

# COMMENTS

## COMPENSATION FOR THE VICTIMS OF CRIME: A CANADIAN PROPOSAL\*

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### I. INTRODUCTION

In the whole civilized world, the history of crime and punishment over the past one thousand years reveals a steadily increasing concern with the treatment of the criminal and a virtual lack of concern for his victim. The victim of crime in our society—and in the administration of justice—has been ignored since the days of the *bot* and *wergild* in Anglo-Saxon England when a monetary compensation was available to the victim of crime or to his family; also for centuries by the ancient law of *deodand* the object or instrument which killed or injured a person (for instance, a horse and cart) was forfeited to the state for the benefit of the victim or his family. The discontinuance of damage payments to the victim of crime was the price that English society paid for a centralized system of criminal justice in the Court of the King's Bench—the King transferred the money payment from the victim to himself—and although the common law provided a civil remedy in the Court of Common Pleas for the victims of most crimes, the benefits of such civil actions have been largely illusory because most criminals are financially worthless, and judgments of civil courts against them are simply uncollectable debts. Thus in most cases the victim of crime under our system of law has been left to bear his own losses. That this also is the case, most of the world over, provides no answer in justice.

In the past decade, however, there has been a surge of concern and there has been action in at least five jurisdictions: New Zealand, Great Britain, California, New York<sup>1</sup> and Saskatchewan, with initial steps being taken in several others.<sup>2</sup> The Committee on Legislation of the Canadian

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<sup>1</sup> The New York scheme was scheduled to become operative in March, 1967.

<sup>2</sup> In Canada, the provinces of Manitoba and British Columbia are in the process of enacting schemes; see Ross, *The Victims of Crime Deserve a Break*, Reader's Digest, Aug., 1967, 67, at 69. Nova Scotia is also reported to be active herein.

Corrections Association will soon recommend the introduction by each province of a publicly administered system of compensation to cover loss or injury suffered as a result of crime. It is a generously conceived scheme that goes far beyond any of those which are at present in operation or which have been embodied in proposed legislative bills.

## II. RATIONALE OF COMPENSATION

Even where there is agreement that compensation should be made to victims of crime, there is great uncertainty and even confusion as to the basis on which compensation should be made, as to the specific objectives to be attained, and as to the extent of the loss or damage caused by crime which must be compensated.<sup>3</sup>

There are certain objections to founding compensation on the fact that a crime has been committed. One such objection is based upon the role of the victim, which may not always be completely innocent. Professor Mueller refers to studies which reveal that the victim plays a dual role, one inviting compassion, the other inviting blame.<sup>4</sup> Documented studies have been done which indicate the victim himself often contributes to the occurrence of the crime, through his own carelessness, aggressive behaviour or imprudence.<sup>5</sup>

With respect to the nature of the loss suffered, Professor John Edwards has pointed out that : "the failure on the part of householders, apartment dwellers, schools, public buildings, factories, warehouses and stores to take elementary precautions for the safeguarding of their property, is undoubtedly a major contributory factor in the increasing ability of criminals to commit with impunity offences against property." He finds there is a strong case against the state assuming responsibility for making good property losses attributable in large measure to the negligence of owners. However, he goes on to say : "To attribute, however, to the ordinary individual the same degree of imperviousness where his person, not his property, is imperilled, is to make a grievous mistake."<sup>6</sup>

Another difficulty which arises if compensation is to be based on whether a crime has been committed is the question of how far the technicalities of the criminal law are to be applied in order to determine the

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<sup>3</sup> Under the British plan, introduced in 1954, a ceiling is placed on at least one category of compensation, that of lost earnings : the maximum recoverable is set at twice the average industrial wage, HOME OFFICE, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, CMND. No. 2323, § 22 (1964).

<sup>4</sup> Mueller, *Compensation for Victims of Crime : Thought Before Action*, 50 MINN. L. REV. 213-21 (1965) quoted in : Canadian Corrections Association, Material Copied from Copyrighted Articles & Books for Private & Confidential Use of Committee Members at 25 (Draft No. 4) (1965) [hereinafter cited as C.C.A. Material].

<sup>5</sup> Fooner, *Some Problems in Evaluation of Proposals for Victim Compensation*, in C.C.A. Material at 84.

<sup>6</sup> Edwards, *Compensation to Victims of Crimes of Personal Violence* at 5 (unpublished material 1965).

eligibility of the complainant for compensation. Many authorities maintain that "the provisions of the criminal law are, in truth, irrelevant to the question whether compensation should be paid."<sup>7</sup> They contend that unless there is a conviction it is impossible to say that a person's conduct constitutes a crime, and not a mere accident. In cases where the person who caused the injury is acquitted it is submitted that compensation should still be paid; but, of course, it must be on some principle other than that the claimant has been the victim of a crime. In the same vein, when an insane person causes harm probably no crime is committed, yet compensation should presumably be paid.

Problems of this sort have arisen in the administration of the British scheme. Members of the Criminal Injuries Compensation Board had originally disallowed applications for compensation for injuries inflicted by children under the age of ten in view of the conclusive presumption in England that no child under the age of ten can be convicted of a criminal offence.<sup>8</sup> This is criticized as being wrong in principle and not within the intention of the government in setting up the scheme. The submission is that: "[T]he scheme . . . is not to be regarded as an adjunct to the criminal law; it is more realistic to treat it as an adjunct to the law of tort . . . . What . . . could be less relevant than for defendant's counsel, in an action for tort, to urge in mitigation of damages that the defendant was blind drunk when he fractured the plaintiff's skull?"<sup>9</sup>

Professor Mueller also submits that :

[I]f compensation depends on proof beyond a reasonable doubt that a crime has been committed, a majority of victims would remain without compensation. A lesser degree of proof increases the possibility of fraudulent claims, but does complete the analogy to tort actions. Every crime by which a citizen suffers a loss is also a tort. If the civil rather than the criminal burden of proof were employed the terminology 'compensation for victims of crime' would no longer seem appropriate. Instead, 'tort loss compensation' would be a more accurate title.<sup>10</sup>

One theory of the basis of crime injury compensation is that the state has a duty to protect citizens from crime, that the commission of a crime is the result of the state's failure to perform this duty, and that the state should therefore assume responsibility for compensating the victim for his loss or injury. As has been elsewhere pointed out,<sup>11</sup> this rationale applies to harm resulting from all types of crime, and any equitable compensation

<sup>7</sup> E.g., Glazebrook, *Compensation for Victims of Crimes of Violence*, 2 BRIT. J. CRIM. 295-99 (1962), quoted in C.C.A. Material at 41.

<sup>8</sup> An amendment in 1966 lifts this disqualification; Samuels, *Compensation for Criminal Injuries in Britain*, 17 U. TORONTO L.J. 20, 29 & n.58 (1967). The age is seven in Canada, CRIM. CODE § 12.

<sup>9</sup> Watson, *Mens Rea Misapplied*, 116 THE NEW L.J. 684, at 685 (1966).

<sup>10</sup> Mueller, *op. cit. supra* note 4, at 29.

<sup>11</sup> *Id.* at 32.

scheme would have to cover the total amount of loss through crime, a staggering concept in terms of cost and administration.<sup>12</sup> A somewhat less syllogistic approach is popularly termed the "wheel of fortune" theory. This is premised on the assertion that crime is an inherent hazard of our society. The reasoning continues: "It [crime] inevitably falls upon someone though the particular victim may be 'selected' by chance, and . . . the individual as victim should not have to bear his misfortune alone."<sup>13</sup> Compensation is "the mechanism by which lucky members of society make it up to the ones who are unlucky."<sup>14</sup>

In contrast to these philosophical bases, a "social welfare" theory holds that society ameliorates distress of its members, not as a "right" but as "social policy," if they become widowed, orphaned or indigent. This seems to be the underlying concept of the existing schemes particularly the California one which makes need a basic requirement for compensation and makes victims of crime ineligible if they are unmarried individuals, childless married couples, elderly or unable to pass a public welfare means test.

### III. EXISTING SCHEMES

All of the current schemes—those of New Zealand,<sup>15</sup> Great Britain,<sup>16</sup> California<sup>17</sup> and Saskatchewan<sup>18</sup>—are restricted in their application to the victims of crimes of *violence* who incur personal injury. There does not seem to be any consideration given to the damage caused by non-violent crimes. These would accordingly exclude many instances of crimes against property. It is interesting to note, however, that the British Criminal Injuries Compensation Board, in its first annual report recommends that an improvement in the scheme under which it functions would be the provision of a schedule of offences, with a discretionary power in the board to award compensation in cases not specified in the schedule if they considered the justice of the case required it.<sup>19</sup> This might indicate that the board feels that there should be recovery for property losses, at least in some cases.

#### 1. New Zealand

The New Zealand law, the first born of all such schemes, provides for compensation to a person injured and to the dependants of persons killed by

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<sup>12</sup> This theory of absolute state obligation was denied by the 1961 report of the British Home Office Working Party on Compensation for Victims of Crime, CMND. No. 1406. The sentiment was that whereas considerations of sympathy for the innocent victim might motivate compensation, it could not be accepted that there was "any bounden duty to mitigate the victim's hardship."

<sup>13</sup> *Supra* note 5, at 87.

<sup>14</sup> *Ibid.*

<sup>15</sup> The New Zealand Criminal Injuries Compensation Act, Act No. 134 of 1963 (N.Z.).

<sup>16</sup> HOME OFFICE, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, CMND. No. 2323 (1964).

<sup>17</sup> CAL. PEN. CODE §§ 13600-03 and CAL. WELFARE & INST'NS CODE § 11211.

<sup>18</sup> The Criminal Injuries Compensation Act, Sask. Stat. 1967 c. 84.

<sup>19</sup> CMND. No. 2782, at 6.

certain criminal acts of violence. The specific crimes are listed in the schedule. The Crimes Compensation Tribunal which consists of three members has the power to award compensation in respect of expenses actually and reasonably incurred as a result of the victim's injury or death, loss of income and any other reasonable pecuniary loss resulting from the victim's injury, and also pain and suffering of the victim. The amount to be awarded is in the discretion of the tribunal, but there are statutory limits. In the case of pecuniary loss and expenses the limit is £1000 and in the case of pain and suffering of the victim the limit is £500.<sup>20</sup> The New Zealand act requires the tribunal to give due weight to the behaviour of the victim. Conviction of the offender is not necessary to ensure payment of compensation. In one case a youthful victim lost an eye as a result of being shot with an airgun in the hands of an eleven-year old boy. The victim was compensated by payment of £674, although the offender was not prosecuted to conviction. Provision is made for recovery from the offender of amounts paid under the act to the victim. Five such orders have been made but it is not known at this date if they were collected.

A paucity of applications was reflected in the first year of the scheme's operation by the granting of only seven awards, with the number increasing only to nine in the second year. The 1965 annual report of the operation of the New Zealand plan ends with these words :

To sum up : the Act has not been used as much as was expected, so its cost to the taxpayer has been small; it has adequately met the needs of some necessitous cases; no unexpected difficulties have been experienced in its operation; the recovery of a portion of the compensation from offenders may have psychological value for the prevention of certain kinds of offences.<sup>21</sup>

## 2. *Great Britain*

The British scheme is not in statutory form, having been implemented by a White Paper;<sup>22</sup> it is more flexible than that of New Zealand and makes no reference to any specified crimes. Rather, it provides the simple criterion that compensation is recoverable where personal injury is directly attributable to a criminal offence.

In both schemes, the Compensation Board is empowered to make an award to a victim whether or not the offender is prosecuted for or convicted of the offence. Like the New Zealand statute, the British scheme requires the board to reduce the amount of compensation or to reject the claim altogether in accordance with its assessment of the degree of responsibility attributable to the victim. Compensation, under the British scheme, is expressly assessed

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<sup>20</sup> Note, 1 N.Z.U.L. Rev. 327 (1965).

<sup>21</sup> Crimes Compensation Tribunal Report, (unpublished 1965) *In* C.C.A. Material at 5.

<sup>22</sup> *Supra* note 16.

on the basis of common-law damages for personal injuries, and usually a lump sum payment is made, whereas in New Zealand there is provision for a periodical pension.

The British scheme excludes from the ambit of compensation offences committed against a member of the offender's family and also injuries caused through motoring offences, except where a motor vehicle has been used as a weapon. It also provides reparation to any person who suffers personal injury (i) in the course of arresting or attempting to arrest a suspected offender, (ii) in the course of preventing or attempting to prevent an offence from being committed; or (iii) in giving help to a police officer who is engaged in arresting an offender or in preventing the commission of an offence.<sup>23</sup>

In the first two years of its operation, the British board has granted some 2,058 awards, while it rejected only 278.<sup>24</sup> It is generally considered to have been a successful undertaking.

### 3. California

The approach in California is embodied in two independent legislative acts.<sup>25</sup> Additions to the Penal Code<sup>26</sup> provide on the one hand for the indemnification of citizens who are personally injured or suffer damage to their property in aiding the prevention of a crime or apprehension of a criminal. Secondly, there is legislation providing payments to victims incapacitated by crimes of personal violence.<sup>27</sup> There is, unlike two of the existing schemes,<sup>28</sup> no enumeration of such crimes although the epithet "personal" is not defined. It has been pointed out that compensation in California is based on need rather than on loss :<sup>29</sup> the aim is to adequately maintain the victim rather than to restore him to his former position. However, it would seem that while neither New Zealand nor Britain expressly subscribe to this feature, the wide discretion given to the tribunal in both these countries accommodates implementation of such an approach. The Saskatchewan act seems to speak of both need and loss.<sup>30</sup>

California's scheme has been in operation since early 1966, and as yet there has been no extensive report upon its working. On the basis of the

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<sup>23</sup> California and Saskatchewan have similar provisions, *infra*. In Ontario, an act was passed this year to furnish such compensation, *infra* note 34.

<sup>24</sup> Samuels, *op. cit. supra* note 8, at 50.

<sup>25</sup> Note, 18 STAN. L. REV. 266 (1965), presents an extensive and comparative description of the plan.

<sup>26</sup> CAL. PEN. CODE §§ 13600-03.

<sup>27</sup> CAL. WELFARE & INST'NS CODE § 11211.

<sup>28</sup> Those of New Zealand, *supra* note 15, and Saskatchewan, *infra*.

<sup>29</sup> *Supra* note 25, at 270.

<sup>30</sup> *Supra* note 18. Section 9(b) provides that the board shall take into account "the financial need of the person who was injured or of the dependents of the victim." Section 11 enumerates various heads of loss for which compensation may be awarded.

first two cases only, however, observers report great dissatisfaction on the part of the recipients.<sup>31</sup>

#### 4. *Canada*

The Saskatchewan Criminal Injuries Compensation Act,<sup>32</sup> the first in Canada, has not yet been proclaimed. Notwithstanding, this legislation appears to have been the impetus in at least three other provinces where legislation is before Parliament—Manitoba, British Columbia and Nova Scotia. The Saskatchewan act, like the California and British plans, encompasses the situation of attempt at crime prevention as well as that of victimization by crime. The Ontario legislature recently gave first reading to a bill to provide for payment of up to \$500 a month or a lump sum of \$10,000 in compensation to persons injured while assisting police officers;<sup>33</sup> while the Attorney General's department in Ontario is said to be carrying out a full scale study of legislation to provide compensation for all victims of crime.

Sections of the Criminal Code already provide for restitution of property and compensation for loss of property suffered as a result of the commission of an offence.<sup>34</sup> These sections are rarely used by our courts, except as a condition of the imposition of a suspended sentence.

### IV. THE CANADIAN PROPOSAL

The Legislation Committee of the Canadian Corrections Association is not a little apprehensive that the diversity of schemes under review by the various provincial legislatures will result in a haphazard handling of the problem of compensation to victims of crime in Canada.<sup>35</sup> The committee accordingly urges upon each province the desirability of uniform legislation. Such legislation must provide a scheme of compensation in each province to cover loss or injury sustained by any person, regardless of his financial position, as the result of any crime under the Criminal Code of Canada. Such a scheme would be more far-reaching than those presently in existence in Great Britain, New Zealand and California, that contemplated by the Saskatchewan statute, or the draft legislation in the other provinces, principally because it would cover property losses as well as losses through personal injury and be available as a matter of justice without any welfare means test. The scheme proposed is not a piece of welfare legislation;

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<sup>31</sup> California's Program of Compensation to Crime Victims, Legal Aid Briefcase, December, 1966 (Geis & Zietz).

<sup>32</sup> *Supra* note 18.

<sup>33</sup> An Act to Provide Compensation for Injuries received by Persons Assisting Peace Officers, Ont. Bill No. 130, assented to June 15, 1967.

<sup>34</sup> CRIM. CODE §§ 628, 629, 630 and 638.

<sup>35</sup> The author submits after a reading of the various proposals that the treatment may well be an inadequate one in any given province.

whether it be regarded as an adjunct to the law of torts, a complement to the administration of criminal justice, or as simply broadening the total system of justice in each province, is entirely an academic question. We must endeavour to remove the hardship that has been left by society to be borne by the unfortunate victim of crime. To provide him with welfare payments is no answer in justice.

A number of benefits accruing to the system of law enforcement are envisaged by the committee :

- 1) Compensation may overcome public apathy in relation to both the victim and the criminal and may help law enforcement by encouraging the laying of criminal charges;
- 2) The availability of compensation encourages members of the public to prevent crimes;
- 3) Additional information on what crime is costing its victims may lead to increased interest in preventative programs.

The Canadian plan would differ from existing schemes in some ways. There seems to be no logical justification for restricting compensation to victims of crimes of *violence*. Non-violent crimes can cause more serious and permanent hardship to the victim and his dependants than those crimes of violence that cause only temporary physical injury. Limitations which exclude compensation for injuries resulting from offences committed by members of the victim's family and for motor-vehicle injuries should not be included. With these points in mind, an outline of the proposed plan can be drawn :

### 1. Injury Compensable

All injuries, personal and property, incurred as a result of any crime as defined by the Criminal Code will be compensable. Such injury may ensue as the direct end of a criminal act or as a result of an attempt to prevent or assist the prevention of crime.<sup>36</sup>

### 2. Quantum of Compensation

Payment, which it is suggested should be in lump sum,<sup>37</sup> will be for such heads as medical expenses, pain and suffering, humiliation, loss of income, property loss, and legal fees. A judgment awarded in a civil suit

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<sup>36</sup> An insupportable anomaly in Canadian law discussed by the editor of *Chitty's Law Journal*, Judge Kennedy, concerns the requirement of the Criminal Code that any person must, if requested, assist a peace officer in arresting a person or preserving the peace, and the fact that no provision exists for compensating him if injured while so acting. Kennedy, *Compensation for Victims of Crime*, 14 CHITTY'S L.J. 1 (1966).

<sup>37</sup> It has been suggested that the lump sum system is now thoroughly discredited, Samuels, *supra* note 8, at 40. On the other hand, it is not desirable that the board should be required to make reassessments of a case : the aim should be for a final disposition within a reasonable period.



should be taken into consideration in determining the amount of compensation.<sup>38</sup> The conduct of the victim will be reflected in the award where the crime is, in part, victim-precipitated by provocation or carelessness.

### 3. Eligibility Standards

A victim of a criminal act should be compensated even if the act in question did not lead to any prosecution or conviction either because the evidence against an accused was insufficient, or because the offender was legally innocent owing to his young age, insanity or similar factor.

It is recommended that large corporations be excluded as victims; and that although they are eligible, the amount of compensation obtainable by shareholders for an offence committed by the company be limited.

### 4. Administration of the Scheme

As stated, the scheme would be financed out of general revenue by means of the establishment of a fund. A board is the proper administrative body to bear claims and to approve or deny compensation. A right of appeal should be to a court of law on the sole ground of denial of natural justice. Thus, there would be no strict legal right to compensation; the making of an award would be entirely within the discretion of the board. Hearings should be private with the right to be represented by counsel, even where provided under a legal aid scheme.

In conclusion, it is hoped that uniform legislation will be enacted in all provinces that will provide a generous but not unlimited scheme of compensation. It would be confined to offences under the Criminal Code of Canada and to cases in which in the discretion of the board compensation should be paid. It would include payment for property loss and loss of income as well as for personal injury. The proposed legislative scheme would provide, too, for compensating a person who assists a police officer or otherwise assists in preventing any act prohibited by either federal or provincial penal legislation. Compensation would also be available to persons mistakenly prosecuted or convicted of any federal or provincial offence. In all cases the victim would have a *prima facie* legal right to compensation not limited in amount by the statute, and the board or tribunal making the award would in no case apply any means test, but base its award entirely on law and justice.

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<sup>38</sup> Where compensation is awarded, the board should be subrogated to the extent of its payment (plus expenses) to any right of civil action which the victim may have against any third party. But if the board recovers more from the civil suit than it paid to the victim, the additional money would be turned over to the victim. Moreover, the victim should have the right to join with the board in the civil action, or to commence an action of his own, if he so desires.