would cause great injustice to attempt to force every fact situation into a single compensation mould.

A more difficult problem manifests itself when considering the extent to which the victim's character and mode of life are to be taken into account. Justice stated, "We also think that the character of the claimant should be disregarded except insofar as it has some bearing on his responsibility for his injuries sustained,"[102] but it is arguable that bad character and a "shady" way of life will usually have "some bearing" on one's victimization. Thus the Working Party took the position:

> [Crimes of violence] are by no means always committed upon honest persons, and where a particular crime arises directly from the undesirable activities of the victim, his mode of life, and the company he keeps, it could scarcely be argued that the State had any moral obligation to compensate him. 102a

On the other hand, it no doubt "is desirable to confine the investigation before awards are made to events surrounding the commission of a crime, as determinations of the circumstances which preceded it would be difficult to make and limits on the scope of inquiry hard to impose."[102b] Deductions for bad character would also lead to prejudice against persons with criminal records who are attempting to rehabilitate themselves.

Such questions do not lend themselves to easy answers, and even if there was general agreement on a metaphysical level, it would be impossible to precisely define all circumstances which would give rise to victim-responsibility. Consequently the matter probably is best left to the discretion of the board by means of a broad provision, such as Section 17(3) of the New Zealand Act:

> In determining whether to make an order under this section, the tribunal may have regard to all such circumstances that it considers relevant, and shall have regard to any behavior of the victim which directly or indirectly contributed to his injury or death.

In addition to making deductions where victim-responsibility was proven, the board could be specifically directed to pay special attention to behavior of the victim where the offence often involves a degree of victim-responsibility, such as, for instance, injuries sustained in fights. This is the approach of the British scheme with regard to sexual offences.

2. Victim Behavior Subsequent to the Crime

As the price for compensation, the state has a perfect right to demand certain behavior from the victim. There should firstly be a requirement that the crime must be reported to the police within a shor period. The English scheme demands that the crimes be reported "withou delay"[103] and in Saskatchewan the requirement is "within a reasonable time".[104] The New York statute also insists that the crime be "prompt reported" and further states that "in no case may an award be made when the police records show that such report was made more than 48 hours after the occurrence of such crime unless the board, for good cause shown, finds the delay justified."[105]

Secondly, it should be insisted the victim cooperate fully i the prosecution of the offence. However, in this regard there is a tim factor. It is in the interests of the victim to have the compensation hearing completed as soon after the event as possible. A basic assumpt motivating the scheme is that the victim is often in dire circumstances and there is thus the necessity for a prompt award. A danger which has been raised is that some victims, having received compensation for their injuries, will subsequently refuse to testify at the criminal hearing. This does not appear to have been a concern of any of the legislatures and there is thus no reference in any of these statutes to such a possibility. The New Zealand statute does provide that the Attorney-General may apply to the tribunal for an adjournment of the compensation hearing on the grounds that the criminal offence is being, or about to be, prosecuted,[106] but this is probably a result of a fear of prejudicing the criminal case by the compensation hearing, which is to the public. Thus it may well be that the fear of a compensated victim being uncooperative with the prosecution is illusory. If it were

regarded as a substantive concern, the best solution may be to immediately pay the most pressing bills of the victim, such as medical expenses, and provide him with a living allowance, while placing the remainder of the award with the Public Trustee. Payment from trust would then be contingent on the victim's full cooperation with the Attorney-General.

Thirdly, full cooperation must be expected of the victim at the compensation hearing itself. He should be compellable to give testimony under oath, with the usual perjury penalties applicable, and to submit to a medical examination before a physician appointed by the board. Full disclosure of documentation should be expected so that a proper determination of loss of income may be made.

PART III

A. PRINCIPLES GOVERNING MEASUREMENT

The most important principles in any victim compensation scheme are those which determine the basis by which damages are to be measured. There is the basic issue as to whether compensation is to be payable only when need can be proven. A second issue is whether the principle of true compensation is to be adopted or whether compensation is to be payable for only pecuniary (i.e. out-of-pocket) loss. Finally, the question of limitations, superimposed to keep the scheme within reasonable economic limits, must be considered.

1. Existing Schemes

The schemes presently in operation adopt widely varying answers to all of the above issues. The principles behind the British plan are stated in the White Paper:

> "Compensation will be assessed on the basis of common law damages, except that: -
>
> '(a) The rate of loss of earnings (and where appropriate, of earning capacity) to be taken into account will not exceed twice the average (according to the age and sex of the victim) of industrial earnings at the time that the injury was sustained;
>
> (b) There will be no element comparable to exemplary or punitive damages; and
>
> (c) There will be no award for loss of expectation of happiness.'" 107

Thus the measuring guage adopted by the British is that of common law damages, with two heads of damage, exemplary and loss of happiness, excluded. There is no maximum award and the only specific limitation is with respect to loss of wages. Consequently large awards are not infrequently made. The Third Report notes that in the 1966-67 fiscal year out of a total of 2,204 awards, 160 resulted in a payment of more than £ 1,000 and 10 of those payments were for more than £ 5,000.[108] The largest award up to that time was £ 9,500.[109]

The California and New York approach has been at the opposite extreme to the British. The California legislation required that: (1) the victim be married with dependent children; (2) the case be one of murder or incapacitation; (3) conviction be obtained against the offender; (4) the victim must be in "need". The rigour of the usual welfare standard is somewhat relaxed in that the normal property qualifications are waived. In effect the California plan adds little to the State's existing welfare programs, as is illustrated by the provision that not more than $100,000 would be awarded in the scheme's first year of operation (in a State of over 30 million people). These qualifications have led one commentator to term the California scheme 'iniquitous".

> "In tying the question of reparation to what appears to be a rigorous means test, whereby the applicant must show not only the 'need for aid' according to the strict income standards used in California's program of providing poor relief but also in restricting the scope of the new legislation to married victims with dependent children, the State of California has acted in a manner incompatible with its reputation in the field of corrections as a progressive and humanistic society." 110

The New York plan does not permit an award unless it is determined that the claimant would otherwise suffer "serious financial hardship," and if an award is given, "all of the financial resources of the claimant" are to be considered.[111] Where these standards are me awards are limited to out-of-pocket expenses, including loss of wages ($100 per week maximum), with the maximum aggregate award set at $15,00

It can thus be seen that the British and California - New York schemes adopt diametrically opposed principles for the measurement of damages. The British approach is generally to render true compensation to the victim, i.e., for both out-of-pocket expenses (subj to the loss of wages limitation) and for non-pecuniary loss (subject to

the exclusion for loss of amenities). Conversely, the latter approach has no relation whatever to compensation: a majority of the victims of crime would not even qualify for an award due to an inability to manifest desitution; those who do qualify can claim for only out-of-pocket expenses; and strict limits are placed on even the expenses which may be claimed.

The New Zealand approach is a hybrid of the above plans. The compensible heads of damage are listed in Section 18:

> "(a) Expenses actually and reasonably incurred as a result of the victim's injury or death;
>
> (b) Pecuniary loss to the victim as a result of total or partial incapacity for work;
>
> (c) Pecuniary loss to dependents as a result of the victim's death;
>
> (d) Other pecuniary loss resulting from a victim's injury, and any expenses which, in the opinion of the tribunal, it is reasonable to incur;
>
> (e) Pain and suffering of a victim.

This while it is clear that the common law damages approach was not adopted, limited recovery is permitted for pain and suffering. Strict limitations are placed on an award under each of the above heads; pain and suffering £ 500 ($1,400); loss of wages £ 10.5.0 ($30 per week; all other losses combined £ 1,000 ($2,800).

There is no criterion in the Act which limits compensation to cases of destitution. However, there is an interesting provision permitting the Board to have regard to "such circumstances as it consi relevant" in determining the amount to be awarded. It is thus arguabl that the Board could itself apply a means test by having regard to need in making its award, even though they are not directed to do so. This interpretation has in fact been supported by the Chairman of the Saskatchewan Criminal Injuries Compensation Board when he stated, "Nee is no doubt a factor" in New Zealand.[112] But another writer has concluded that New Zealand's plan compensates "all victims regardless of wealth".[113] I have been unable to determine whether need is in fac considered in New Zealand, and if so, how rigorously a means test is

applied; but, due to the absence of a legislative direction, I assume that need is not a prerequisite to recovery. It seems unlikely that an administrative tribunal would take it upon itself to so drastically effect a compensation scheme in the absence of precise legislative guidelines.

The Saskatchewan Act reproduces verbatim the New Zealand provisions with respect to heads of damage.[114] No specific maximums are set out in the Act but the Lieutenant-Governor in Council has the power to fix the maximum amount of compensation that may be awarded in respect to each head of damage. This power has resulted in an Order in-Council providing that any award which totals in excess of $5,000 must be approved by the Lieutenant-Governor in Council.[115] The Board is also to consider "all relevant circumstances" and, most significantly, it is specifically directed to have regard to "financial need",[116] but there are no guidelines set out in the Act to assist the Board in determining the extent of financial need which must be demonstrated as a prerequisite to compensation. This, I submit, is quite unsatisfactory. The decision as to whether need is to be the yardstick should be one made by Government, not by the tribunal it sets up. To state that the Board is to regard need as a relevant consideration but to render no assistance in determining what effect a finding of financial need shall have, or how such need is to be measured is, I suggest, a legislative default. The ambiguity of this provision was shown in the first decision delivered by the Saskatchewan Board on the application of Billy S. Miller. One passage in the decision was as follows:

> The Act is clearly designed to provide compensation to innocent victims of crimes of violence, particularly in cases where earning capacity has been affected; and to provide such compensation having regard to the financial need of the victim or his dependents but without denying compensation to those who are not in need ...

Translating this interpretation in practice will likely prove exceedingly difficult. In this particular case the applicants were father and son claiming for medical expenses and general damages arising out of an assault on the son. Special damage of $435.20 were awarded the father and $300 for pain and suffering were awarded the

son. No deduction was made even though the parents jointly earned approximately $12,000 per annum with only one other dependent.

The general principles of the Saskatchewan Act have been summarized by the Chairman in the following manner:

> I particularly direct your attention to the use of the words 'expenses incurred' and 'pecuniary loss' and 'incapacity to work'. These words are intended to limit the items of loss for which an award may be made. Apart from pain and suffering, each of the above items must, to put in common parlance, be supported by an invoice, a receipt, or a payroll. Pain and suffering would appear to be the only heads of allowable non-pecuniary damage. Damage for loss of amenities, loss of consortium and other common law items of non-pecuniary loss are to be ignored. In the case of injury, the total or partial incapacity for work is important. Accordingly, if the victim is a housewife or other person not being a wage-earner, compensation will be strictly limited to expenses incurred and pain and suffering.
>
> You will recall that the Board must have regard to the financial need of the victim and this is a further variation of the common law principles of assessment of damages. 117

The Massachusetts Act is rather puzzling. Any compensation paid "shall be in an amount not exceeding out-of-pocket loss, together with loss of earnings, or support resulting from such injury",[118] and no award is to exceed $10,000. Yet in determining the amount the Court is to take into consideration "the rates and amounts of compensation payable for injuries and death under other laws of the Commonwealth and of the United States, excluding pain and suffering."[119] The latter would seem to permit general damage awards, e.g., for loss of amenities, but these appear to be specifically precluded by the preceding section. Need is not made a factor in the Massachusetts Act although the Court is to consider the availability of funds appropriated for the purpose of the Act.

Thus the jurisdictions which have enacted victim compensation have adopted widely varying principles for measuring damages. They range from the rigorous California-New York approach, which seems to add little to existing social security measures, to the Saskatchewan method of giving a wide discretion to the Board itself, to the Massachusetts-New Zealand approach of compensating out-of-pocket expenses regardless of need, and finally to the British concept of true compensation in the form of common law damages.

2. Should Need be a Criterion.

Which measure of compensation is to be applied to victims of violent crime is essentially a value judgment on which reasonable men may differ considerably. One must examine the case of the victim of crime, having regard to the various justifications propounded on his behalf, to determine the relative weight of his claim on the scale of social priorities. Consideration must be given to the total cost of the plan and to the availability of public funds. Having given these matters some thought, I submit that a strict welfare test should not properly be included within a victim compensation program on either a metaphysical or pragmatic level. The victim can already collect normal welfare payments if his "need" is sufficiently great and there is, therefore, little purpose in the enactment of victim compensation if this criterion of eligibility is to be applied. Most medical expenses will be paid by some insurance program and regular welfare payments will provide him with a subsistence income. As put in the words of one writer, to apply this test to the victims of crime is "to deny that they present a just claim for compensation."[120] The argument on their behalf is that they stand in a position fundamentally dissimilar to that of normal welfare recipients and that the merits of their case is sufficiently weighty to justify special attention. If this claim is admitted, then the welfare criterion must fail. As Childres has stated

> Welfare programs are analogous only in that they deal with destitution, which compensation is intended to prevent. Welfare and compensation are unrelated in their rationale, their victims, and the social problems they seek to alleviate. Debilatating poverty is a blot on the national character of our prosperous nation. For most poverty however, there is no admitted causal relationship involving the government. For destitution threatened by criminal injury to the person, there unquestionably is such a relationship." 121

The case for being more generous for the victim of crime need not, however, be based entirely on the "causal relationship" involving the government, a relationship perhaps not as unquestionable as Childres has asserted. The case can also be based on all the other justifications behind the scheme, none of which, apart from the basic element of need, applies to other welfare cases. For instance, if the previously drawn analogies of motor vehicle accident unsatisfied judgment funds, workmen's compensation acts and strict liability provisions are to have any meaning, then the victim of crime must stand in a different category than the welfare recipient. Also it is those taxpayers who have contributed most to the scheme who will be denied any recovery for their injuries if a "need" criterion is applied. The words of B.J. Cameron,[122] noting the "psychological effect on the community produced by the very fact that there is such a scheme in existence," an aspect of victim compensation which, while "impossible to measure .... may well be of a greater importance" can well be remembered. The psychological effect of a scheme which permitted recovery only to those victims who could qualify for welfare payments is not likely to be significant.

On a pragmatic level, it is clear that the cost of dispensing with impecuniosity as a prerequisite to compensation would not be unduly burdensome. This is proven conclusively by the British experience where the cost of the third year of operation was less than £ 1,000,000, inclusive of administrative expenses.[123] The New Zealand Board awarded only $2,810 in its most generous year.[124]

Thus it is submitted that need and a means test should not be regarded as proper concepts to incorporate within a victim-compensation scheme.

Having rejected need as a prerequisite to compensation, it is necessary to consider the extent to which compensation will be provided. The possible heads of damage which could be included have been hereinafter subdivided into pecuniary and non-pecuniary sections.

3. Pecuniary Losses

First, I submit that all receiptable items (i.e. out-of-pocket expenses) should be fully compensated with no specific limitations such as New Zealand's £ 1,000 maximum, provided that all expenses were reasonably incurred. The costs of medical attention and hospitalization may be enormous and, while all medical expenses usually are covered by insurance programs, this is not always the case.

Secondly, loss of income should be compensated, but it is not unreasonable to adopt, as Britain has done, a limitation. This statement is no doubt inconsistent with the above arguments for true compensation to the victim of crime. But the plan must be neither completely logical nor theoretically perfect; it's purpose is to render justice to the victim of crime within a tolerable cost to the public purse. I feel that an income restriction is perhaps the best method of reconciling these two competing social claims. It would prevent extremely large awards while giving adequate compensat to all, so long as the restriction was not too severe. I do not think it should be less than $500 per month, plus $50 for each dependent. This would ensure that the successful citizen devastated by violent crime would be permitted at least a reasonable standard of living, even though it would be considerably less comfortable than that to which he had been accustomed.

Thirdly, expenses reasonably incurred in making the claim before the Board should be allowed, such as travelling expenses and legal fees where counsel was necessary. Consideration might also be given for incidental property losses such as repair or replacement of eye glasses, wrist watches and dentures.

Sexual offences give rise to a particular type of damage claim in view of the inherent possibility of pregnancy. Should pregnancy result from a criminal offence the compensation plan clearly should pay the medical and hospital expenses incurred during pregnancy, and compensate the mother for loss of wages for a reasonable period before and after the birth. A more difficult question is whether compensation should be paid for the maintenance of any child born as the result of the offence. The British plan answers this question in the negative. This seems somewhat harsh and the position advocated by Justice may be preferable.

> Although we can appreciate the theoretical objections to the inclusion of children born in consequence of rape within the category of victims of crimes of violence, we think that the mother should be entitled to some compensation if she chooses to keep the child instead of arranging for its adoption. It might be in the best interests of the child that it should remain with its mother, and, moreover, she would probably be able to maintain the child at less expense than would be incurred if the child were placed in the care of the local authority. Furthermore ... it is not alwayspossible to arrange for a child born in consequence of a criminal offence to be adopted, since some adoptive parents are reluctant to accept the child whose father is known to be, or suspected of being, a man with a criminal disposition. Even when a child is placed in the care of a local authority the mother may be called upon to make some contribution towards the cost. Accordingly, more and more unmarried mothers are obliged to work in order to maintain a child born out of wedlock. We therefore recommend that the mother of a child born in consequence of a crime of violence should be entitled to some payment by way of contribution towards the maintenance of the child. 125

4. Non-pecuniary Losses

It remains to consider whether the plan should attempt to fully compensate the victim, or whether compensation should be restricted to pecuniary loss. Justice remarked:

> Although we think that compensation should be based on the principle of reparation, we think that a victim should not be entitled to receive by way of a lump sum benefit the same amount as that which he would recover in an action for damages against the offender. We think that the state should not be expected to underwrite in full the offender's common law liability, and this principle could be recognized by reducing the amount which the victim would otherwise receive in respect of items of damage other than loss of earnings. We do not think, however, that it is desirable for us to lay down a specific limit to an award or a specific percentage by which an award may be reduced. Such a limit or percentage might, nonetheless, be incorporated in the Act either specifically or by the formulation of a general principle, which would allow the tribunal to develop its own practice. 126

A strong case can be made for at least compensating the victim for pain and suffering. "In some crimes, particularly forcible rape, kidnapping and some robberies, the unliquidated claim for compensation for pain and suffering is all that the victim generally has. Thus, it would appear to mock the victim and to play havoc with consistency to urge the compensation of a forcible rape victim ... and in the next breath to reject her claim for pain and suffering".[127] In the course of her research, Miss Eleanor Corlett has discovered two very poignant cases occurring recently in Alberta which would lend support towards the inclusion of some form of general damages. In one case[127a] a teenager was shot in the neck and suffered a permanent paralysis to his right arm and side. His family's out-of-pocket expenses were $2,000. No one could possibly suggest that the payment of $2,000 to his family could be regarded as "compensation" for such a calamitous injury. In a second case[127b] a truckdriver who came to the rescue of a woman being criminally attacked was rewarded with a grievous leg injury. Eventually his leg had to be amputated just below the knee. As a consequence, the victim was out of work for two years, losing $20,000 in wages. Fortunately, he did receive $10,000 for loss of his limb from a private insurance policy, but again it is apparent that the compensation was inadequate. It is to be noted that the Workmen's Compensation Board makes general awards for particular injuries such as the loss of a limb or eye, that is, over and above the compensation given for loss of wages.

There seems no reason why the victim of crime should not receive at least similar benefits.

The contrary argument is that the purpose of the scheme is not to make the victim whole, but to reimburse him for the monetary loss which he has suffered as a result of the crime.[128]

New Zealand and Saskatchewan have in general adopted the latter philosophy but have specifically allowed pain and suffering as the only non-pecuniary head of damage. New Zealand specified a $1,400 limit for an award under this head and Saskatchewan, while making no specific limitation in the Act, no doubt restricted the amount that could be awarded under pain and suffering by the general requirement of need.

The general damage heads at common law in addition to pain and suffering include loss of expectation of life, loss of amenities of life, and loss of expectation of happiness.[129] Sometimes these are the subject of individual awards but often are grouped together for a lump sum estimation. Britain allowed common law damages but expressly excluded loss of expectation of happiness. There does not appear to be any logical justification for allowing or disallowing any one of these heads, but logicality is not necessarily a primary aim of this scheme. The conflict between justice and cost again might best be served by a compromise - inclusion of pain and suffering and exclusion of the other non-pecuniary heads of damage.

In this regard, nervous shock would be considered part of pain and suffering. Justice recommended "Compensation should be payable only to victims who can establish some physical injury,"[130] but where physical injury is accompanied by psychological injury, compensation would be payable for both. This is the same conception which has recently been rejected in the law of torts. A preferable limitation in those cases where victims suffer nervous shock without accompanying physical injury, e.g, where witnessing a crime upon a close relative, would be that no damages could be allowed unless <u>some</u> injury to them was reasonably foreseeable. Thus if the nervous shock was a reasonably foreseeable consequence of the crime it would be compensible regardless of the absence of physical injury.

5. Dependents

With respect to dependents, it is undesirable to allow them to claim damages for anything but their actual monetary losses. In a tort action the claim of the deceased is permitted under various statutes[131] on the assumption that the wrongdoer should not be allowed to escape liability by reason of his having killed, rather than merely maimed, the victim. But this reason is obviously inapplical to the scheme herein proposed. Therefore claims of dependents should be permitted for pecuniary loss suffered as a result of the loss of dependency, plus such expenses as were necessarily incurred as a result of the death, e.g., funeral expenses.

B. DEDUCTIONS FROM AWARD

Victim compensation is a scheme undertaken by the state as a matter of grace and double recovery by the victim should thus be prohibited. This would necessitate the deduction of all benefits received by the victim in amelioration of his injuries from any source whatsoever.

Clearly the Board should be subrogated to the victim's tort claim against the offender. If the victim accepts an award and then chooses to sue the offender, he should be required to repay the Board up to the full extent of the award. (Subrogation is considered subsequently).

Also there should be a deduction for all public non-participatory benefits. Thus such things as workmen's compensation and payments under a non-participatory medical plan should be deducted.

A more difficult question arises with respect to the deductibility of the proceeds from private insurance policies. Childres has said, "It would seem unwise policy to require deduction of insurance payments. People would consider themselves unfairly penalized. The program should avoid even the slightest suggestion that its thrust discourages people from carrying for themselves."[132]

Justice has supported this viewpoint under the belief that "there should not be any discrimination against victims".[133] The Canadian Corrections Association has suggested that as a compromise measure, insurance benefits be deducted but the victim be compensated for the premiums which he has previously paid.[134]

Conversely, it has been argued that "the collateral benefit rule, which serves to prevent wrongdoers from escaping full damages by virtue of the prudence of those whom they injure, has no application to a state compensation plan."[135] Therefore the rationale for permitting double recovery in tort law disappears.

The British, New Zealand, Saskatchewan and New York plans all compel the deduction of amounts received from the offender or from public funds, but seem to permit the victim double recovery insofar as he receives private insurance benefits. On the other hand, Massachusetts prescribes the deduction of such benefits.

C. METHOD OF PAYMENT

It is clearly desirable to have provision in the scheme for periodic payments, thereby eliminating the guesswork which must be exercised by a common law court. Although the British scheme in genera requires a lump sum payment[136] (a provision which has been sharply criticised)[137], the New Zealand and Saskatchewan plans have given their tribunals the discretion to make periodic payments.[138] New York directs a lump sum award but periodic payments can be made in the case of death or protracted disability.[139]

It has been previously noted that in certain instances, it may be undesirable to make a full award, e.g., where it might benefit the offender or cause the victim to lose his initiative to assist in a prosecution of the offence. There may also be cases where the recipient would not handle the money providently.[140] Thus it is desirable to allow the Board a discretionary power to pay the money to the Public Trustee, or perhaps to a welfare association, on such terms as may be necessary. An ideal provision seems to be Section 22 of the Saskatchewan Act

> An order for the payment of compensation under this Act may be made subject to such terms and conditions as the Board thinks fit with respect to the payment, disposition, allotment or apportionment of the compensation to or for the benefit of the victim or the dependents or any of them, or as to the holding of compensation or any part thereof in trust for the victim or the dependents or any of them whether as a fund for a class or otherwise.

A final possibility is the discovery of evidence subsequent to an award which would have had a substantial effect had it been known at the time of the award. It thus seems desirable to give the Board a power to review its decisions. Again the Saskatchewan Act offers a ready precedent in Section 23:

> (1) The Board may at any time, on the application of the Attorney-General or the victim or any dependent or the offender, vary an award for the payment of compensation under this Act in such manner as the Board thinks fit, whether as to terms of the Order by increasing or decreasing the amount ordered to be paid or otherwise.
>
> (2) In dealing with an application under Subsection (1), theBoard shall consider:
>
> (a) any new evidence that has become available;
>
> (b) any change of circumstances that have occurred since the making of the Order or any variation thereof, as the case may be or that is likely to occur;
>
> (c) any other matter the Board considers relevant.

PART IV

ADMINISTRATION OF VICTIM COMPENSATION

The difficult problems in a compensation scheme - basic justification, scope of compensation, measure and limitation of awards have now been dealt with and it is apposite to turn to the more tractable questions in the area of administration. Most of the schemes now in operation have adopted similar administrative characteristics and they seem to have worked reasonably well. The annual reports published by the British Board in particular leave the impression of an efficient and just procedure.

A. THE ADMINISTRATIVE AGENCY

Compensation may be awarded by either the courts, a presently existing administrative agency, or a specially created tribunal. When this type of scheme was proposed, it was clearly necessary to create a new tribunal empowered with a wide discretion in order to meet the many unforeseen problems which inevitably emerge out of a completely new venture. This decision was supported by one writer in the following terms:

> It was, it is submitted, clearly a wise decision in the New Zealand Parliament to entrust this task to a tribunal rather than to the Judiciary. The field is a new one, and there was thus two alternative courses open; to make use of theexisting legal services, or to provide new machinery. The former would entail precise definition of all the varying circumstances which would give rise to or exclude, the right to claim compensation - a task which would require an amount of foresight beyond any possessed by normal human beings. By contrast, the establishment of a new tribunal clothed with a wide general discretion and endowed with a charter in broad terms would greatly reduce the need for detailed and complicated legislation. It is true that the same general powers and discretions could be conferred on the Judiciary, but to ask a body which was trained to the rigid and precise picking-over of statutory words and the careful following of evidence to work out what is to be done in an entirely new field such as this is to court disaster. 141

In lending its support to the creation of a new tribunal Justice commented on the great problems involved in adapting existing machinery to the special requirements of the scheme, and cited two cogent reasons for not giving original jurisdiction to the High Court: (1) There would be greater delay, since claims for compensation would have to take their place in the waiting list together with other forms of litigation; (2) Proceedings in the courts would be more formal and probably costlier than proceedings before an administrative tribunal.[142]

In view of the considerable experience that has now been gained in other jurisdictions, the task of awarding compensation could conceivably be entrusted to ordinary legal channels. In fact, the most recent jurisdiction to adopt victim compensation, Massachusetts (whose plan came into force July 1, 1968), has given the task to the common law courts.

The New South Wales approach must also be noted. Rather than create a new and distinct procedure for dealing with victims, New South Wales simply expanded the existing powers of the criminal court to make a restitution award, and superadded the equivalent of an unsatisfied judgment fund to ensure that any restitution award was at least partially fulfilled. Thus, where a person is convicted of a felony the court can direct that a sum of up to $2,000[143] be paid out of the property of the offender to the victim for his injuries or loss sustained by reason of the felony. In the event of an acquital or dismissal, the court gives to the victim a certificate stating how much it would have directed the accused to pay had there been a conviction. If the victim can satisfy the Undersecretary of the Department of the Attorney-General that he has exhausted all other legal remedies available to him, he can receive a payment from the consolidated revenue fund which is financed by the state.

In addition to parsimoniousness, the New South Wales approach has two very serious deficiencies: firstly, a prosecution must be launched and a court hearing must be held before any award can be made, thereby eliminating a large number of victims from possible benefit; secondly, "the victim would tend to feel that his ...

award would depend on the conviction of the offender being secured, thereby perhaps prejudicing a fair trial,"[144] and this would be a much more dangerous situation than in other compensation schemes due to the close identification between criminal trial and restitution award. Therefore, it is submitted that the compensation hearing and the criminal trial should be kept distinct and that the New South Wales method is not a satisfactory way of implementing victim compensation.

This still leaves open the Massachusetts approach of utilizing the courts to make compensation awards following a separate hearing for the victim. As a matter of general principle "a decision should be entrustedto a Court rather than to a tribunal in the absence of special considerations which make a tribunal more suitable" However, it is submitted that there are good reasons for leaving the task to a special administrative tribunal. The expeditious procedures will save considerable administrative costs and will render quick justice to the victims of crime. This seems most desirable when one considers the cumbersome processes and great delays and expense, including the virtual necessity of obtaining a solicitor, which would be involved in a judicially-operated scheme. The tribunal would become exceedingly expert in its function and would probably be able to discharge its duties at least as competently as a court could do. While complex safeguards may be necessary to protect the interests of both parties in litigious proceedings they are undesirable in what is essentially a non-adversary system.

Creation of a special administrative tribunal presupposes that compensation will be awarded regardless of need. If a strict means test were to be applied to claimants, as in California and New York, then the entire matter would be best left in the hands of the ordinary welfare authorities, as California has in fact done. They are already sufficiently expert in the assessment of "need" and in the administration of welfare cases, and there seems no particular reason to create a special tribunal. Compensation would be for only out-of-pocket expenses and a social worker can assess these as easily as a tribunal. The smaller number of claimants who

would qualify under such a criterion would not appear to justify the additional expense of creating and operating a new governmental agenc

B. JUDICIAL REVIEW

Assuming that an administrative tribunal is to be created it is necessary to consider the extent to which such tribunal is to be amendable to judicial review. Most of the legislatures have regarded their compensation programs as privileges conferred on victims, and have thus made their schemes ex gratia. On this basis they have attempted to exclude judicial review of a compensation board's decision on any grounds whatsoever.

Some writers have repudiated the concept that compensation under such a scheme is a "privilege". Even if accepting the notion that the State is not under a legal obligation to pay compensation until the enactment of such a scheme, they have contended that once a scheme is put into operation, compensation becomes a right of the citizen. "An insurance company is 'liable' to pay compensation to an insurance victim if he suffers a loss specified in a policy, even though the insurance company is not liable for causing the loss in question; an obligation to pay compensation ... need not involve fault-responsibility for the event causing the loss. We have no difficulty in accepting the obligation of the state to pay unemployment or sickness benefits, and the new schemes would likewise regarded as a further extension of the welfare state."[145]

It is not surprising that persons adopting this attitude deplore the exclusion of judicial review. "The public cannot remain satisfied with a situation under which important benefits of the welfa scheme are entirely subject to the discretion of a small tribunal or board."[146] This feeling would naturally be more prevalent in the United States than in Commonwealth countries because of the "due process" clause in the American Constitution, which makes it unconstitutional for a legislature to preclude judicial review where the rights of subjects are concerned.[147] But even Justice supported full judicial review of compensation awards.

> When the compensation board has made a final award the claimant should be entitled to appeal to a court of appeal on all questions of law and fact. We think that it would be unnecessary to create a special appeal tribunal, since we are confident that the Court of Appeal has the necessary manpower and experience to deal with claims most satisfactorily. That Court could also be relied upon to reject frivolous appeals on a question of fact. The right of appeal should be unfettered so as to avoid arguments on the distinction between questions of law and fact. 148

Notwithstanding the strong case for judicial review of what is at least a quasi-judicial function, the three Commonwealth jurisdictions have purported to substantially exclude the courts from the scheme. Britain adopted its non-statutory scheme with this idea in mind, although it does not appear to have been completely successful,[149] and Saskatchewan, which did enact a statute, definitively proscribed judicial review.[150] New Zealand has permitted judicial interference with a board decision on the single ground of lack of jurisdiction.[151]

One does not have to be an alarmist to note the increasing powers which are being alloted to administrative agencies. In Alberta, the Clement Commission has noted the proliferation of administrative tribunals which frequently determine matters of great importance to citizens.[152] Such bureaucratization is a reflection of the complicated society in which we live and is not to deprecated ipso facto. But one might well criticize the increasing tendency to remove such tribunals from the control of the sacrosanct "rule of law". It may often be desirable to prevent an appeal to the Courts on the merits of the case, but to preclude the extraordinary remedies - which are exercised only where there has been a lack of jurisdiction or manifest error of law - is surely something to be done only when circumstances clearly call for such drastic measures. In the words of the Clement Commission:

> There is embedded in the democratic principles of the administration of justice a right to appeal by a person who considers himself aggrieved, and the Committee is of the view that this principle should be more fully recognized in administrative law than it is at present ....

> The Committee is unanimously and firmly of the view that in every case there should be a right of appeal to the Supreme Court of Alberta on a question of jurisdiction and a question of law. No legitimate reason can be put forward why a tribunal to whom the Legislature has delegated certain defined authority should be permitted with impunity to transgress the bounds of the jurisdiction that it was intended it should exercise. Similarly, there should be no excuse for a tribunal misapplying law, or ignoring law, to which all citizens of the Province are subject, in favour of its own views as to what should be applicable to the persons that are affected by its decisions. 152a

The slight inconvenience which might be caused to the board in particular cases by the allowance of judicial review would indubtiably be offset by the greater satisfaction and security which citizens would feel knowing that their legitimate demands would be protected by the historic watchguards of individual rights.

It is thus submitted that a special tribunal be created to administer the victim-compensation scheme and that judicial review with respect to jurisdiction and errors of law, as a bare minimum, be permitted.

C. COMPOSITION OF THE BOARD

All boards are composed of three persons with the exception of Britain, which has eight members, three of whom sit on each appeal. It is also a general requirement that at least the Chairman be a lawyer of considerable standing, and New York and Britain require <u>all</u> members to have had legal training. However, there seems to be some merit in the Justice proposal to vary the experience of the tribunal by appointing a doctor and requiring that one of the members be a woman. 153,1 Saskatchewan is the only jurisdiction that does not specify any qualifications for Board members, leaving the matter entirely to the

discretion of the Governor-in-Council, an idea which is supported by the Harvard Model Act.

Appointments are made by the Executive for terms ranging from five years (New Zealand) and seven years (New York) to an unspecified duration (Great Britain and Saskatchewan).

D. THE INITIAL DECISION

Those plans which have chosen to create special tribunals or boards have adopted two distinct methods for dealing with an application in the first instance. The first method, adopted in Britain and New York, is to have the initial decision made by a single member with the applicant given the right of appeal to the full Board if he is dissatisfied.[155] In Britain an application form must be submitted by each claimant which, in addition to describing the incident and extent of his injury and loss, must also give the Board the authority to obtain a copy of any statement he made to the police, medical reports from a hospital and the doctors from whom he received treatment and details of payment from his employers and public funds.[156] Upon receipt of the application the Board's staff makes inquiries of the police, the hospital, the doctor, the applicant's employers and the National Insurance Office. As soon as all of the necessary information is obtained, the papers are submitted to a single member of the Board for his decision.[157] The single member does not see any witnesses, but in a very few cases, perhaps where there is scarring, he may decide to see the applicant. He then makes an award or rejects the claim. If the claimant is dissatisfied with the decision of the single member, he is entitled to a hearing before three members of the Board. At the hearing the matter is considered de novo and decided solely on the evidence presented at the hearing. The success of this procedure is well illustrated by the fact that, at the time of the second report on March 31, 1966, the decisions of single members had been accepted in 98.5% of the cases in which awards were made, and in 73% of the cases which were rejected.[158]

Procedure in New York is basically similar except the single member has the power to order a hearing when he is unable to reach a decision on the documentary evidence before him. Moreover, an appeal from such a decision is apprently a review of the decision of the original member and not a trial de novo as in Britain.[159]

The Saskatchewan plan adopts a more formal approach in that hearings before the full three-man Board are held on every application.[159a] This is probably the best approach for smaller jurisdictions where the volume of claims will be considerably less than in Britain or New York. Whereas the British Board received 6,318 applications in the first three years of operation,[160] the New Zealand Board received 47 claims in a similar span,[161] and the Saskatchewan Tribunal apprently received about a dozen in its first year of operation.[162] With such a small number of claims, it would not be onerous to have the Board deal with each one in a formal hearing. It may well be true that "most cases are fairly clear and can be determined without a hearing,"[163] but if the stage was ever reached when the formal hearing became cumbersome, the British-New York approach could easily be implemented. An incidental advantage to the full hearing would be to attract more publicity to decisions, thereby assisting in making the scheme better known amongst the people.

Prior to the hearing the claimant should be supplied with copies of all documentation which the Board intends to consider in coming to a decision. This was another important principle recommended for universal application by the Clement Commission:

> Individuals have a right to the disclosure of reports received by a tribunal which it may take into account in coming to a decision, and an opportunity to meet them. To deny the right is to deny one of the essentials of a fair and open hearing. 163a.

E. CONDUCT OF THE HEARING

The hearing should be in public unless the Board decides that in camera proceedings are necessary in a particular case by reas of the offender not being charged or convicted[163b] or a public hearir not being in the interests of a victim or dependents, or in the interests of public morality. This is the New Zealand and Saskatchewan method and the British decision to hold secret hearings has been subjected to well-justified criticism. "Secrecy is undesirable in all such matters. It is never enough that justice sho be done: it must be seen to be done, for if something less than justice is done, how is the matter to be remedied or even ventilated if the press has no access to the relevant tribunal?"[164]

The schemes generally adopt a liberal attitude towards the admissibility of evidence at a hearing. Both New Zealand (Section 13) and Saskatchewan (Section 18) contain this provision:

> The Board may receive in evidence any statement, document, information or matter that, in its opinion, may assist it to deal effectually with the matter before it whether or not the same would be admissible in a court of law.

Proof of a conviction is taken as conclusive evidence that an offence has been committed unless an appeal is in progress. An acquittal or dismissal should, however, be irrelevant to the Board's determination.

Most applicants conduct their own cases but some hire counsel. It seems desirable to also have an advocate to assist the Board in dealing with each case. His function in Britain is outlined by their Board as follows:

> He acts as a friend of the Board rather than as a party to the dispute. He presents all the facts and arguments which are relevant whether they are favorable or unfavorable to the applicant's case. He also draws attention of the Board to its previous decisions and to the decisions of the courts. In some cases he challenges the case put forward by cross-examination, by the evidence he calls and by his submissions of law. In others, the evidence he calls and the arguments he puts forward may tend to establish the applicant's case.

> So even when the applicant's case is not put forward by a professional advocate, the risk of it not being fully before the Board is greatly reduced. 165

Moreoever, where a full hearing is to be held in every case it will be necessary to have someone conduct a preliminary investigatic to compile all the relevant evidence, and the Board's counsel would seem to be the ideal functionary in this respect.

The Board should be required to give reasons for its decisions, particularly when an application is rejected. This will make the "record" more substantial and thus increase the chances of judicial interference on the grounds of "error of law on the face of the record", a result which may or may not be regarded as desirable depending on one's basic attitude towards judicial review. But in any case it is desirable to give the applicant an explanation as to why he is to be denied compensation. One key recommendation of the Clement Commission was that reasons be given for decisions of all administrative tribunals, as stated in the report:

> In the first place, the requirement of an opinion provides considerable assurance that the case will be thought through by the deciding authority. There is a salutary discipline in formulating reasons for a result, a discipline wholly absent where there is freedom to announce a naked conclusion. Error and carelessness may be squeezed out in the opinion-shaping process. Second, the exposure of reasoning to public scrutiny and criticism is healthy. An agency will benefit from having its decision run the professional and academic gauntlet. Third, the parties to a proceeding will be better satisfied if they are enabled to know the basis of the decision affecting them. Often they may assign the most improbable reasons if told none. 165a

Moreover, the public should have guidelines to assist in determining whether a potential application will be successful, and this can only be accomplished as a number of cases are decided which demark, as no statute can ever hope to do, the limits of the scheme.

To adequately inform the public of these guidelines, it would be necessary to publish the Board's decisions. The Alberta Law Review, published by the students of the Faculty of Law, would seem to be a useful medium for this purpose as it is distributed to many

lawyer in the province, and its triannual publication would adequatel serve the interest in currency. The more prominent cases would likel receive wider publicity than newspapers, radio and television, althou full reasons might not be given. The Board should also have availabl upon request full reports of all decisions.

F. SUBROGATION

It remains to consider the status of the victim's tort claim against the offender. As previously noted, it will be a rare case when such a claim will result in damages being collected, but it must nonetheless be provided for to prevent double recovery.

The tort claim of a victim should be preserved, since the proposals for compensation will result in awards somewhat less than would be received at common law. Thus, where the offender is not impecunious, the victim could seek his normal remedy if he were dissatisfied with the Board's award. Any moneys he actually recovered would go firstly to pay his legal costs, and secondly to pay back the Board to the full extent of the original award.

If the victim decided not to pursue his common-law remedy, the Board should be subrogated to his claim. Since there has already been a hearing to determine the validity of the claim (it being assumed that any criminal act resulting in an award would a fortiori give rise to a civil remedy), it seems redundant and unnecessarily expensive to force the Board to go to the steps of a common law suit. Thus in New Zealand, the tribunal itself may, on the application to the Secretary of Justice, make an Order directing the offender to refu the whole or any specified part of compensation paid.[166] This Order is then entered in the proper judicial office as a regular civil judgment. If this procedure were to be adopted it would also be necessary to protect the rights of the offender, who, after all, was never heard or represented at the hearing. Thus he should be able to at least appeal the award to the Courts, as in New Zealand, or perhaps insist on a trial de novo where the regular rules of evidence would apply.

Subrogation shares many common characteristics with the concept of restitution and is therefore subject to similar criticism If the offender has paid his debt to society by a term of imprisonme it might seem excessively harsh to impose on him a civil judgment payable to another State agency. It is thus to be hoped that the Board would make its decision on whether to commence a civil action at least in part upon the possible effect that such an action might have on the rehabilitative prospects of the offender. For example, the New Zealand statute contains the following provision:

> Before making any order under this Section the Tribunal shall give the offender an opportunity to be heard, shall obtain and consider a report from the Probation Officer, and shall have regard to the financial position of the offender, his employment, the possibilities of future employment, his liabilities to his family and otherwise; and such other circumstances as the Board considers relevent. 167

PART V

INJURIES SUSTAINED DURING CRIME PREVENTION

Whatever view one might have with respect to the entitlement of a victim of crime to compensation, it must be admitted that one particular category of victims stands in a special position. The citizen who is injured while assisting a police officer, preventing an offence or apprehending a criminal presents an unassailable claim to compensation. Ours is a nation in which a policeman can order a private citizen to assist him, whatever the risk to his personal safety, and that citizen is subject to criminal liability if he refuses. Without question, the State should compensat such a citizen for any injuries he sustained while carrying out such directives. And the individual who voluntarily assists in the course of law enforcement surely stands in an equally meritorious position. As put by one writer:

> Morally and legally this issue is of central importance. Looking at good samaritanship in terms of social organization, is it not essential that society, through its statutory law and administrative practice, should, at the very least, say to the potential good samaritan: 'Even though we may not tell you to assist your fellow citizen threatened by a crime of personal violence, or to assist the police when need exists, nonetheless, if your sense of human identity with your fellow citizen, of brotherhood, is such that you <u>do</u> assist him and suffer substantial loss thereby, we shall, as a community, share that loss with you? 168

In fact, it is an enigma how our humanitarian society could have delayed so long in recognizing such claims. Two jurisdictic California and Ontario, have recently enacted schemes specifically designed to assist citizens who are injured while assisting in the course of law enforcement. California's scheme is, of course, in addition of its parsimonious victim-compensation scheme, thereby bestowing additional benefits on a citizen injured during law enforcement. Ontario does not yet have a scheme which compensates all victims of violence.

Because his claim is inherently more justifiable than that of the ordinary victim of crime, the law enforcing citizen should be entitled to greater generosity from the state. It is therefore submitted that the limitations on awards which are to otherwise apply in these cases be waived. The measure on awards should be that of common law damages with the allowance of pain and suffering and loss of expectation of life and happiness. Also, specific maximums placed on particular heads of damage should be deleted. Of course this creates the potential for large awards, but this is not a serious threat. The incidence of citizens seriously injured or killed while assisting in law enforcement in Alberta is not great. And Government, the representative of all the people, should fully and truly compensate an individual injured while attempting, quite altruistically, to protect his fellow citizens. Common law damages in Canada have not been known to over-compensate plaintiffs and one need not have regard to the fantastic awards occasionally made in the United States.

The general principles of victim compensation are applicable for this special category. However, it is desirable to have some additional limitations to meet special circumstances. For one thing, the law enforcing victim should only be recognized when he acts altruistically; thus if his injury is sustained while protecting his own person or property, he should not be additionally compensated, for in such cases, he stands in a position identical to other victims of crime. This limitation might be extended to instances where he is protecting his close relatives as well.

The beneficial"psychological effect on the community", prevalent with any victim compensation program, would reach its quintessence with a program designed to compensate those heroic individuals injured while attempting to protect their fellow citizens.

VI

CONCLUSION

It is therefore respectfully submitted that compensation be paid by the Government of the Province of Alberta to the victim of criminal violence. In terms of cost, the program could be easily borne; administrative difficulties are minimal; the need of the victim is demonstrable. To alleviate the burden of crime victims is, moreover, an important aspect of a humanitarian and just society.

FOOTNOTES

Since a bibliography is appended, it is unnecessary to employ complete footnotes. Each footnote reference will be keyed to the alphabetically-ordered bibliography so the full citation can be readily found. Articles lacking named authors will be referred to by both the first word in their titles and, since many titles are virtually identical, by their periodical reference.

Some materials have been referred to so frequently that special annotations have been used as follows:

Annotation		Actual Citation
Harvard Model Act	-	A Penal Statute to Private Compensation for Innocent Victims of Violent Crime, 10 Harvard Journal on Legislation 127-147.
Jour. Pub. L. Symp.	-	"Compensation for Victims of Criminal Violence: a Round Table". 8 Journal of Public Law 191-253 (1959).
Justice	-	Justice (Society). Compensation for Victims of Crimes of Violence London, Stevens, 1962, 31 p.
Minn. L.R. Symp.	-	Compensation to Victims of Crime: An Examination of the Scope of the Problem: A Symposium. 50 Minnesota Law Review 211-310 (1966).
Schafer	-	has published a book and several articles; unless otherwise indicated all references will be from the book: Restitution to Victims of Crime.

White Paper	–	Compensation for Victims of Crimes of Violence, Cmnd. 2323 (Great Britain).
First, Second or Third Report	–	refers to the annual Reports of the Criminal Injuries Compensation Board of Great Britain.

1. Culhane at 272.
2. For a full analysis of the institution in historic times see Schaffer, chapters 1 and 2. The author notes the existence of restitution in Greece, Turkey, India, and among the Hebrews, all before the time of Christ, and even in the Code of Hammurabi (about 2250 B.C.).
3. For a fuller analysis of how this process evolved see "Compensation ...," 61 N.W.U.L.R. at 76-84.
4. Scott at 283.
5. Schaffer at 12.
6. Scott at 284.
7. "Compensation ...," 61 N.W.U.L.R. at 84-85 (emphasis added).
8. "Penal Practice...".
9. Barker advocates this at 124.
10. Justice at 4.
11. House of Commons Debates.
12. Cameron at 370.
13. Inbau; Jour. Pub. L. Symp. at 203, regards this argument as "unrealistic supposition".
14. See "Compensation ...," Canadian Corrections Association, at 2.
15. See Covey at 405: "The real goal under a concerted public liability plan is prevention. Direct economic interest tends to promote investigation and concern for both the wrongdoer and the victim."

16. The Works of Jeremy Bentham 589 (Limited ed. 1962), cited in Childres at 446.

17. "Compensation ...," 40 St. Johns L.R. at 72.

18. "Penal Practice ...".

19. White Paper, parag. 8: "Compensation will be paid ex gratia. The Government do not accept that the State is liable for injuries caused to people by the acts of others."

20. The declaration of policy and legislative intent preceding the statute states that aid will be provided "as a matter of grace".

21. This conclusion is drawn from the remarks of the Chairman of the Saskatchewan Criminal Injuries Compensation Board, James Eremko, in 33 Sask. L.R. at 42. He therein notes that the state has "circumscribed the right of self-defence" and "taken over all police functions". He concedes that these powers "rightly belor to the state", but emphasizes that "as a result thereof the state ought to make proper compensation to victims of crime." However, it may be a mistake to impute the reasoning of Eremko to the Saskatchewan Government, particularly in view of the fact that the Saskatchewan Act specifically compels the Board to have regard to need as a factor in determining compensation. If the state has breached a legal duty towards a victim of crime, the breach should not be less compensible merely because the victim was not rendered destitute.

22. Childres at 455.

23. Childres at 456.

24. "Compensation ...", 61 N.W.U.L.R. at 82-83.

25. See Halsburys Law of England, (3d) vol. 30, at 86-89. Compensation is payable for property destroyed by any persons "riotously and tumultuously assembled together" pursuant to the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38, s. 9). The claim for compensation is made on the defaulting police authorit and, if it fails to pay, an action may be commenced. Formerly the claim for compensation used to be against the hundred. The police authority may have regard to the conduct of the claimant, which may take the form of either provocation or lack of precaution. Any amounts received from other sources is

is deducted from the award. Thus the scheme is a microcosm of a full compensation plan.

26. Shuster v. City of New York (1958) 154 N.E. (2d) 534. For a general review of an individual's rights against the state and municipal governments in the United States, see Covey.

27. Montrose, Journ. Pub. L. Symp. at 199.

28. "Compensation ...", 40 St. John's L.R. at 72.

29. Schultz at 241.

30. The almost inevitable impecuniosity of the offender has been well documented. See, for instance, "The Report of the Osgoode Hall Study on Compensation for Victims of Crime" by Linden. A study was done into 167 persons who had been victims of violence and only three collected anything from their attacke Thus the conclusion drawn was that it was "established beyond doubt that the tort rights of crime victims are illusory." (at 20). This conclusion is supported by the British experience where, after an analysis of all decided cases, the Criminal Injuries Compensation Board has stated that only .79% of the offenders would have been worth suing (Third Report at 14).

31. Chappell at 5.

32. Cross at 816.

33. This is, in fact, the approach taken in California and New York. In Saskatchewan the Tribunal is directed to have regard to need, but this is merely one of many relevant factors which are taken into consideration when an award is made.

34. "Compensation ...", 33 U. Chi. L.R. at 432 states: "Since individuals are expected to bear the consequences of many kinds of misfortune, proponents of compensation schemes have been unable to demonstrate that victims should be compensated simply by observing that they need assistance."

35. Harvard Model Act at 130.

36. "Compensation ...", 61 N.W.U.L.R. at 86.

37. ibid at 85.

38. ibid at 87.

39. ibid.

40. ibid at 88.

41. Miller, Jour. Pub. L. Symp. at 207. The relevant Alberta legislation is The Motor Vehicle Accident Claims Act, S.A. 1964, ch. 56.

42. Restitution to Victims of Crime.

43. See Schaffer, ch. IX for a review of the Canadian provisions with respect to restitution. Sec. 628 of the Criminal Code provides:

628. (1) A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that perso an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order enter as a judgment, in the superior court of the province in wh the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(3) All or any part of an amount that is ordered to be paid und subsectio (1) may be taken out of moneys found in the possessio of the accused at the time of his arrest, except where there is a dispute as to ownership of or right of possession to those mon by claimants other than the accused.

The Court of Appeal may vary or resume a restitution order "whether or not the conviction is quashed." (Sec. 595(1)).

Also sec. 638(2) provides that a court that suspends the passing of a sentence may prescribe as a condition of the recognizance that the accused make restitution and reparation "to person aggrieved or injuries for the actual loss or damage cause by the commission of the offence."

Although no statistics are available, this section seems to used sparingly in practice, and then only for the restoration of

44. Schaffer, "Correctional Rejuvenation ...", at 164.

45. Ibid note 11.

46. Ibid, note 14 (Schaffer is quoting Von Hentig).

47. Penal Practice in a Changing Society.

48. Supported by the U.S. Department of Health, Education and Welfare and cited in Schaffer, "Correctional Rejuvenation ..." at 164 et al.

49. Ibid at 165.

50. Restitution and Compensation in the Criminal Law, 34 Law Magazine and Review 386, 388, (5th Series 1909), cited in Childres at 453.

51. Scott at 279.

52. Foulkes at 237.

53. Yahuda,"Criminal ...", at 145.

54. Justice, para. 46.

55. Justice, para. 47.

56. See Starrs, Minn. L.R. Symp. for a serious attempt at the presentment of the private insurance alternatives. His argume is also presented in Starrs, "A Modest Proposal ...". Occasionally private insurance is advocated without careful analysis as a reation to "government paternalism" and illusionary problems foreseen in state compensation: see Ibang , Jour. Pub. L. Symp.

57. Harris at 50.

58. Harris at 50.

59. "Compensation ...", 33 U. Chi. L.R. at 540.

59a. Mueller, Jour. Pub. L. Symp. at 219.

60. Ibid. at 231.

61. Mueller, ibid. at 230, estimated that the cost of a full victi compensation scheme in the United States would be $20 billion, a figure clearly "too fantastic to be feasible".

62. Third Report, para. 3. New Zealand was the only other jurisdiction for which statistics were available. In the first four years of operation (ending in 1967), the New Zealand Board paid: 1964 - £ 1042; 1965 - £ 159[illegible]; 1966 - £ 1405 and 1967 - £ 1184.

63. Miller, Jour. Pub. L. Symp. at 303-4;
Mueller, Minn. L.R. Symp. at 215.

64. Ibanu, Jour. Pub. L. Symp. at 202; See also Mueller, Minn. L.R. Symp. at 216.

65. Ibanu, ibid at 202.

66. Weihofen, Jour. Pub. L. Symp. at 217.

67. Cross at 816.

68. Ibanu, Jour. Pub. L. Symp. at 202.

69. Justice, para. 10.

70. "Great Britain ...", 78 Harv. L.R. at 1685.

71. "Compensation ...", 19 Vanderbilt L.R. at 224.

71a. First Report, para. 14(3).

72. Third Report, para. 5-6.

73. White Paper, para. 13.

74. Third Report at page 27 (statement made August 4, 1966).

75. Section 1.

76. White Paper,para. 17.

77. Justice, para. 20.

78. "Compensation ...", 33 U. Chi. L.R. at 547.

79. Insurance Act, R.S.A. 1955, ch. 159, sec. 302.

80. Motor Vehicle Accident Claims Act, S.A. 1964, ch. 56, sec. 7.

81. White Paper, para. 18.

82. Comment (c) to Section 102 at 135.

83. White Paper, para. 14.

84. Comment to Section 301 at 138.

85. Zeigel at 332.

86. Childres at 461.

87. Bryan at 14.

88. "Compensation ...", Can. Corrections As[illegible]., at 12. (Recommendati

89. Justice, para. 7.

90. Childres at 460.

91. Justice para. 7.

92. White Paper, para. 5, states that "virtually all the public comment ... has accepted ... that compensation can justifiably be restricted to the victims of crimes of violence."

93. New York - Section 621(5); Mass. - Section 1.

94. White Paper, para. 14(a).

95. Third Report, para. 7(2).

96. Justice, para. 17.

97. M. Wolfgang, Patterns in Criminal Homicide, Philadelphia, 1958, cited in Morris at 5.

98. Ibid.

99. Ibid at 6.

100. Schultz at 4.

101. Childres at 469.

102. Justice, para. 19.

102a. "Compensation ...", Cmnd. 1406 at 11.

102b. "Compensation ...", 33 U. Chi. L.R. at 550.

103. White Paper, para. 14(6).

104. Section 10(1)(b).

105. Section 631 (1)(c).

106. Section 17(6).

107. White Paper, para. 22.

108. Third Report, para. 20.

109. Third Report, para. 10. Notwithstanding such apparent generosi the Board has been criticized for not adhering to the principle of common law damages. Walker (at 970), after citing a number of cases, concluded, "In almost every case quoted the amount of damages would be at least 50% higher and in one or two of the cases the damages would certainly be double - if not more. If these examples are indicative of the general standard of valuation, then surely something must be radically wrong." The Board has disavowed such speculation and assured that it was doing its best to make awards on the same scale as the courts: Third Report, para. 20.

110. Edwards at 7.

111. Section 631. "Compensation ...", 30 Albany L.R. at 122-124 criticizes this qualification and suggests "that compensation to victims of crime is part and parcel of the state's obligation to provide a safe environment for its citizens."

112. Eremko at 44.

113. "Compensation ...", 30 Albany L.R. at 123.

114. Section 11 of Sask. Act.

115. Regulation 80/68, reported in Sask. Gazette of March 15, 1968, cited in Eremko at 45.

116. Section 9(b).

117. Eremko at 46.

118. Section 5.

119. Section 6.

120. Childres at 462.

121. Childres at 462.

122. Supra, note 69.

123. Third Report, para. 3(a).

124. "Report on the Operation in New Zealand", appended to a letter from the Minister of Justice to the Attorney-General of Saskatchewan, dated November 7, 1967.

125. Justice, para. 42.

126. Justice, para. 40.

127. Starrs. Minn. L.R. Symp. at 306.

127a. Edmonton, Police File No. 60520-67.

127b. Calgary, Police File No. 61-163498.

128. "Compensation ...", 19 Vanderbilt L.R. at 225; Childres at 463; see also "Compensation ...", Cmnd. 1406, para. 50.

129. Loss of amenities might be regarded as an element of suffering and hence compensible within the head of "pain and suffering", but "today the courts are showing a tendency to erect this into a clearly separate head of damage". Mayne and McGregor, Damages, 12th ed., 1961 at 784.

130. Justice, para. 19.

131. See, for instance, The Trustee Act, R.S.A. 1955, ch. 346, s. 3;

132. Childres at 464.

133. Justice, para. 44.

134. "Compensation...", Can. Corr. Assn. (unpublished) at 14.

135. "Compensation ...", U. Chi. L.R. at 551.

136. White Paper, para. 19.

137. "Great Britain ...", 78 Harv. L.R. 1685; see also Samuels.

138. N.Z. Section 19(2); Sask. - Sec. 14(1).

139. Sec. 632.

140. In the Third Report; para. 17, the British Board cited a case where an award of £ 1,000 was awarded to a widow and £ 4,500 to her children; within 17 months the widow was prosecuted for child neglect.

141. Brett at 23.

142. Justice, para. 56.

143. The maximum award is $300 with regard to summary offences.

144. Report of the Special Committee of the Man. Bar Ass. at 22.

144a. The Clement Commission at 45, citing from the Franks Report.

145. Harris at 58.

146. Harris at 58.

147. See "Compensation ...", 30 Albany L.R. at 125-127 for a consideration of the New York attempt at preclusion of judicial review: "The wisdom of allowing an arbitrary and capricious decision by an administrative officer to stand unreviewed in an area where the award, though a mere gratuity, is of such vital importance to the individual recipient seems questionable. Perhaps it would be desirable that a standard of "fairness" be imposed on every administrative decision ...".

148. Justice, para. 64.

149. In R. v. Criminal Injuries Compensation Board, ex. p. Lain [1967] 3 W.L.R. 348 the Divisional Court held that it had the authority to issue certiorari to quash a decision of the Board for mere inconsistency. A case comment in 83 Law Quarterly Review 486 claims that since the Board has no statutory status or legal powers it would not normally be subject to judicial review and that by the decision the Court "has broken out of the field of law altogether."

150. Sec. 28.

151. Sec. 16.

152. The Report of the Special Committee on Boards and Tribunals to the Legislative Assembly of Alberta, commonly known as the Clement Commission after its Chairman.

152a. Ibid, at 42.

153. Justice, para. 58.

154. Interestingly, an additional qualification for appointment in New York is that no more than two members of the same political party may sit on the board simultaneously.

155. It may be that this is the practice in New Zealand, although the wording of the N.Z. Statute would seem to require a full hearing in each case: see "Compensation ...", 33 U. Chi. L.R. at 555, note 40.

156. See First Report, para. 2.

157. See First Report, para. 6.

158. Second Report, para. 8.

159. Sec. 628.

159a. Although a hearing is held, it would appear that the procedure, is relatively informal. In a letter to Dean W.F. Bowker, Q.C., from Mr. James Eremko, Q.C., dated July 8, 1968, the following passage outlined the Board's procedure:

"We have avoided making rules of practice and procedure and for good reason. We were told that New Zealand does not have any rules. There will be time enough for rules after we have had some experience. Nor do we have a form of application. In order to avoid a separate staff, we finally

Attorney General to receive excerpts from R.C.M.P. reports on file pertaining to cases handled by them. This overcomes the objection that such reports are privileged. We also, after some time, managed to get the help of the Department of Social Welfare to conduct investigations for us. This Department has a staff at various centres in the Province and we merely tell them to obtain all the relevant information, in the same way as they would if investigating an application for social assistance. Medical reports seem to have caused us some concern in the last couple of cases but I do not think that it will be a problem. Mr. Holtzman, the secretary and counsel to the Board, assists in the preparation of cases, particularly when the applicant is not represented by counsel and to date, out of six cases, three applicants have appeared in person. We have been taking evidence under oath but have not been as strict as a court in accepting documentary evidence. Members of the Board have not been bashful and take the opportunity of asking questions of witnesses. We use the services of a court reporter and the evidence is also taped but I expect that the tapes will be destroyed after about six months. Notices of hearing with proof of service are filed by Mr. Holtzman and he also files any documentary evidence which he has received, particularly a police report or excerpts. The applicant then gives evidence and other witnesses follow. The press and news media have favourably remarked upon the informality of the proceedings."

160. Third Report, para. 1.

161. Report of the Special Committee of the Man. Bar Assn. at 17.

162. Conversation between Miss E. Corlett and Mr. James Eremko.

163. Harvard Model Act, Comment to Sec. 501.

163a. Clement Commission at 36.

163b. Saskatchewan's Act provides for open hearings unless a conviction has not been obtained. Even this limited provision for in camera

proceedings has been deemed too broad. In a letter from Mr. James Eremko, Q.C. to Dean W.F. Bowker, Q.C. dated July 8, 1968, Mr. Eremko stated:

"The first important amendment we must have is that the matter of in camera hearings should be left to the discretion of the Board. Please refer to Section 14 which requires a hearing in camera when there has been no conviction. But if the victim took civil proceedings, the hearing would not be in camera. If the intention is to avoid prejudice to the offender upon a criminal trial, there are other ways of accomplishing this. The public is vitally interested in these cases and I assure you that the press and other news media are continually after us for information. We have been hesitant to hand out information of applications pending in view of the in camera provision."

164. Watson at 684.

165. Second Report, para. 31. Note, however, the remarks in Harvard Model Act, Comment to Sec. 502, to the effect that the Board should do its own investigating, as well as preside at the hearing. "Since this is a small commission handling a very small area of compensation, it would be unnecessarily cumbersome and expensive to separate the function at the hearing; and there should be no harm to the applicant since the Act does not intend to create an adversary procedure."

165a. Clement Commission at 36 quoting from The Attorney General's Committee on Administrative Procedure (the Acheson Report, U.S. Government Printing Office, 1941).

166. Section 23(1).

167. Sec. 23(3).

168. Morris at 136.

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