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# TENTATIVE PROPOSALS FOR COMPENSATION OF ACCUSED ON ACQUITTAL

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

July, 1987

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

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The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplifiction and modernization of the law.

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These proposals have been prepared by the research staff of the Commission and have been approved by the Commission for the purposes of discussion.

It is the policy of the Commission to seek response to its proposals before a final report is prepared for presentation to the Minister of Justice. Accordingly, the Commission invites comments and criticisms from the Bench and Bar and others interested in this particular area of the law.

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## I. INTRODUCTION

The basis of our criminal justice system is the concept tha a person is presumed innocent until proven guilty by law. Safeguards are built into the legal system to protect the rights of those who have been accused of a crime. Their purpose is to ensure that no one will be convicted of a crime which he did not commit. In addition, there are safeguards designed to protect the individual from an erroneous accusation of guilt.

In spite of the protections and safeguards offered by the law, it does happen that on occasion individuals are unjustly convicted or unjustly accused. It is the dilemma of this latter group - those who have been charged with an offence, but who are subsequently able to demonstrate their innocence - which is the subject matter of this paper.

Until recently, the prevailing view has been that such an eventuality is "one of the inevitable hazards of living in society"[1] and that those who have been unjustly accused have bee well served if there ultimately is a finding of "not guilty". Now, however, another view is surfacing, that an acquittal is not satisfaction enough. Something more - a form of monetary redress - is required.

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1 Report of the Committee on Costs in Criminal Cases (New Zealand, 1966), para. 28. Cited in Report on Civil Rights - Part 2 - Costs of Accused on Acquittal, Law Reform Commissio of British Columbia, 1974, p. 28.

It has no doubt been the dramatic case of Susan Nelles that has pushed the issue of compensation for those unjustly accused so forcefully into the limelight. Susan Nelles is the nurse who was charged in 1982 with the murder of four babies at the Toronto Hospital for Sick Children. There was a period of fourteen months between her arrest and her exoneration. It was reported by newspapers that at the end of that time her legal bills totalled between $150,000 and $200,000.[2]

Most individuals who fall into this category - that is, those who are innocent of the crime of which they have been accused - will not have legal costs that in any way approach the amount incurred by Susan Nelles. Yet the question to be asked is the same in each case: should a person who is innocent and who has been forced to prove that innocence with his own financial resources be compensated in some way? Should a person whose life has been disrupted, whose source of income may have been affected, whose name has been blackened through no fault of his own, receive some form of monetary redress?

The public purse supports the criminal justice system. Yet no one financially assists the innocent accused who is drawn into that system. Does the criminal justice system not have an obligation to the accused who has somehow inadvertently become caught in its mechanism?

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2 The Globe & Mail, Toronto, May 27, 1982 gave the figure of $150,000. The Vancouver Sun, Vancouver, June 4, 1982 reported the sum to be between $150,000 and $200,000.



Although at least two of Canada's Law Reform Commissions have studied the problem of what the criminal justice system ow to those who have been unjustly accused,[3] none of their proposa have been acted upon by their respective governments, nor has there been agreement among the Commissions themselves on the means by which compensation should be awarded. With this paper the issue is once again being addressed.[4]

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3 The Law Reform Commission of Canada issued a report in 1973 titled Criminal Procedure - A Proposal for Costs in Criminal Cases. The Law Reform Commission of British Columbia issued report in 1974 titled Civil Rights - Costs of Accused on Acquittal.

4 The Law Reform Commission of Canada and the Law Reform Commission of Saskatchewan collaborated for a time in this area of the law, but ultimately concluded that separate papers were warranted.

## II. A SUMMARY OF THE PRESENT LAW

Under the present law, the likelihood that an accused will be compensated for costs is very remote. The reason for this state of affairs is not hard to identify. Until fairly recently, in virtually all cases the Crown neither paid nor received costs.

> [I]n dealing with costs in cases between the Crown and a subject...the rule should be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.[5]

Over the years, statutory provisions have been developed that enable the courts to award costs. However, they are either very limited in scope or have been interpreted in a manner that has reduced their effectiveness.

Criminal law offences are divided into two categories, the indictable offence (the more serious offence) and the summary offence (the less serious offence). Each is treated differently in the Criminal Code. Even in the matter of costs there are differences. Each category, therefore, will be considered separately.

### A. Indictable Offences

In the prosecution of indictable offences, there is no general power to award trial costs. There are a few circumstances under which costs may be awarded to an accused but their occurrence is extremely rare. Costs may be awarded to an

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5 Johnson v. The King, [1904] A.C. 817 (P.C.).



accused when the indictment or count under which he has been charged is incorrect and it is considered necessary by the court to adjourn the matter so that a correction may be made. Under those circumstances, the accused may be awarded costs that he incurred as a result of the system's initial error and the necessity for amendment.[6] Costs may also be awarded in prosecutions for the virtually obsolete crime of defamatory libel.[7] Courts of Appeal hearing indictable offences are explicitly precluded from making orders for costs.[8]

It has also been suggested that superior courts can rely on their inherent powers to impose costs on the Crown, but only in exceptional cases "analogous to contempt of court situations" where "necessary to censor the negligence or misconduct of a party".[9]

Prior to December, 1985, there was much speculation about section 438(2)(c) of the Criminal Code. Did it give a court general authority to award costs?

Section 438(2)(c) stated that the court had the power to regulate the pleading, practice and procedure in criminal matters, including costs. The question whether the word "regulate" included the substantive power to award costs was

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6 Criminal Code, s.529(5).

7 Criminal Code s. 656. See also Law Reform Commission of Canada, Working Paper 35, Defamatory Libel (1984).

8 Criminal Code s. 610(3).

9 A.G. Quebec v. Cronier (1981) 63 C.C.C. (2d) 437.

considered by commentators in scholarly works and by members of the judiciary but a definitive interpretation did not emerge.[10] The word "costs" was deleted when section 438(2) was amended in December of 1985, rendering further consideration of the matter unnecessary.

B. Summary Conviction Offences

Legislation that deals with the awarding of costs in the prosecution of summary conviction offences is found in the Criminal Code in sections 744, 750, 772 and 438(1) and (2)(c).[11]

Sections 744 and 772 provide that the trial court may, at its discretion, award costs that are reasonable for summary proceedings and that are not inconsistent with the schedule following section 772.

A reading of section 744 would lead one to believe that it confers a broad discretion on summary conviction courts to award costs. However, section 744 has been construed as referring only to the exceedingly modest fees and allowances set out in section 772 and the schedule following.[12] The schedule which sets out the fees and allowances that may be charged by summary conviction courts is badly out of date. The last changes to the schedule were made in the 1953-54 revision to the Code, and then only some

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10 R. v. Brown Shoe of Canada Ltd. (1984), 11 C.C.C. (3d) 514; Re Christianson (1951) 100 C.C.C. 289; Rudd v. Taylor (1965) 51 W.W.R. 335 (Q.B.).

11 Criminal Code, R.S.C. 1970, c.C-34.

12 A.G. Quebec v. A.G. Canada, [1945] S.C.R. 600.



of the items were revised upward.[13] For example, mileage costs may be allowed at the rate of 10¢ a mile; if the services of an interpreter are required he may be given $2.50 for each half day he is attending trial, and if he is away from his ordinary place of residence, he is allowed his actual living expenses up to a limit of $10 per day. In addition, and perhaps most importantly the fees and allowances set out in the schedule do not provide for the item that is the defendant's greatest expense - lawyer's fees. It seems, therefore, that none can be ordered.[14]

It is easy to see that reliance on this schedule has rendered the application of section 744 of little value when one is searching for an avenue by which an accused might be fully compensated for justice gone awry.

In the case of an appeal, section 758 allows a court to make any order concerning costs that it considers just and reasonable. In 1980 the question of whether the power to award costs pursuant to this provision included the awarding of costs against the Crown was raised in the case of R. v. Ouellette.[15] It was concluded that on an appeal from a summary conviction, the Crown may indeed be asked to pay costs. In this particular instance, the Crown was ordered to pay the accused's costs on a solicitor

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13 Robert S. Reid and Peter T. Burns, "The Power to Award Costs in Criminal Costs or How Juridical Illusions Remain Illusions None the Less", (1981-82) 24 Criminal Law Quarterly 455, at 474.

14 Ibid., at 473.

15 [1980] 1 S.C.R. 568.

and client basis.[16] Just what the full scope of those costs is likely to be is uncertain. Different courts have handled the matter in different ways. It is an issue that has yet to be resolved.[17]

C. Provincial and Municipal Offences

Provincial and municipal governments also have the power to create offences, and those offences are processed through the criminal justice system. They are often referred to as quasi-criminal offences because they are usually less serious than criminal offences. However, they can still result in fines or jail terms. Examples of Saskatchewan legislation that contain quasi-criminal offences are The Highway Traffic Act, The Liquor Act and The Wildlife Act.

In Saskatchewan, Criminal Code procedures are incorporated by The Summary Offences Procedure Act.[18] Section 3(3) makes Part XXIV of the Criminal Code (including sections 744, 750 and 772) applicable to summary conviction proceedings under provincial law

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16 In a more recent instance of an appeal from a summary conviction, where the Crown was ordered to pay costs to the accused, Mr. Justice Wright of the Saskatchewan Court of Queen's Bench ordered that costs in a fixed sum be paid to the accused; R. v. Moen (1987), 50 Sask. R. 159. Also see: R. v. Wolter (1986), 49 Sask. R. 81.

17 Atrens, Burns and Taylor, Criminal Procedure: Canadian Law and Practice (1983), XX 96-100.

18 R.S.S. 1978, c. S-63.



and municipal law. The payment of costs in provincial and municipal offences is therefore regulated by the provisions of the Criminal Code.

D. The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms[19] has made available a new avenue of compensation. Those who believe thei Charter rights have been violated may ask for redress under section 24(1). That section states:

> Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The range of remedies available under section 24(1) includes: to stay or quash proceedings; to dismiss an indictment; to impose a lesser sentence upon conviction; to exclude evidence; to make a declaration that there has been an infringement of a constitutional right; to discipline the persor who has infringed the right; to award monetary compensation.[20] In deciding which of those remedies is "appropriate and just" ir the context of criminal law, McDonald J. in Germaine v. R. suggests that the requisite remedy is one that furthers the

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19 Constitution Act, 1982: Part I, Canadian Charter of Rights and Freedoms.

20 Germaine v. R. (1984) 10 C.R.R. 232 at 242; McLellan and Elamn, "The Enforcement if the Canadian Charter of Rights an Freedoms: An Analysis of Section 24" (1983) 21 Alta. L. Rev. 205.

object of the guaranteed Charter right that has been infringed, without offending the reasonable expectations of the community for the enforcement of criminal law.[21]

It should be emphasized that these remedies are available only when the Charter itself has been contravened. In the criminal process where Charter rights are not violated a request for monetary compensation could not be made under section 24(1). However, for those whose rights have been infringed under the Charter, it is a possible avenue of compensation that should not be overlooked.

A number of commentators have assessed section 24(1) of the Charter and believe that it should be, and will be, given a "generous interpretation".[22] Several judicial decisions reflect the view that section 24(1) should be broadly applied. In Re Southam Inc. v. R. (No. 1)[23] it was stated:

> The spirit of this "living tree" planted in friendly Canadian soil should not be stultified by narrow technical interpretations without regard to its background and purpose; its capability for growth must be recognized.

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21 (1984) 10 C.R.R. 232.

22 Manning, Morris, Rights, Freedoms and the Courts: Practical Analysis of the Constitution Act 1982, at 481, Toronto, Emond-Montgomery Ltd., 1983; Fairley, H.S., "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review", (1982) 4 Sup. Ct. L.R. 217; Gibson, Dale, "Enforcement of the Canadian Charter of Rights and Freedoms", at 481-527, Tarnopolsky and Beaudoin (eds.) The Canadian Charter of Rights and Freedoms, Toronto, Carswell, 1982.

23 3 C.C.C. (3d) 515.



In R. v. Belton[24] Allen Prov. J. noted:

> As to the relief that may be given, it appears that th Charter has granted a very wide range within which a Court can exercise its discretion.

In Germaine v. R.[25] it was explained that the word "remedy" in the legislation was to be given a "generous interpretation".

Germaine was one of the first cases in which monetary compensation was granted as a remedy under the Charter. McDonal J. therefore felt it was necessary to demonstrate that monetary compensation did indeed form part of the armoury of remedies tha may be granted when it is just and appropriate to do so. He looked to the Constitutions and cases of other nations for precedents, relying in particular on the case of Maharaj v. Attorney General for Trinidad and Tobago (No. 2).[26] He conclude that an order for monetary compensation was a remedy available i a court of superior jurisdiction. He added, "I express no opinion about any other court". Compensation was also granted i a case heard one month later, in May of 1984. In Re Marshall an The Queen it was held that since the accused suffered a violatio of rights guaranteed by the Charter, he was entitled to his cost (on a solicitor-client basis) as the "appropriate and just remedy".[27]

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24 (1983) 2 C.R.R. 227.

25 Supra, footnote 21.

26 [1978] 2 All E.R. 670 (P.C.).

27 (1984) 13 C.C.C. (3d) 73.

It is interesting to note that McDonald J. in Germaine v. R. leaves open the issue of whether a remedy of monetary compensation is available in any court other than that of superior jurisdiction. This has proved to be a contentious point, with strong opinions held on both sides. McLellan and Elamn argue that section 24(1) authorizes a court to grant any remedy normally within the jurisdiction of that court.[28] A provincial court, therefore, would not have access to remedial powers that are not now available to it. A superior court, he argues, has inherent jurisdiction and may grant any remedy unless prohibited from doing so by statute. It is free to order a monetary remedy, but a provincial court, which does not have inherent jurisdiction, is not.

There are cases which support this view. Lee Prov. J. states that a provincial court does not have the power under section 24(1) "to order the making of an apology, the payment of damages or the performance of some act to draw attention to the transgression of the accused's rights".[29] In the more recent case of R. v. Halpert, Hawkins Co. Ct. J. says:

> With great respect to the trial judge and to the principles of large and liberal interpretation, I feel that a court of competent jurisdiction, within the meaning of section 24(1) of the Charter is limited in its choice of remedies to those within its jurisdictional competence which, in the case of a summary conviction court dealing with costs is

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28 Supra, footnote 20.

29 R. v. Blackstock (1983) 29 C.R. (3d) 249 at 254.



> severely, but nevertheless clearly circumscribed by section 744 and 772 of the Code.[30]

As indicated previously in this paper (pages 6 and 7), the schedules set out under sections 744 and 772 are so limited as t be practically valueless.

The contrary argument to the Charter remedy is that the phrase "such remedy as the court considers appropriate and just in the circumstances" refers only to jurisdiction over subject matter and parties and that every court has unlimited discretion to award whatever remedy it considers appropriate and just.[31]

In R. v. B.B.[32] it was held that all courts have the authority to award monetary compensation for an infringement of Charter rights, including Youth Courts.

> It seems that the clear intention of the framers of th Charter was to bestow the authority to grant a just an appropriate remedy, whatever form that might take, on any court with competent jurisdiction to deal with the matter before it for trial.

Porter Prov. J. found that the police had acted in an overly zealous, uncoordinated manner in contravention of the accused's rights and awarded the accused compensation in the amount of $3,000. Judge Porter went on to say that it would not be a broac and generous interpretation of the Charter to say that a particular court may legally grant some remedies but not others.

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30 (1985) 12 C.R.R. 201.

31 Gibson, Dale, "Enforcement of the Canadian Charter of Rights and Freedoms", 481-527, at 507, Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms, Toronto, Carswell, 1982.

32 (1986) 8 C.R.D. 425.45-01.

It would seem that the boundaries of section 24(1) are still being established. For the most part, there is agreement that compensation may be awarded in criminal proceedings in a superior court where the Charter has been violated, even though there is no authority in statute to do so. Whether compensation may be similarily awarded in a provincial court is still cause for dispute, and one that only the passage of time and cases through the courts will resolve.

Although the Charter has opened a new avenue of compensation, it is restricted to those whose Charter rights have been violated. For others who believe they merit recompense from the criminal justice system but whose guaranteed rights have not been infringed, the situation remains the same. There is no adequate financial support for an accused who is innocent and subsequently acquitted. Assistance is limited and infrequent.

It is clear that something else is needed. A new system must be devised - about that there seems to be general agreement. But just what should that new system be? When should an accused who has been subsequently acquitted be entitled to costs? What expenses should be compensated? Who should pay? These are the difficult matters to be examined.

A number of countries have established compensation schemes; others are still in the process of studying the problem. An awareness of how this problem has been dealt with in these other



jurisdictions will be of assistance in a study of this matter. We have therefore provided a brief look at the schemes already existence.

## III. SURVEY OF EXISTING COSTS SCHEMES

### A. The United Kingdom

The most recent Act governing costs in criminal proceedings in England and Wales is The Costs in Criminal Cases Act, 1973.[33] This Act consolidated the provisions relating to costs in a number of existing Acts, primarily The Costs in Criminal Cases Act, 1952.[34] It gives the courts wide discretionary authority to award trial and appeal costs to an accused who has been acquitted, or to the prosecutor. The last practice note that was issued to provide direction in this matter stated that the making of such an award "is a matter in the unfettered discretion of the court in the light of the circumstances of each particular case".[35] It stated further that it should be accepted as "normal practice"[36] to award costs where the power to do so is given, except where:

(a) the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is;

(b) there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit;

(c) the defendant is acquitted on one charge but convicted on another, the court should make whatever order seems just having regard to the relative

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33 21 & 22 Eliz. II, c. 14.

34 15 & 16 Geo. VI & 1 Eliz. II., c.48.

35 Practice Note [1982] 3 All E.R. 1152.

36 Ibid.



importance of the two charges and the conduct of the parties generally.[37]

### B. New Zealand

Costs may also be awarded in criminal cases in New Zealand. Under its system, the court has the discretion to award costs to the successful defendant.

The procedure to be followed is set out in The Costs in Criminal Cases Act, 1967 (N.Z.).[38] The court has absolute discretion to award a sum it thinks just and reasonable in relation to the costs of the defence. Where there has been an acquittal or discharge, or the information is dismissed or withdrawn for any reason, the defendant may make an application.[39]

The court must, however, take into account all relevant circumstances, and in particular:

(a) whether the prosecution acted in good faith in bringing and continuing the proceedings;

(b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;

(c) whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty;

(d) whether generally the investigation of the offence was conducted in a reasonable and proper manner;

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37 Ibid.

38 N.Z.S. 1967, No. 129.

39 Ibid., s. 5

(e) whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point;

(f) whether the information was dismissed because the defendant established (either by the evidence of a witness called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty;

(g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.[40]

There is no presumption for or against the granting of costs,[41] but no defendant is to be granted costs just because he has been acquitted or discharged or because the information has been dismissed or withdrawn.[42] On the other hand, he shall not be refused costs merely because the proceedings were properly brought and continued.[43]

The New Zealand legislation does make reference to one situation where the costs of a defendant who was convicted might be paid. Where the accused is put to a greater expense in his defence because the prosecution wishes to address a difficult or important question of law, then he may receive costs that are just and reasonable.[44]

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40 Ibid., s.5(2).

41 Ibid., s.5(3).

42 Ibid., s.5(4).

43 Ibid., s.5(5).

44 Ibid., s.6.



Despite the comprehensive legislation, the New Zealand courts seem reluctant to award costs to acquitted persons. For example, the expenditure for this item totalled only $8,695.00 in the financial year ending March 31, 1986. Officials from the New Zealand Department of Justice explain the small figure on the basis that the bulk of criminal cases are defended by legal aid. Those whose cases were conducted by legal aid would not be entitled to compensation because they had not used their own financial resources in mounting a defence. In the same fiscal period, that is, the financial year ending March 31, 1986, $4.85 million was spent on legal aid for offenders.[45]

C. Australia - New South Wales

In the Australian State of New South Wales costs may be awarded to an accused who has been acquitted if the court finds that it would not have been reasonable for the prosecution to institute proceedings had they been in possession of all the relevant facts before the proceeding; and that any conduct of the defendant that might have contributed to the beginning or continuation of proceedings was reasonable in the circumstances.[46]

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45 Correspondence from the New Zealand Department of Justice, 1986.

46 Costs in Criminal Cases Act, 1967 (N.S.W.) s.3.

In coming to a determination the court may refer to all relevant facts established in the proceedings and all relevant facts contained within the application itself.[47]

If the court finds that the above criteria have been met, it may award a certificate to the applicant. This certificate is then presented to the Under Secretary of the Department of the Attorney General who approves the payment.

Although this avenue to compensation has been available since 1967, applications under it are extremely rare. To date total awards have never exceeded the $10,000 the Treasury has allotted for this purpose. Often, the awards made during the course of a year are minimal. In 1972, the Law Reform Commission of Western Australia noted that the annual cost to the government of the scheme in New South Wales was $1,255.50 for 1969 and $758.00 for 1970.[48]

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47 Ibid.

48 Payment of Costs in Criminal Cases, Western Australia Law Reform Committee, Working Paper, 1972, p.14.



## IV. PROPOSED COMPENSATION SCHEME

It is clear that in Canada the system of costs in criminal matters is outdated and of little value. P.T. Burns and R.S. Reid, in the book Criminal Procedure: Canadian Law and Practice, state the case very strongly:

> The present system of costs in criminal matters makes little sense. It is an anomalous and archaic system based on a principle that is no longer valid in our modern society. The case authority patently illustrates that the system does not work; in many cases costs are awarded without proper authority, and in other cases the costs that are awarded are totally inadequate to be classified as compensatory.[49]

They conclude that apparently the Canadian public is willing to accept this situation and are not concerned enough to institute a scheme of compensation.[50]

It is our view, however, that the Canadian public has indicated a very real concern about the issue of costs for an innocent accused. In the aftermath of the Susan Nelles trial, media editorials and comment, including letters to the editor, strongly supported the view that the criminal justice system owes something to those who have become entangled in the legal process through no fault of their own. Several newspapers[51] featured editorials supporting some sort of compensation scheme for those

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49 Supra, footnote 17, at XX 151.

50 Ibid.

51 Editorial, The Globe and Mail, Toronto, May 27, 1982; Letters to the Editor, The Globe and Mail, Toronto, May 27, 1982; The National, Ottawa, February, 1982; The Star-Phoenix, Saskatoon, August 8, 1981; The Leader-Post, Regina, June 16, 1982, and others.

who have been forced to mount an expensive defence to prove their innocence. It is the view of the Commission that the public would support a scheme which provides compensation. The Commission believes, further, that simple justice demands it.

The same issues that the Commission is considering here have already been studied by those jurisdictions where a system of redress for the innocent accused has been implemented. The following statement is the philosophical basis upon which the New Zealand legislation is grounded:

> It would, we think, be common ground that by accepting the benefits of an ordered society the citizen becomes subject to various dangers and risks, among them the risk of being suspected, of being arrested and of being prosecuted for offences he has not committed. These dangers are minimized by the provision of fair procedure, trained and upright police forces, and speedy and efficient access to the Courts. Nevertheless, there are and will always be cases where innocent men are prosecuted without any fault being necessarily laid at the door of the police. It does not seem to us to follow that in these circumstances the citizen must also be expected to bear the financial burden of exculpating himself. Because we cannot wholly prevent placing innocent persons in jeopardy that does not mean that we should not as far as is practicable mitigate the consequences.[52]

The Commission is in basic agreement with that view. No system works perfectly all the time. And when a system is as vast and complex as that of criminal justice, it should not be a surprise that occasionally events go awry without blame being attributable to anyone. Although these sorts of unhappy

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52 Report of Committee on Costs in Criminal Cases (New Zealand, 1966), para. 30. Cited in Report on Civil Rights - Part 2 - Costs of Accused on Acquittal, Law Reform Commission of British Columbia, 1974, p. 28.



occurrences are minimal, they cannot be completely prevented. No one can promise the citizen that he will not be unjustly accused. But the system can promise the innocent accused compensation for the cost of proving his innocence. The Law Reform Commission of Saskatchewan believes this is a promise that should be made.

As indicated previously in this paper, there are schemes in existence in various other jurisdictions, most notably Great Britain, New Zealand and Australia. Although their schemes look good on paper, it seems that very few individuals are receiving the benefits the legislation was intended to provide (see page 14). Can the problems with those systems be overcome?

Another difficulty is the question of who should be compensated. This is the issue that has generated the most discussion, particularly within the legal profession. Other matters that have to be decided are: what expenses incurred by the accused are to be compensated; what process would be used to award compensation; how should concurrent offences be dealt with?

We are aware there are very divergent views on the kind of a scheme that should be implemented. But this is no reason to defer action. To wait until there is consensus is to take no step at all.

### A. Who should be compensated?

The most controversial and important issue is that of who should be compensated. There are primarily two schools of thought. One holds that every person who is charged and is

subsequently acquitted is entitled to compensation. The Commission is not in accord with this all-encompassing view. We do not believe it is right to award compensation to those accused who have probably committed the act charged or a similar offence. Rather, we believe (as do most jurisdictions which have already implemented a compensation scheme) that compensation is owing only to those who are truly innocent and who have been drawn into the legal system through no fault of their own.

Legislation reflecting these principles would not allow an acquitted accused compensation when that acquittal is based solely on a technicality or on a reasonable doubt. Rather, compensation would be allowed only when the evidence has satisfied the Court that the accused, on a balance of probabilities, did not commit the offence. A determination of who is entitled to compensation would be made by the court in accordance with certain guidelines.

Nor would it allow compensation to the acquitted accused who, for some reason, had made it difficult for the justice system to ascertain his innocence. The Commission believes that such an individual should not be awarded compensation if it is largely as the result of his own actions that he finds himself in the predicament of being before the courts. In such a situation it is not unreasonable that he bear the expense of his defence.

There is one category of accused persons who, although being without fault, would not be eligible for compensation under the scheme proposed here. These are individuals who have been



convicted of an offence but who subsequently, after satisfying the sentence imposed (or a portion thereof), are found not to have been guilty of the offence for which the conviction was originally entered. While we believe this is a serious concern, it is our view that the basis of compensation for this category is different enough to warrant a separate compensation scheme. The person who has been convicted and who has suffered the consequences of that conviction, whether it be prison, or loss of reputation, or other more tangible losses such as loss of income, has a different basis for compensation than the acquitted accused who is seeking redress only for the costs associated with criminal proceedings.

Often we have used the term acquitted when describing those who are entitled to apply for compensation. By that term we mean to include all those defendants who have been acquitted at trial or on appeal, as well as: those whose charges have been withdrawn or discontinued; those who have been granted a stay of proceedings; and defendants who have been discharged after a preliminary hearing. It is to be emphasized, however, that an "acquittal" would not, in and of itself, be determinative of the compensation issue. Rather, it merely determines one's entitlement to bring an application for compensation.

B. The "third verdict" Problem

The Commission's decision to recommend compensation only for the truly innocent may be met by the criticism that a "third verdict" will be created. The contention is that by awarding compensation to some acquitted and not to others two classes of innocence have been created.[53] The end result is three verdicts: (1) guilty, (2) not guilty, with compensation (meaning probably innocent), and (3) not guilty, without compensation (meaning probably guilty).

It is suggested that this creates a problem for the accused who is acquitted but is not awarded compensation, because he may not be seen by the public to be innocent. The critics argue further that under our criminal justice system it is a person's right to be presumed innocent until proven guilty according to law. The method of compensation proposed here would deny the individual who was acquitted, but not awarded costs, that right.

It is the view of the Commission that the the "third verdict" problem is not as insurmountable as it might appear. The public, by and large, is aware of the distinction between "true innocence" and acquittal or discharge. They know that there are occasions when someone who has committed a crime "gets off". Often acquittal and innocence do not converge because of the strict rules of proof and strict procedural requirements set by the criminal justice system. These standards are necessarily

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53 Criminal Procedure, A Proposal for Costs in Criminal Cases, The Law Reform Commison of Canada, 1973, pp. 7 and 8.



stringent so that the innocent may be protected from conviction. But are the same strict rules of proof and procedure equally applicable to a determination of costs? In our view they are not.

It would be appropriate to rely on other lesser standards c proof and to take into account the reasons for acquittal in determining who is entitled to compensation. The British Columbia Law Reform commission ~~believes~~ which studied this problem in 1973 concluded:

> An award of costs to the accused who is acquitted on a obvious technicality when the weight of evidence would otherwise support a conviction is more likely to bring the law into disrepute in the public eye than any theoretical violation of principle.[54]

The Commission is in accord with this view. While the public ma be ready to compensate the truly innocent, we do not believe the would be disposed to compensate an accused who was "lucky to get off", to use a turn of phrase employed by the New Zealand Report.[55] This serves as an indication that the singling out of the "truly innocent" will not throw the criminal justice system into disarray.

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54 Report on Civil Rights, Part 2 - Costs of Accused on Acquittal, Law Reform Commission of British Columbia, p.33.

55 Report of Committee on Costs in Criminal Cases (New Zealand, 1966). Cited in Criminal Procedure: A Proposal for Costs in Criminal Cases. The Law Reform Commission of Canada, 1973, p 8.

It is for these reasons that we recommend the award of compensation be made only to some of those accused who are acquitted, that is - those who are also found to be "truly innocent".

C. The Basis for Compensation

In the Commission's opinion, some of the criteria which the court should consider in its determination of who is without fault are:

(a) Whether the charge was dismissed on a technical point even though the evidence as a whole would support a finding of guilt;

(b) Whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;

(c) Whether the accused did anything that contributed or might have contributed to the institution or continuation of the proceedings or that, if he did do so, it was reasonable in the circumstances;

(d) Where the accused is acquitted on one or more charges, but is convicted on another charge or charges, the relative importance of the charges involved.

This is not meant to be an exhaustive list of all the possible factors that could be considered relevant to the determination of one's eligibility to compensation; it is a list of the more common factors which would be relevant to such a determination. Similar factors have been identified in the New Zealand compensation scheme and have also been the basis for the recommendations put forward by the Law Reform Commission of British Columbia.[56]

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[56] Supra, footnote 55, at p. 37 and footnote 54.



The British Columbia Law Reform Commission is again in accord with New Zealand on the question of whether there should be a presumption for or against costs. They conclude that there should be no presumption at all and we agree with this position. To create a legal presumption in favour of costs in all cases of an acquittal would be to place a severe restriction on the presiding judge's discretion to determine the issue of compensation. Further, such a presumption would result in the primary burden being placed on the Crown to establish the defendant's disentitlement to compensation. We believe the better approach is to grant to the court complete unfettered discretion to determine the issue of eligibility for compensation. If the circumstances commonly considered relevant to such applications (as set out above), are to be enumerated in the legislative scheme, they should be prefaced in a way which precludes their being taken as imposing a restriction upon the court's overriding discretion in such matters.

D. Offences Covered

The Commission proposes that the scheme encompass criminal offences and quasi-criminal (regulatory) offences, both federal and provincial. We expect that where regulatory offences are concerned, the cost of mounting a defence will, in most cases, be minimal. However, on occasion, more significant expense may be

incurred, and for this reason we propose that an accused who is acquitted of a regulatory offence also be entitled to apply for compensation.

E. Administration

As indicated, payment of compensation should be from public monies, from a fund established for that purpose.

The province would be responsible for the administration and payment of awards arising from provincial regulatory offences, and it is hoped that the federal government would assume responsibility in this regard for matters relating to federal regulatory offences. It is further suggested that any system of compensation that is ultimately implemented by the federal government and is available to accused persons charged with criminal offences would best be administered by the province, with the actual cost of such compensation awards being shared by both federal and provincial governments. The manner in which this would be done is a matter for negotiation between the two.

The establishment of a fund as suggested above has a further advantage - it enables an award to be made to the accused rather than against the Crown. To make an award against the Crown implies fault on the part of the prosecutors or the police or the body or individual who laid the charge. That is not the intent of this proposal. There have been and will continue to be instances where a charge is properly laid even though the ultimate result might be acquittal. To imply fault would be



inappropriate where no fault exists. Such a likelihood, in addition, might make police officers and prosecutors overly cautious in the pursuit of their duties.

There are instances, however, where the police, prosecutor, government department, public body or individual may have acted negligently or in bad faith in bringing proceedings forward. Other jurisdictions do make provision for the awarding of costs against the Crown in these rare circumstances.[57] A mechanism which would allow for the recognition of reprehensible behaviour might prove to be particularly valuable where actions have been brought under private prosecutions. The knowledge that such a provision exists would serve to deter frivolous actions and punish parties who bring them. Whether or not Saskatchewan legislation should contain such a provision is an issue that requires further study.

F. Procedure

This report has focused on the theoretical basis and merits of compensation schemes in general, and has outlined at a conceptual level a proposed scheme for Saskatchewan. Essential to the acceptance of any scheme for payment of costs is a satisfactory procedural framework. The Commission recognizes that a set of rules must be formulated which will not unduly delay the criminal process.

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[57] Great Britain: Practice Note [1982] 3 All E.R. 1152; New Zealand: Costs in Criminal Cases Act, 1967 (N.Z.), N.Z.S., 1967, No. 129 s.7(2).

As a general rule all accused persons who are ultimately "acquitted" would be eligible to make an application for compensation. It would be the judge who disposes of the charge at the trial, appeal or preliminary hearing who would hear the application for compensation. The judge would be at liberty to consider all facts and circumstances considered relevant to the issue, established either during the proceedings or on the application itself. A right to compensation would arise only upon a finding of "true innocence". It would then be the judge's function to determine the amount of compensation to be awarded, after hearing from the accused about the expenses incurred in mounting his defence. In the vast majority of cases, it is anticipated that such applications would be conducted in an informal manner, similar to that followed when speaking to sentence. Occasionally something further may be required, but it is not the Commission's intention to introduce a second trial into the proceedings.

In instances where a charge has been withdrawn or stayed, an application for compensation could still be made. When this occurs early on in the proceedings, the accused will have spent little on his defence. However, if proceedings are disposed of close to trial, the accused may already have incurred significant legal fees or other necessary expenses. In such a case, an application for compensation could be made to the court that would have heard the matter if the charge had not been withdrawn or stayed.



Special procedural rules must be formulated when oral submissions are inadequate to resolve fully the issue of costs. Answers to questions such as who should be able to call witnesses and whether police files, Crown files and other documents may be subpoenaed are critical to the successful implementation of the proposed cost scheme. Undoubtedly, further study will be required to determine how the scheme can best be implemented. The Commission will elicit the views of the Bar and Bench on the procedural implications before issuing a final report.

G. Amount and Scope of Compensation

It is the Commission's view that an award should be sufficient to compensate the accused for the expenses reasonably incurred in conducting his defence. These could include: counsel fees, the expenses incurred in calling witnesses or producing other evidence, travel and accommodation disbursements, or any other disbursements which were reasonable and necessary to participate in the proceedings. The court would have the discretion to award a sum which it considered just and reasonable taking into account all relevant circumstances.

H. Further Considerations

(a) Included or Concurrent Offences

A difficult situation arises when an accused is acquitted of one offence but convicted on an included offence, or of another offence on which he was tried concurrently. In what manner should he be compensated, if at all?

We believe there may be occasions where an award would be appropriate. We have therefore made provision for this eventuality in the list of factors to be considered by the court when assessing the merits of the applicant's claim. The court will be asked to consider the relative importance of the charges involved where the accused is acquitted on one or more charges, in its determination of whether an award should be made.

(b) The Final Result

An award for compensation should be based on the final result. For example, if an individual were convicted at trial but subsequently on appeal was successful and the charges were dismissed, an application for compensation could then be launched. However, if the appellate court, rather than dismissing the charge, ordered a new trial, an application for compensation would necessarily have to be postponed until the charges were finally disposed of at the second trial. It is only after final vindication that compensation should be considered. This finality would occur only after all appeals had been exhausted or abandoned.



(c) The Legal Aid Client

A significant number of those who travel through the criminal justice system are assisted in their defence by legal aid. This, however, should not present a difficulty if an application for compensation is made upon acquittal. The accused would ask to be reimbursed for expenses actually incurred, if any. This would be only those expenses not covered by the legal aid tariff.

It may be worth noting that data collected by the Law Reform Commission of Saskatchewan indicates that because so many of those who do pass through the criminal justice system are supported by legal aid, a compensation scheme would not represent a major government expenditure.

## V. SUMMARY

The protections and safeguards afforded by the criminal justice system do not always provide adequate protection against the risks of being unjustly accused of a crime. An acquittal in such instances is not always sufficient to fully compensate the individual who has been drawn into the criminal process through no fault of his own. We propose that a new scheme of compensation be introduced into the law of Saskatchewan, which would significantly expand the court's jurisdiction to award costs to accused persons in appropriate cases.

Our recommendations in this regard may be summarized as follows:

1. The proposed compensation scheme would have application to all criminal and quasi-criminal proceedings, both federal and provincial, instituted in Saskatchewan. Payment of compensation would be from a public fund established for that purpose and awards would be made to the accused rather than against the Crown. The provincial government would administer the scheme and it is hoped that the actual costs of such compensation awards would be shared by the federal and provincial governments.
2. All accused persons who are acquitted would be eligible to make application for compensation. This would include: all those defendants who have been acquitted



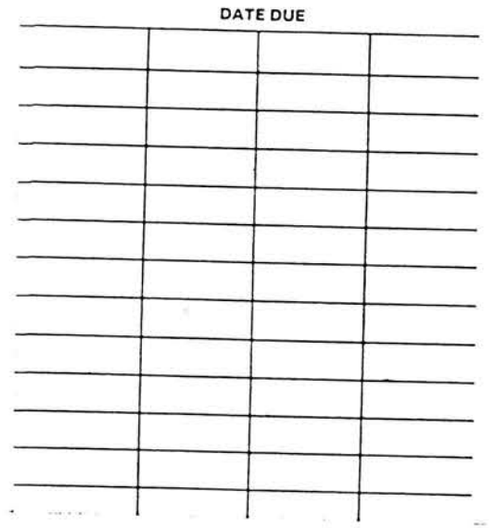
at trial or on appeal; those whose charges have been withdrawn, discontinued, or stayed; and those who have been discharged after a preliminary hearing.

3. One's eligibility to bring an application must be distinguished from one's entitlement to compensation. Although all "acquitted persons" would be eligible to make application, it is only the "truly innocent", that is, those who have been drawn into the legal system through no fault of their own, to whom compensation would be owing. This would be a discretionary matter, that is, to be determined by the court upon application. We see factors such as the following as being relevant to this determination:
   (a) Whether the charge was dismissed on a technical point even though the evidence as a whole would support a finding of guilt;
   (b) Whether the charge was dismissed because the tribunal considered the accused to be innocent in fact;
   (c) Whether the accused did anything that contributed or might have contributed to the institution or continuation of the proceedings or that, if he did do so, it was reasonable in the circumstances;

(d) Where the accused is acquitted on one or more charges, but is convicted on another charge or charges, the relative importance of the charges involved.

4. Once a final determination of "true innocence" is made, a right to compensation would follow. An award should be sufficient to compensate the accused for the expenses reasonably incurred in conducting his defence and could include: counsel fees, the expenses incurred in calling witnesses or producing other evidence, travel and accommodation disbursements, or any other disbursements which were reasonable and necessary to participate in the proceedings.

5. The procedure to be followed on such applications should be as simple as possible, and in most cases similar to that followed when "speaking to sentence". Further study is required to determine the appropriate procedure in the more difficult cases where inconsistencies and conflicts have arisen. The views of the Bar and Bench will be elicited.



time being to foreclose the debate surrounding the issue of whether a person can be born into or marry into a claim under the *Family Law Reform Act*.[24]

The *Family Law Act, 1986*, like its predecessor, continues to generate a broad array of issues which must be dealt with by the courts. At a time when it appeared that the courts were injecting a degree of predictability into the law respecting post-limitation amendments, recent cases have again provided fertile ground for a re-examination of these issues.

In the final analysis, our courts have yet to follow a united path when dealing with claims under the *Family Law Act, 1986*. It is submitted that *MacIsaac* can be viewed as a signal from the Divisional Court that there may be a more restrictive approach taken to the interpretation of the *Family Law Act, 1986*, as it relates to potential claims of unborn children and yet-to-be-married spouses. It remains to be seen whether the courts will adopt a similar restrictive approach in future cases dealing with post-limitation amendments.

[24] See also *Ficht v. Kitchen* (1984), 47 O.R. (2d) 495, 46 C.P.C. 125 (H.C.J.); *Gooch v. Larsen* (1986), 54 O.R. (2d) 253 (H.C.J.); *Eastman v. The Queen in right of Ontario* (1982), 17 A.C.W.S. (2d) 293 (Ont. Dist. Ct.); *Seghers v. Double A Farms Ltd.* (1984), 9 D.L.R. (4th) 273, 46 O.R. (2d) 258, 43 C.P.C. 193 (H.C.J.).

## CLAIMS FOR "LOST YEARS" IN ONTARIO

*Michael H. Ryan* *

In 1980, in *Gammell v. Wilson*,[1] the House of Lords held that a deceased's estate could recover as damages in an action for negligence the income the deceased would have earned had he lived, that is, during the deceased's so-called "lost years".

The decision engendered a great deal of controversy in England at the time. Concern centred on the possibility that tortfeasors (and their insurers) might be faced with claims by estates for lost earnings which would duplicate the damages already recoverable by dependants for loss of support under the *Fatal Accidents Acts* ("FAA").[2] There was also considerable concern about the potentially large awards to which "lost years" claims could give rise. Indeed, the Law Lords in their speeches revealed discomfort with the implications of their decision and several invited legislative action to alter the situation.[3] Within a few months, Parliament had intervened and enacted legislation barring the recovery of damages for loss of income in respect of any period after a person's death.[4]

While there is no longer a right to damages for the "lost years" in England, it has since been suggested that the law of Ontario might permit recovery of such damages and that *Gammell v. Wilson* should be followed here.[5] While the issue has never been decided in any reported Ontario case, it has been raised[6] and it

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[1] [1981] 1 All E.R. 578.

[2] *Fatal Accidents (Damages) Act*, 1908 (U.K.), c. 7; and *Fatal Accidents Act*, 1976 (U.K.), c. 30.

[3] See the speeches of Lord Diplock, *supra*, footnote 1, at p. 583, Lord Fraser of Tullybelton, at p. 588, Lord Russell of Killowen, at p. 590, and Lord Scarman, at p. 595.

[4] *Administration of Justice Act*, 1982 (U.K.), c. 53, s. 4 (quoted in footnote 7, *infra*).

[5] See Earl A. Cherniak, "Assessment of Damages in Fatal Accidents", 3 Adv. Q. 330 (1981-82), at pp. 339-40; and S.M. Waddams, *The Law of Damages* (Toronto, Canada Law Book Ltd., 1983), pp. 443 and 602-3.

[6] *White v. Dominion of Canada General Ins. Co. and two other actions* (1985), 50 O.R. (2d) 231 at p. 241, 11 C.C.L.I. 121 at p. 134, [1985] I.L.R. para. 1-1888 (H.C.J.), *per* Barr J.

seems to be only a matter of time before the issue will have to be confronted squarely in this jurisdiction.

What are the prospects for the success of such a claim in Ontario? That is the question this article addresses.

It is useful to begin with a look at the legal context in which the "lost years" claim first arose in England and the reasons why *Gammell v. Wilson* attracted such widespread attention.

## The Position in England

At common law, no claim for personal injury survived the death of the injured person. The sometimes harsh effects of this doctrine on surviving dependants and the horrible anomalies it created ("it is better to kill than to injure") led to the enactment of s. 1 of the *Law Reform (Miscellaneous Provisions) Act, 1934*[7] in England. That legislation provided for the survival of causes of action for physical injury for the benefit of the deceased's estate. Its provisions find close counterparts in the law of Ontario and all other Canadian jurisdictions.[8]

[7] 1934 (U.K.),c. 41. The relevant portion of s. 1 read, prior to its amendment in 1982, as follows:

> 1(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action ... vested in him shall survive ... for the benefit of his estate. ...
>
> (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:—
>
> (*a*) shall not include any exemplary damages;
>
> . . . . .
>
> (*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

The *Administration of Justice Act, 1982*, *supra*, footnote 4, made the following changes:

> 4(1) The following subsection shall be inserted after section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (actions to survive death)—
>
> "(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death."
>
> (2) The following paragraph shall be substituted for subsection (2)(*a*)—
>
> "(*a*) shall not include—
>
> (i) any exemplary damages;
>
> (ii) *any damages for loss of income in respect of any period after that person's death*;" [Emphasis added.]

[8] See *Trustee Act*, R.S.O. 1980, c. 512, s. 38(1); *Survival of Actions Act*, R.S.A. 1980, c. S-30, s. 2; R.S.N.S. 1967, c. 298, s. 1(1); S.P.E.I. 1978, c. 21, s. 4(1); R.S.N. 1970, c. 365, s. 2; R.S.N.B. 1973, c. S-18, s. 2(1); S.Y.T. 1981 (1st Sess.), c. 16, s. 3(1); *Trustee Act*, R.S.M. 1970, c. T160, s. 55(1); R.S.S. 1978, c. T-23, s. 58(1); R.S.N.W.T. 1974 c. T-8, s. 33 (rep. & sub. 1976 (1st Sess.), c. 11, s. 1); *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 66(2).



Although the "lost years" claim is grounded in the rights which flow from the Act of 1934, it was not until the 1979 decision of the House of Lords in *Pickett v. British Rail Engineering Ltd.*[9] that the potential for such a claim arose in England. Before the decision in *Pickett*, English courts assessed damages for loss of income on an injured person's post-accident life expectancy and not on his pre-accident life expectancy.[10] (This had never been the case in Canada[11] and the decision in *Pickett* merely brought English law into line with Canadian law in this regard.) *Pickett* itself did not involve a fatal injury claim but, once it was accepted that the principle that a person whose life was shortened was entitled to recover his future lost earnings from the tortfeasor on the basis of his pre-accident life expectancy, there appeared to be no reason why that principle should not extend to fatal injuries.

Plaintiffs were not slow to seize upon the opportunity which *Pickett* presented.

Because provision had already been made in the FAA for the recovery of damages by surviving dependants, however, the extension of the principle adopted in *Pickett* to fatal accident cases gave rise to a difficulty. The problem was well illustrated by the fact situation which confronted Griffiths J., in *Kandalla v. British Airways Board*,[12] a "lost years" case which was a precursor of *Gammell v. Wilson*.

*Kandalla* involved a claim by a father, on his own behalf and on behalf of his wife, under the FAA for damages, *inter alia*, for loss of support as a result of the death of their two children. The claim was joined with a claim under the Act of 1934 on behalf of the children's estates for the children's future lost incomes.

Griffiths J. stated the nature of the problem that he was faced with by virtue of the "lost years" claim in the following way:[13]

> A claim of this nature, conveniently referred to as "the claim for the lost years" was recently allowed by the House of Lords in the case of a living plaintiff whose life expectation had been materially shortened by reason of

[9] [1979] 1 All E.R. 774.

[10] See *Oliver v. Ashman*, [1961] 3 All E.R. 323 (H.L.).

[11] See *The Queen in right of Ontario v. Jennings* (1966), 57 D.L.R. (2d) 644, [1966] S.C.R. 532.

[12] [1980] 1 All E.R. 341 (Q.B.).

[13] *Ibid.*, at p. 348.

industrial disease: see *Pickett v British Rail Engineering Ltd.* In so deciding the House of Lords overruled the earlier decision of *Oliver v Ashman* in which the Court of Appeal had held that no such claim could lie. By deciding as they did the House of Lords mitigated the hardship suffered by the family of the plaintiff from the result of the decision in *Oliver v Ashman*. If an injured plaintiff whose life expectation has been shortened sues and recovers damages, his dependants lose their rights to bring a subsequent action under the Fatal Accidents Acts: thus if a man of 40 has had his life expectation reduced to three years and cannot recover as damages his earnings during the "lost years" so that they are available to provide for his family after his death, his family will be worse off than if he had brought no action at all for his personal injuries and left them to sue after his death.

The same dilemma does not arise in a case such as the present where the wage earner has been killed in the accident and claims are brought both under the Law Reform (Miscellaneous Provisions) Act 1934 for damages on behalf of the estate and under the Fatal Accidents Acts, for both actions can run concurrently. Justice can be done to the parents by an award under the Fatal Accidents Acts, and any sums for the "lost years" awarded under the Law Reform (Miscellaneous Provisions) Act 1934 which exceed the value of the Fatal Accidents Acts damages will be a pure windfall for the parents.

He then went on to comment as follows:[14]

> I have no enthusiasm for these results that seem to flow inevitably from deciding that a claim for the "lost years" survives for the benefit of the estate. It does the deceased no good for, unlike the living plaintiff who recovers for the "lost years", the deceased can derive no comfort from the thought that he can make proper provisions for his dependants or any other objects of his bounty. In fact in most cases it will merely provide a windfall for the dependants, who will, as I have illustrated, recover not only fair compensation for their pecuniary loss as they have hitherto done under the Fatal Accidents Acts but an additional sum over and above such loss.

But the trial judge found no "legitimate judicial basis on which to reject the plaintiff's submissions".[15] He accordingly assessed damages under the FAA in the total sum of £54,000, apportioning £21,000 to the plaintiff and £33,000 to his wife based on their actual pecuniary loss flowing from their dependancy upon their daughters. He also assessed damages under the Act of 1934 at £54,000 in respect of the "lost years" which he apportioned equally between the estates (and which would pass by operation of law to the plaintiff and his wife in addition to the other assets of the estate, valued at £16,000).

In the result, since it appeared that each of the parents would receive more from the estates than the value of their FAA claims, the FAA claims were "extinguished".

[14] *Ibid.*, at p. 349.
[15] *Ibid.*



Why the FAA claims were extinguished is a matter I return to below. I comment first on the measure of damages.

It was not mere coincidence that the quantums of damages awarded in *Kandalla* under the FAA and the Act of 1934 were identical. The measure of damages used for both purposes is essentially the same. Megaw L.J. (dissenting on other issues), said the following concerning the calculation of damages in the course of his judgment in the Court of Appeal in *Gammell*:[16]

> If damages for loss of income in the lost years were recoverable by the estate in a Law Reform Act action, presumably the same principle of assessment would apply as applied in an action such as *Pickett's* case. The judge would have to assess what the earnings of the lost years would have been (presumably net of tax). That will often be an extremely difficult task, involving what is truly no more than guesswork in many aspects in many cases. But it is essentially the same task as is required to be carried out in assessing the dependency in a Fatal Accidents Act case.

The Court of Appeal's assessment of damages for lost income was affirmed on appeal.

Thus, in assessing for the purpose of an action under the Act of 1934 the income which would have been earned in the "lost years", English courts made a judgment concerning various factors which would impinge upon a determination of the amount that would have been left for the estate at the end of the expected life, *i.e.*, a deduction was made for living expenses. This is the same process that the courts go through in assessing the loss of support a spouse or children has suffered for the purpose of calculating an FAA claim. The living expenses of the deceased are the same in either case and the residual representing loss of support or loss of future income accordingly the same.

Why the recovery of lost income under the Act of 1934 should have the effect of extinguishing FAA claims was explained by the House of Lords in 1937 in *Rose v. Ford*.[17] In that case the House of Lords first held that damages for loss of expectation of life were recoverable under the Act of 1934. (The actual damages claimed in that case were for mental pain and suffering arising from the contemplation of the lost expectation of life, and did not include loss of income.) Lord Wright said the following:[18]

> One other point I ought to mention. It is said that, if this element of damage is allowed, there may be a risk of duplication of damages in partic-

[16] [1980] 2 All E.R. 557 at p. 567.
[17] [1937] 3 All E.R. 359.
[18] *Ibid.*, at p. 375.

> ular, because the Act of 1934, by sect. 1 (5), provides that the rights conferred by the Act shall be in addition to, and not in derogation of, rights conferred on dependants by the Fatal Accidents Act, or other like Acts. If the Act necessarily involved this consequence, it would all the same have to be enforced, but, in my opinion, the Act does not. I think that, in practice, no duplication of damage need occur. I think the jury would be properly directed to take into account, either that they were at the same time giving damages under Lord Campbell's Act, as they did here, or that such damages had been, or might be, given. The object of damages in these cases is compensation for the benefit of the estate. It is true that the claims under Lord Campbell's Act are independent, and are for the separate pecuniary loss sustained by the dependants, whereas the damages under the Act of 1934 go into the general estate, in which quite different persons, creditors, legatees, or other beneficiaries may be interested. But one of the fruits of continued life is, generally, provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced. The award of damages in the present case shows how duplication may be avoided. This matter can fairly be left to the good sense of the jury or judge.

Although Lord Wright states in this passage that the award under the Act of 1934 should be reduced *pro tanto* by the award under the FAA, he later stated that the rule should work in reverse, *i.e.*, the FAA award is the one which should be reduced.[19]

It is to be noted that the extinction of an FAA claim would occur only if the plaintiff advancing the FAA claim were a beneficiary. In principle, one could have an FAA claimant who was dependent upon the deceased but to whom no money was left under the will. In such a situation, the estate could make full recovery for the "lost years" *and* the dependant could make a further and separate recovery under the FAA. The defendant would "pay twice".

One could also find a situation where the entire estate was left to a dependant spouse but there was no valid claim for loss of support; *i.e.*, a case in which the deceased could have been expected to devote none of his income to the support of his wife, for example, because of an inharmonious marital relationship. In such a case, the "lost years" doctrine would have an insidious effect. Even if a defendant established facts negating the claim for loss of support, the surviving wife could recover the same sum as income lost to the estate. As a result, the wife would be in exactly the same financial position as if she succeeded in her loss of support claim since she would not have been entitled to recover twice in any event.

[19] See *Davies et al. v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601 at pp. 615-16.



## The Position in Ontario

Since 1886,[20] the law of Ontario has made provision for the survival of certain causes of action. That legislation is now contained in s. 38(1) of the *Trustee Act*,[21] which provides, in part, as follows:

> 38(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased;

When the predecessor of s. 38 was first enacted, it was "not distinguishable" in effect from s. 1 of the Act of 1934.[22] If that situation had persisted, the argument favouring the recovery of damages for "lost years" in Ontario would have been compelling.

However, there was prompt reaction in Ontario to the House of Lord's decision in *Rose v. Ford* which resulted in a significant parting of the ways between English law and Ontario law. Section 38(1) (then s. 37(1)) of the *Trustee Act* was amended by adding the following words to the end of the section as it is quoted above:[23]

> . . . provided that if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by *The Fatal Accidents Act*.

(The reference to the *Fatal Accidents Act* is now to be read as a reference to Part V of the *Family Law Act, 1986*.)[23a]

That the intent of this amendment was to reverse the effects of *Rose v. Ford* and to restore the law of Ontario to what it had always been thought to be before that decision is confirmed by contemporary reports of the debate the amendment provoked when it was introduced in the Legislature.[24]

The simple question which the Ontario courts will have to address is whether the claim for "lost years" is a species of claim for loss of expectation of life. If it is, it is barred by the 1938

[20] See *Statute Amendment Act*, S.O. 1886, c. 16, s. 23.
[21] *Supra*, footnote 8.
[22] See *Major v. Bruer*, [1937] 4 D.L.R. 760 at p. 766, [1938] O.R. 1 at p. 8 (Ont. C.A.), *per* Middleton J.A.
[23] S.O. 1938, c. 44, s. 3.
[23a] S.O. 1986, c. 4.
[24] *Globe and Mail*, Toronto, April 6 and 8, 1938. For an interesting comment on the public debate which preceded the enactment of the 1938 amendment and an analysis of the underlying issues see Cecil Wright, "The Abolition of Claims for Shortened Expectation of Life by a Deceased's Estate", 16 Can. Bar Rev. 193 (1938).

amendment. If it is not, we have the anomalous situation that non-pecuniary damages for loss of expectation of life are not recoverable in Ontario but future pecuniary loss is.[25]

It is submitted that the better view is the former.

It is a view that derives some support from the speech of Lord Edmund-Davies in *Gammell v. Wilson*. Posing himself the question as to whether or not a cause of action for "lost years" would lie, he said the following:[26]

> . . . in my judgment an affirmative answer is obligatory in light of the decisions of this House in *Rose v Ford* [1937] 3 All ER 359, [1937] AC 826 and *Pickett. For it is impossible to distinguish in legal principle between a claim in respect of shortened expectation of life on the one hand and in respect of shortened expectation of working life on the other.* And in *Rose v Ford* [1937] 3 All ER 359 at 365-366, [1937] A.C. 826 at 839 Lord Russell said:
>
> > "I am of the opinion that, if a person's expectation of life is curtailed, he is necessarily deprived of something of value, and that, if that loss to him is occasioned by the negligence of another, that other is liable to him in damages for the loss. That cause of the action was vested in the deceased before and when she died, and, by virtue of the Act of 1934, it survives for the benefit of her estate. It is no new cause of action created by that Act; it is a cause of action existing independantly of the Act, which by the Act is preserved from the extinction which the death of the deceased would otherwise have brought about."
>
> That passage must equally be applicable in its entirety to a claim in respect of the "lost years" resulting from cutting short a person's *working* life, and, as Holroyd Pearce LJ said in *Oliver v Ashman* [1961] 3 All ER 323 at 330, [1962] 2 QB 210 at 227-228, it leaves "no room for distinguishing between a claim brought by a living plaintiff and a claim brought on behalf of a dead plaintiff in respect of the loss of earnings during the years of which he has been deprived".

His Lordship appeared to be of the opinion that a claim for loss of future earnings is really nothing other than one element of a claim for loss of expectation of life.

Lord Scarman approached the matter in a similar fashion,[27] and

[25] It is interesting to note that in Alberta and Manitoba, which are the only Canadian jurisdictions where *Rose v. Ford* was not reversed by legislation, the courts have apparently proceeded on the basis that nothing can be recovered by a deceased's estate for loss of prospective earnings. See, for example, *Crosby v. O'Reilly et al.* in which the trial judge instructed the jury to that effect. His instruction to the jury on that issue, which is cited in the report of the decision of the Court of Appeal, 43 D.L.R. (3d) 571 at pp. 572-3, [1973] 6 W.W.R. 632 at p. 634, attracted no comment by that court or by the Supreme Court of Canada, 51 D.L.R. (3d) 555, [1975] 2 S.C.R. 381, [1974] 6 W.W.R. 475, when the case was before those courts. In *Crosby v. O'Reilly et al.*, the Supreme Court of Canada held that damages for loss of expectation of life should not be limited as a matter of law to a conventional sum.

[26] [1981] 1 All E.R. 578 at p. 584. (Additional emphasis added by author.)

[27] *Ibid.*, at p. 592.



Lord Russell of Killowen also appeared to have regarded the claim for "lost years" as a claim for loss of expectation of life.[28]

When reading the speeches of the Law Lords in that case, it is to be borne in mind that the result of treating damages for loss of future earnings as a species of damage for loss of expectation of life was, in the context of the English legislation, that both types of damage were recoverable. The identification of the two in the context of the Ontario legislation would lead to the opposite result: neither type of damage would be recoverable.

It must be said that the language of s. 38 may leave something to be desired. Clearly preferable, if one intends to exclude "lost years" claims, is the language of s. 66(2) of the *Estate Administration Act* of British Columbia[29] which provides that recovery in an action by a personal representative of a deceased person shall not extend, if death results from such injuries, to damages for the loss of expectation of life, and then goes on to specifically exclude "damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died".

[28] *Ibid.*, at p. 590.

[29] *Supra*, footnote 8.

de révision du Code civil, ne devrait-on pas permettre au tribunal, dans un certain délai, de réviser son jugement? Même si les plus élémentaires principes de justice sont favorables à cette dernière formule, l'approche adoptée devra être très mesurée. Il en est ainsi d'ailleurs des taux d'actualisation des indices ou des taux d'indexation qui sont actuellement étudiés afin de faciliter le travail des tribunaux, dans ce rôle de prophète qu'on leur a longtemps imposé sans leur fournir des outils adéquats.

Enfin, les différentes formules qui parlent de plafonds ou de tables d'indemnités, de comité de tamisage ou d'arbitrage ou encore de la scission du procès sont également examinées.

Nous n'en sommes pas encore arrivés à l'étape où certaines solutions doivent s'incliner devant d'autres. Ce que nous savons cependant, c'est qu'il n'existe pas de formules vraiment gagnantes dans ce dossier et que même après l'adoption de la réforme, il faudra laisser la porte ouverte aux innovations et aux ajustements.

Est-il nécessaire de mentionner que le ministère de la Justice du Québec est à l'affût actuellement de tout ce qui s'écrit ou se dit sur le sujet, qu'il prend note de toutes les suggestions?

Nous serons très attentifs aux conférences et discussions qui prendront place au cours de ce colloque car, comme le traduit si bien une locution connue : « Le procès est encore devant le juge. »

# The Future of Personal Injury Compensation

**Blenus Wright**
Assistant Deputy Attorney General
Ontario

## The Insurance Crisis?

It is alleged that there is an acute insurance crisis having a significant and far-reaching impact on all sectors of the Ontario economy and society.

What is the evidence of an insurance crisis? Let me refer to three pieces of evidence :

1. The Legislative Assembly of the Province of Ontario on July 3, 1986, passed the following unique resolution with 38 ayes and 23 nays :

   That in the opinion of this House, given the present trend towards escalating court awards in the liability insurance sector, and the resultant detrimental effect on the availability and affordability of insurance coverage, the Government should consider placing legislated limits on court awards.

2. Ontario drivers apparently pay 15 to 30 per cent more for insurance than drivers in other provinces while Ontario has more cars than any other province, but a lower number of accidents than the Canadian average. As a result drivers are being introduced to the "pay as you smash" principle, or "next time you crash, reach for your cash".

A friend of mine purchased a brand new 1985 Dodge Aries of which he was particularly proud, but while approaching his place of employment to make a right turn into the driveway, he noticed another car parked in the next driveway with the driver seemingly occupied, with his head down, perhaps reading; my friend put on his signal light and proceeded to make the right turn only to be hit on the door of the passenger side. The other driver pulled out of the driveway without first looking. Immediately, the driver of the other car said, "Please don't call the police, I will pay you for the damages" and proceeded to request my friend to go to his house, which my friend did and was given cash in the amount of $ 350. That evening on the way home, my friend stopped at the dealership where he had purchased the car and was given an estimate of $ 550 to replace the outer skin on the passenger door. My friend phoned the driver of the other car, who at the thought of $ 550 began to suggest that he knew a friend of his who was in the body shop business who would probably do it for less than $ 550. My friend insisted that he

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wanted to get the work done at the dealership and if that was not satisfactory to the other driver, that he would have no choice but to call the police and report the accident. The other driver met my friend the next day and provided him with a cheque for the additional $ 200 rather than reporting the accident to his insurance company.

3. The Insurance Bureau of Canada has recently commenced a series of newspaper advertisements depicting two automobiles in collision with the caption "We have to stop bumping into each other like this". The body of the ad states :

> Last year insurance companies spent more than two billion dollars on car repairs. Huge sums were paid for lost wages due to injuries, for pain and suffering, loss of potential future earnings, and similar costs. Substantial payments were also made to the dependents of people killed in accidents. When you add it all up, the insurance industry paid out well over three billion dollars as a result of auto claims. And every year these costs keep going up. Where does it end? It ends up in your premium. The best thing for each of us to do to help control auto insurance costs is to drive more safely.

Tort or no tort — fault or no fault? That is the question. Where does the blame lay for the crisis? What precipitated the question? What is the answer?

As the Slater Report notes, there are no lack of accusations, counter accusations, finger pointing and anecdotal explanations. Some of those include :

1. a scam produced by greedy insurers who are, in fact, making a great deal of profit in the current market;
2. judicial inflation;
3. re-insurers blame primary insurers for pursuing the destructive course of cash-flow underwriting during the heady days of high interest rates while failing to retain sufficient amounts of risk. Interest rates fell, investment income declined, while claims were rising in terms of frequency and size and premium income and reserves suddenly proved wilfully inadequate;
4. failure of public authorities to ensure the solvency and liquidity of insurers, to control rates and to protect consumers adequately.

The Slater Report appears to focus on the question of judicial inflation. Court awards are escalating out of control. Ontario is becoming California North. Courts are simply reflecting the deep social, legal and economic changes that have fundamentally altered the risk environment. It appears that a growing number of Canadians believe that high court awards are a primary cause of the current liability insurance crisis. A Gallup poll taken March 31, 1986, indicated that 33 per cent of the public believe that escalating court awards were to blame for the crisis in insurance.

U.S. studies have concluded that the court system is to blame. State legislatures have introduced bills for tort reform concluding that legislative intervention is needed to rein in the American tort system.

Slater concludes that Ontario is not California North but there is an indication that it may become so in the foreseeable future, not so much in the escalation of the size of the awards, but in the continuing expansion and extension of liability.

The Slater Report refers to the case of *McErlean* v. *City of Brampton et al* 32 C.C.L.T. 199. This case involved a collision by two unlicenced trail bikes with a capability of going fifty miles per hour driven by unlicenced 13 and 14 year olds on a sharp and blind curve in a road on vacant park land which contained an abandoned gravel pit. The court found that the municipality made no attempt to exclude the public. The road was a good smooth gravel road and trail bike riders could round the curve at speeds of up to 50 miles per hour and still remain on their own side of the road. The court also found that, "the combination of circumstances, a road which narrowed at a sharp, blind curve and its use by other young trail bike riders, was, an unusual danger for trail bike riders". One of the drivers was an inexperienced driver weaving back and forth on the wrong side of the road. The court said :

> He was old enough and knowledgeable enough to know that it was not reasonably prudent to drive a motor vehicle around a blind curve on the left hand side of the road and to know that, if he could not drive a vehicle well enough to control it, he ought not to drive it at all, let alone around a blind curve on a road used by young trail bike riders.

The court found him to be 15 per cent at fault.

The injured plaintiff is paralyzed, incontinent and unable to speak. The court said with respect to the plaintiff :

> To have used that curve even at a moderate rate of speed and entirely on his own side, in all of the circumstances, was a failure to take reasonable care for his own safety.

He was found ten per cent responsible.

The City's failure to act was found to be more blameworthy and it was assessed 75 per cent of the total plaintiff's damages of $ 7,230,150.

An important point to note is that in reference to this case, Slater comments that the seeds of the insurance controversy lie not in the amount of the award but rather in the imposition of liability.

Subsequent to that case, the same Ontario Supreme Court judge, in a case called *Giannone* v. *Weinberg* gave the largest medical malpractice award in Canada's history totalling $ 3,2 million. A six-year old girl fell and the result was a compound fracture of the right arm. The doctor put her arm in a cast at the hospital on August 9, 1981. On August

the 11th, she commenced to run a fever and was returned to the hospital where it was determined that the cast was too tight. The cast was split and the doctor prescribed 222's for the fever. The problem persisted and on August 12th, the cast was removed and the doctor discovered that the arm had developed a gas gangrene. Unfortunately, the dominant right arm was amputated at the elbow.

The court found that she suffered daily pain, that there was a serious danger that she will develop skin problems, neck pains and psychological problems with depression. She has had a lot of mental suffering and will probably experience an emotional crisis during adolescence. The court also found that it was improbable she would go on to post-secondary education and she will probably not marry. Liability was admitted and the only question was the amount of the damages.

Both of these cases are under appeal. Until final decisions are rendered, it would be unfair to use them to denounce the tort system as a failure.

Slater attacks the tort system and decides that tort reform is not the answer. The basic insurance problem is three-fold : availability, affordability and overall adequacy. There are three basic reasons why tort reform is not the answer.

1. No strong connection has been established between the areas of difficulty and the present insurance crisis. The proposals would make only modest differences to the costs and availability of insurance.
2. Even if some measures are implemented, there is no evidence that the tort system would, in fact, be improved.
3. Any reform of the tort system should only be implemented when objectives of that system have been satisfactorily identified. Slater states, "when the operation and objectives of the tort systems are mired in contradiction and confusion, adding ad hoc 'reform' measures that exacerbate the problem is no solution".

Slater believes that modern tort law has been dramatically transformed from a mechanism primarily concerned with deterrence to one whose main purpose is compensation. He refers to the Osborne Study and quotes :

> The massive transformation of the fault system... is a change which is explicable only on the basis of liability insurance and judicial compassion for the victims of social progress. Judges who in their written judgments give no indication of the prevelance of liability insurance are, in fact, keenly aware that in almost all cases, the defendant is not paying, and that they are in the last analysis deciding whether or not the plaintiff should be compensated from insurance monies.



> The prevalence of liability insurance fundamentally altered the moralistic nature of the law shifting function of fault. The law shifting mechanism was converted into a law spreading mechanism and it became more realistic to speak of the fault system as a fault-insurance system. The punative and deterrent aspects of fault were diminished and compensation became the predominant function of tort law.

Slater concludes that there is a profound inequity and unpredictability in continuing to use tort as a mechanism for accident compensation.

Slater believes that the answer lies in separating the compensation function from the deterrence function. He quotes from the Ontario Law Reform Commission Report of 1979 that, "Tort law is a haphazard and inefficient means of deterrence". Slater also finds that the tort system fails with respect to compensation; one-third to one-half of accident victims get compensation while others are left out — they are denied compensation because fault could not be found. He also complains about the enormous delays under the tort system.

Slater recommends a no-tort system of accident compensation run by the private insurance industry. Compensation would be provided on a no-fault basis, but fault will remain relevant and deterrence will be achieved through a more refined and rigorous penalty-rating or premium-pricing mechanism. He recommends unlimited medical and rehabilitation benefits, including costs of care and income care benefits at levels that would be reasonably adequate for the vast majority of citizens. With respect to additional coverage for income replacement, additional layers of insurance could be purchased voluntarily.

Slater concludes that :

> The crisis reflects serious socio-legal and economic changes of a structural nature that give rise to such a degree of uncertainty as to permanently alter the risk environment and the insurance market. Certain fundamental reforms to the system are required in order to stabilize the risk environment and insure the provision of available, affordable and adequate insurance.

What have been the responses to the Slater Report?

The Ontario Branch of the Canadian Bar Association agrees that there are significant problems within certain lines of insurance, but :

> These difficulties will not be solved by general system-wide changes. Instead, specific and focused solutions are required. Should focus on the specific problem areas instead of focusing on a no-fault insurance scheme — an insurance line in which few problems exist.

The C.B.A.O. claims that there are two general shortcomings of Slater : (1) The Report did not examine the role of tort as educator, re-enforcer of values, avenger of persons injured by anti-social behaviour, keeper of the peace and ombudsman. (2) The Report is based on the false premise that tort should ideally compensate everyone.

The C.B.A.O. response points out that the State of New York has had no-fault insurance since the 1970's and is currently suffering from the same problems within the same insurance lines as is Ontario. In Michigan, the issue of availability and adequacy of auto insurance persists despite a no-fault system. The response also claims that premiums do not decrease with the introduction of no-fault insurance.

Specifically, the C.B.A.O. response addresses the role of tort in an interesting paper prepared by Professor R.J.S. Gray, Assistant Dean of Osgoode Hall Law School. He states :

> The law of tort has played a significant role in establishing the societal values we most cherish. It has created, nurtured and propagated these values so that today we consider them to be essentials of the kind of society we hope to live in.

He quotes from Linden, *Canadian Tort Law* :

> We have not yet invented (better) mechanisms, nor is there any guarantee that they would be introduced if discovered. We do, however, possess tort law which is aimed at "maximizing service and minimizing disservice to multiple objectives". This description may not stir excitement in our hearts. But it should make us pause before we conclude that tort law is "doomed to irrelevance".

Philosophizing further, Gray states :

> The idea that a person who imposes harm on another or deprives another of a benefit through wrongful conduct should and will correct the situation is the corollary of the "golden rule". All of us want to live in a society that contains, protects and endorses these ideals. The tort of negligence with its insistence on the worth of the individual and the validity of "fault" as the basis for loss fixing is a significant part of the underpinning of these values in our society.

In response to the alleged deficiencies of tort as a compensatory mechanism, specifically that it does not compensate all victims of injury, Gray retorts that :

> If it is meant to be a system of distributive justice, which is the assumption made in the Slater Report — then, no doubt, it is a failure, but it seems bizarre to assail tort for failing to accomplish that to which it has never aspired. Tort is about correcting hurtful "wrongs".

He claims that Ontario is not bereft of mechanisms to deal humanely with the victims of "pure" accidents as distinct from "negligent" accidents. A very extensive network of social benefits does exist.

Replying to Slater's alleged deficiencies of tort as a deterrence mechanism in that deterrence does not work any more because of "widespread phenomenon of liability insurance" which takes the pain out of tort liability, Gray responds that for every theoretic piece minimizing tort's role as a deterrer, there is another applauding it.

With regard to the scare of the California North syndrome, Gray responds :

> What relevance is this comparative exercise outlining the woes of tort in our friendly, but culturally and politically, quite different neighbour? Why, when the existing situation is found to be relatively problem free, predict the slide into oblivion. Nobody wants this to become the situation in Canada. Why should we envision an insensitive and radicalized judiciary forcing us to become "California North", over the will of the citizenry and the Legislature and the corpses of bankrupted insurance companies?

Gray comments on the bonus-malus device saying that "it violates our societal conviction that citizens should not suffer penalties, in this case quite significant dollar penalties, without the ability to be heard before an impartial tribunal".

In conclusion, Gray states that the Slater Report :

> Is in conflict with the fiercely held view that in the society we wish to live in, a person is entitled, when push comes to shove, to "a day in court". This right, while, no doubt, seldom a pleasurable experience, is our ultimate assurance as individuals, of obtaining "justice". In our view, it is a fundamental of our society which should be impinged upon only with extreme caution.

The C.B.A.O. brief submits that a reformed tort compensation is the optimal compensation system for casualty victims.

Murray Thompson, a member of the Slater Task Force and a former Superintendent of Insurance for Ontario, in an address on September 19th, to the downtown Business Council, mused that more drivers might risk going without auto insurance if Ontario adopted a proposal for no-fault car insurance. He said that taking away the right of victims to sue those responsible is no way to attack the problem of insurance costs. He advised opting for changes to the old, rather than inaugurating a new system.

The Committee for Fair Action in Insurance Reform, which I understand is made up largely of lawyers, has claimed that if the Slater no-fault system is introduced, consumers will likely pay more than twice as much for their auto insurance and injured parties will find compensation cut substantially and the number of accidents could rise significantly. The Committee also notes that no-fault plans have had "extremely unsuccessful histories" and that some U.S. states have returned to the tort system. The Committee concludes that :

> The social costs of the abolition of the tort system consequently involve the loss of a significant deterrent to unsafe conduct, of a safety valve for human frustrations over the losses inflicted by others, of an identification of fault and an assignment of compensation to innocent victims.

Along the way in this debate, a number of suggestions for changes to the present system have been made.

Some suggested reforms :

1. Amend *Family Law Act* to limit claims for loss of care, guidance and companionship to "serious or permanent claims".
2. Amend rules with respect to pre-judgment interest which would not begin to run until sufficient medical information has been given to the defendant.
3. Amend *Courts of Justice Act* to give courts discretionary power to impose "structured judgment" in lieu of lump sum to eliminate uncertainties associated with "gross-up" or Federal Government remove tax on income earned on personal injury damages.
4. Legislature intervention to include collateral benefits, i.e. private disability insurance, public assistance schemes, in calculation of actual loss to prevent double-recovery.
5. Possibility of abolishing joint and several liability.
6. Enactment of Good Samaritan legislation to provide greater protection to volunteers providing medical assistance in good faith.
7. Allow arbitration to facilitate a more expeditious resolution of the smaller automobile accident claims.
8. Standardize limitation periods for all accident cases.
9. Increase weekly indemnity, medical, rehabilitation and death benefits under section "B" coverage and provide for greater use of advance payments, particularly where liability is not in issue.
10. Formulation and development of new insurance structures :
    - — expansion of farm mutuals
    - — development of reciprocal exchanges
    - — self-insurance
    - — Canadian Insurance Exchange
    - — entry of financial conglomerates into general insurance.

There appear to be an abundance of good suggestions for changes to improve the current tort system and the insurance industry generally, but Slater contends that patches to the old are not sufficient. He wants a new garment. The C.B.A.O. strongly suggests that the proposed changes should first be tried before throwing out the old and replacing it with the untried.

What is the answer? With the complexity of such a multi-faceted problem which impacts so tremendously on the social well-being of the public, what should the government do? Improve the old or opt for the new? It is my understanding that the New Democratic Party in Ontario will have as a plank of its political platform a recommendation for a no-fault system run by government.



From my own personal perspective and without in any way purporting to speak on behalf of the government as to what decision it may or should make, my preference is to stick with the old, improve the old, and cast it away only when it is clearly shown that it has run its course.

In our affluent society, it has been easy to evolve the "throw it away" rather than "fix it" mentality. I fear that this same attitude is beginning to permeate the law-making segment of our society. There seems to be a philosophy that rather than amending legislation, when necessary, with a view to improving a situation, we tend to scrap all of the legislative experience of the past and opt for new legislation with new phrases and definitions and untried concepts which in the end result benefit the legal profession and it is questionable whether the public interest has really been advanced.

Clearly, legislatures are faced with many competing views and it is not easy to arrive at the best public interest. In such situations, caution should be the watch word and it should be proven that the old system is tired and worn out and should be buried before we opt for the new. My preference would be to make the suggested changes to the old system first and give it a second chance before abandoning it when it is not clear that a new system would be any better. Especially is this so when the evidence is uncertain that the old system is at fault. As Slater lamented, "... one of the most frustrating problems for the Task Force arose from the scarcity of systematic evidence on awards and settlements and on elements in the legislation and the tort-litigation system that contributed to the determination of awards and settlements".

I would rather opt to continue a fault system than be at fault for suggesting a new system when changes to the old might be more advantageous.

... and forgot that I was look- ... the injustice of apartheid

**INDEX**




"... and don't give me any of that 'it gets lonely at the top' stuff."

# Priest's sex assaults cost church $150,000

By Kevin Donovan
TORONTO STAR

OTTAWA — Rev. Dale Crampton's sexual assaults of young boys cost the Roman Catholic church $150,000.

That was the Ottawa archdiocese's financial penance for failing to act on a previous complaint against Crampton, and for not counselling his victims.

The settlement is believed to be the first of its kind in Canada and could set a precedent for future actions against the church, similar to those in the United States since the early 1980s.

Minnesota lawyer Jeff Anderson estimates the Roman Catholic Church in the United States has paid out as much as $90 million to victims of priests.

Anderson, of St. Paul, Minn., has handled numerous cases himself and regularly keeps in touch with more than 100 lawyers acting on other cases against the church "in virtually every state."

He said many of the U.S. cases have been decided on the basis of whether senior church officials were warned of abuse in the past.

Catholic church officials, on discovery of child abuse complaints, have "historically" kept the priests in the clergy, Anderson said.

"Instead of reporting them to the police or booting them out of there like most any other institution, they have, out of loyalty to their own, just moved them around secretly," he said in an interview.

Among the financial settlements in the United States:

- $15 million to 16 families in the case of a Lafayette, La., priest.
- An estimated $2.5 million to

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SILENT SINS

Star reporter Kevin Donovan spent three months travelling across Canada for his three-part series on the sexual abuse of children by Catholic priests. Here is the last of his reports.

# Parents 'shut out' by church after sex assaults

Continued from page A1

three victims and their families in Orlando, Fla.

☐ $375,000 to three boys abused by a priest in Springfield, Ill.

Canadian church officials interviewed by The Star say they hope parents and victims in this country will not follow the U.S. lead.

Valleyfield Bishop Robert Lebel, president of the Canadian Conference of Catholic Bishops, said the danger that the church will be sued is lessened if church officials report the complaints.

"If we follow the law there will not be lawsuits. (The priest) may be sued himself, but not the bishop," Lebel said.

The three Catholic families in the Ottawa area who shared the $150,000 payout in the Crampton case did not make lightly the decision to sue their church, lawyer Bruce Carr-Harris said in a recent interview.

"From the families' perspective, they felt driven to seek a civil remedy because, having gone to the church for help after the assaults, they were shut out by officials, including the archbishop," Carr-Harris said.

Crampton pleaded guilty in 1986 to seven counts of sexual assault involving altar boys aged 11 to 13 over a 10-year period dating back to 1973.

Diagnosed a homosexual pedophile, the 50-year-old Crampton was first placed on probation and ordered to continue treatment he'd started earlier that year. A crown appeal the next year increased his sentence to eight months in jail.

In the 1970s and early 1980s, Crampton was a respected man in the community, as priest, school board trustee and as honorary chaplain for the Royal Canadian Mounted Police.

So it was not unusual that parents allowed their sons to stay overnight at the rectories of his Golbourn Township or Nepean churches, or to spend the weekend at his Horseshoe Bay cottage.

Once there, Crampton would make advances, hug and French kiss the boys, then take them to bed and fondle their genitals, court transcripts show.

One boy's victim impact statement to the courts said he did not yet know the full effects of the assaults. "I'll let you know when I have kids," the boy wrote.

But some of the boys would never have been assaulted if church officials had paid heed to an earlier complaint, according to evidence from the civil action launched by the families of three victims.

## 'Every measure'

According to court records, Crampton had invited a 13-year-old altar boy to his cottage for a day of snowmobiling in 1979. After drinking heavily, Crampton got into bed with the boy and fondled him.

The next morning, the boy went home and told his mother, who contacted a prominent Ottawa psychiatrist for help. The psychiatrist, a Catholic who had done work for the church's marriage tribunal, took the complaint to Ottawa Bishop John Behan.

According to the psychiatrist's account at the civil discovery proceeding, Behan said he would "look into it and take every measure, even the most drastic, to see it is taken care of."

After waiting several weeks for Behan to call, the victim's parents, guilt-ridden because they had entrusted their child to Crampton, called and made their own appointment.

The parents say they explained the assault to Behan at a Feb. 16, 1979, meeting and he promised to correct the situation. It is not known what, if any, action was taken by Behan, but no report of the incident was made to police or children's aid at the time.

More assaults followed over the next three years, including abuse of the three victims whose families launched the civil suit.

In her victim impact statement at Crampton's 1986 criminal hearing, the mother of the 1979 victim writes: "(Bishop Behan) assured us that the matter would be dealt with following an investigation. It upset me very much that in subsequent years Mr. Crampton continued to operate within the Catholic church, performing the duties of a priest."

And the boy's father writes: "It was only last summer when there was an indication that Dale Crampton had been involved with other children that I realized that based on statements from the archbishop's office that nothing had been done with our report and, in fact, that it might have been suppressed by church officials."

During the discovery portion of the civil proceedings, Behan (who died two years ago) denied hearing anything of the 1979 complaint.

However, Behan said some boys had complained in the mid-1960s that Crampton had exposed himself to them. Crampton neither confirmed nor denied the incident and Behan attributed it to a "momentary weakness," according to the civil examination evidence.

Despite knowing the church had prior warning, the three families might not have sued if the archdiocese, after Crampton was charged, had shown sympathy and provided counselling for the victims, lawyer Carr-Harris said.

"But it was my clients' view the church was moving to protect its own and was indifferent to the concerns of the families," he said.

The only attempt made at counselling was when church officials sent one family to a local priest who told the parents it was the boy's fault and "he must have liked it," Carr-Harris said.

Although the civil action began in late 1986, the trial was not set until last October. On Oct. 11, the night before the jury was to be picked, the archdiocese settled out of court, paying the full $150,000 requested by the families.

DALE CRAMPTON: Clergyman pleaded guilty to sex assaults on altar boys.

More news/D33, D35

# The Effect of Income Taxes on Personal Injury Awards

Howard N. Rosen*

Traditionally, income taxes have been a consideration in the determination of lump-sum settlements in cases of fatalities. Under the old *Family Law Reform Act* or new *Family Law Act* (F.L.A.) the surviving members of the family are entitled to a portion of the "after-tax" earnings of the deceased. Since the amounts determined are based on after-tax income, the courts have recognized the need to "gross-up" the settlement for the effect of income taxes. Similarly, future costs in a personal injury action have been subject to gross-up, recognizing the need to pay the future costs out of after-tax income.

In cases of personal injury however, where the plaintiff is claiming for future loss of income, the effect of income taxes has not been considered.

Quoting from the decision of Mr. Justice Barr in *Borland and Barchuk v. Muttersbach*;[1]

> "In calculating future loss of earnings in a personal injury case, income tax payable on such earnings, or on an income to be generated by award of damages for such loss of earnings, is irrelevant. In a wrongful death case, however, the plaintiff's loss is that portion of the after-tax income the survivor might reasonably have expected to enjoy. After this has been calculated it should be grossed up to provide an after-tax income similar to the after-tax income which has been lost. Future care must be provided from after-tax dollars. The allowance under this heading must be increased (grossed up) to a figure which will be adequate after payment of taxes."

The reason income taxes are not taken into account in a personal injury case is traced back to the 1966 Supreme Court of Canada ruling, *The Queen v. Jennings et al.*[2]

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[1] (1984) 27 A.C.W.S. (2d).
[2] [1966] S.C.R. 532.





This has created a startling inconsistancy in the computation of damages, when compared to fatality cases where the effect of income taxes are calculated.

In a personal injury settlement, the lump-sum is received tax free. The future income earned on the lump-sum is subject to taxes as is ordinary interest income. As the plaintiff draws from the pool set up by the lump-sum settlement, he will draw an amount comprised of principle and interest. The annual amount drawn by the plaintiff should exhaust the fund over the predetermined period for which the lump-sum was calculated. Since only the interest portion is taxable (return of principle does not attract any income taxes), a fund set up for a relatively short period of time would increase the plaintiff's after-tax position. This is due to the amount of principle as compared to the amount of interest received in each annual payment. A plaintiff who receives a lump-sum to sustain him over a long period of time is at a considerable disadvantage, since the early payments received will be composed primarily of interest and thus attracting a significant tax liability.

The best way to demonstrate this point is to examine two different scenarios. In scenario 1, the following facts are applicable:

| | |
|---|---|
| • Annual lost income | $20,000 |
| • Tax deductions | $3,960 |
| • Inflation rate (long-term) | 5.0% |
| • Interest rate (long-term) | 7.625% |
| • Net discount rate | 2.5% |
| • Estimated working life | 15 years |
| • Present value of lost income | $247,628 |

Table 1 depicts the future disposable income of the plaintiff; A. as if he continued to work and, B. as if he received a lump-sum settlement.

As is demonstrated in Table 1, the cumulative annual disposable income of the plaintiff is increased due to him receiving his future earnings as a lump-sum. Although we can see in year 13, the annual disposable income drops below his expectations had he continued working, the cumulative position after 15 years is positive.

In scenario 2, the following facts are applicable:

| | |
|---|---|
| • Annual lost income | $25,000 |
| • Tax deductions | $7,920 |
| • Inflation rate (long-term) | 5.0% |
| • Interest rate (long-term) | 7.625% |
| • Net discount rate | 2.5% |
| • Estimated working life | 39 years |
| • Present value of lost income | $618,259 |

Table 2 depicts the future disposable income of the plaintiff; A. as if he continued to work and, B. as if he received a lump-sum settlement.

As is demonstrated in Table 2, the cumulative annual disposable income of the plaintiff is deficient due to him receiving his future earnings as a lump-sum. By year 17, the annual disposable income drops below his expectations had he continued working. By year 39, he has suffered a cumulative shortfall of almost $600,000 because income taxes were not taken into consideration.

Thus, it can be seen that depending on the circumstances surrounding the claim, a gross-up for taxes may in fact be necessary to return the plaintiff to a similar position to what he was in prior to the accident.

The examples described above are simplified for the purposes of this article. In an actual situation the following factors should also be considered:

- Amount of award for non-pecuniary damages.
- Amount of award for future cost of care.
- Amount of award for future cost of homemaking services.
- Amount of award for loss of income to date.
- Amount of award for out-of-pocket expenses.
- Tax deductibility of future medical expenses.

All of these factors (if applicable) must be considered, since each one can have an effect on the tax position of the plaintiff.

It is not appropriate to ignore the effect of income taxes when calculating a lump-sum amount for future loss of income in a personal injury claim. It is not sufficient to assume that because the lump-sum amount is computed from pre-tax income that there will be no material difference between receiving the lump-sum and receiving the annual lost income.





## APPENDIX

### TABLE 1

| | (A) LOST INCOME | TAX DEDUCT. | TAXABLE INCOME | INCOME TAXES | DISP. INCOME | (B) ANNUITY PAYMENT | PRIN. | INTEREST | BALANCE IN FUND | TAX DEDUCT. | TAXABLE INCOME | INCOME TAXES | DISP. INCOME | DIFF. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 20000 | 3960 | 16040 | 4021 | 15979 | 28053 | 9481 | 18572 | 238147 | 3960 | 14612 | 3595 | 24458 | −8479 |
| 2 | 21000 | 4158 | 16842 | 4232 | 16768 | 28053 | 10192 | 17861 | 227955 | 4158 | 13703 | 3296 | 24757 | −7990 |
| 3 | 22050 | 4366 | 17684 | 4454 | 17596 | 28053 | 10956 | 17097 | 216998 | 4366 | 12731 | 2980 | 25073 | −7477 |
| 4 | 23153 | 4584 | 18568 | 4687 | 18466 | 28053 | 11778 | 16275 | 205220 | 4584 | 11691 | 2664 | 25389 | −6924 |
| 5 | 24310 | 4813 | 19497 | 4931 | 19379 | 28053 | 12662 | 15391 | 192558 | 4813 | 10578 | 2326 | 25727 | −6348 |
| 6 | 25526 | 5054 | 20472 | 5188 | 20338 | 28053 | 13611 | 14442 | 178947 | 5054 | 9388 | 1965 | 26088 | −5750 |
| 7 | 26802 | 5307 | 21495 | 5458 | 21344 | 28053 | 14632 | 13421 | 164315 | 5307 | 8114 | 1599 | 26454 | −5110 |
| 8 | 28142 | 5572 | 22570 | 5741 | 22401 | 28053 | 15729 | 12324 | 148586 | 5572 | 6752 | 1214 | 26839 | −4438 |
| 9 | 29549 | 5851 | 23698 | 6038 | 23511 | 28053 | 16909 | 11144 | 131677 | 5851 | 5293 | 827 | 27226 | −3715 |
| 10 | 31027 | 6143 | 24883 | 6350 | 24677 | 28053 | 18177 | 9876 | 113499 | 6143 | 3732 | 416 | 27637 | −2961 |
| 11 | 32578 | 6450 | 26127 | 6677 | 25900 | 28053 | 19541 | 8512 | 93959 | 6450 | 2062 | 5 | 28048 | −2148 |
| 12 | 34207 | 6773 | 27434 | 7021 | 27185 | 28053 | 21006 | 7047 | 72953 | 6773 | 274 | 0 | 28053 | −868 |
| 13 | 35917 | 7112 | 28806 | 7383 | 28534 | 28053 | 22582 | 5471 | 50371 | 7112 | 0 | 0 | 28053 | 481 |
| 14 | 37713 | 7467 | 30246 | 7762 | 29951 | 28053 | 24275 | 3778 | 26096 | 7467 | 0 | 0 | 28053 | 1898 |
| 15 | 39599 | 7841 | 31758 | 8160 | 31438 | 28053 | 26096 | 1957 | 0 | 7841 | 0 | 0 | 28053 | 3385 |
| | | | | | 343468 | | | | | | | | 399910 | −56442 |

## TABLE 2

| | (A) LOST INCOME | TAX DEDUCT. | TAXABLE INCOME | INCOME TAXES | DISP. INCOME | (B) ANNUITY PAYMENT | PRINC. | INTEREST | BALANCE IN FUND | TAX DEDUCT. | TAXABLE INCOME | INCOME TAXES | DISP. ICNOME | DIFF. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 25000 | 7920 | 17080 | 4357 | 20643 | 49307 | 2937 | 46369 | 615321 | 7920 | 38449 | 12609 | 36698 | −16054 |
| 2 | 26250 | 8316 | 17934 | 4585 | 21665 | 49307 | 3158 | 46149 | 612163 | 8316 | 37833 | 12114 | 37193 | −15528 |
| 3 | 27563 | 8732 | 18831 | 4824 | 22738 | 49307 | 3395 | 45912 | 608769 | 8732 | 37180 | 11591 | 37716 | −14978 |
| 4 | 28941 | 9168 | 19772 | 5076 | 23865 | 49307 | 3649 | 45658 | 605119 | 9168 | 36489 | 11168 | 38138 | −14273 |
| 5 | 30388 | 9627 | 20761 | 5339 | 25048 | 49307 | 3923 | 45384 | 601196 | 9627 | 35757 | 10783 | 38523 | −13475 |
| 6 | 31907 | 10108 | 21799 | 5617 | 26290 | 49307 | 4217 | 45090 | 596979 | 10108 | 34982 | 10377 | 38930 | −12640 |
| 7 | 33502 | 10614 | 22889 | 5908 | 27595 | 49307 | 4533 | 44773 | 592446 | 10614 | 34160 | 9947 | 39360 | −11765 |
| 8 | 35178 | 11144 | 24033 | 6213 | 28964 | 49307 | 4873 | 44433 | 587572 | 11144 | 33289 | 9492 | 39815 | −10850 |
| 9 | 36936 | 11701 | 25235 | 6534 | 30403 | 49307 | 5239 | 44068 | 582333 | 11701 | 32366 | 9012 | 40295 | −9892 |
| 10 | 38783 | 12287 | 26497 | 6871 | 31913 | 49307 | 5632 | 43675 | 576702 | 12287 | 31388 | 8549 | 40758 | −8845 |
| 11 | 40722 | 12901 | 27822 | 7224 | 33498 | 49307 | 6054 | 43253 | 570647 | 12901 | 30352 | 8093 | 41214 | −7716 |
| 12 | 42758 | 13546 | 29213 | 7596 | 35163 | 49307 | 6508 | 42799 | 564139 | 13546 | 29253 | 7609 | 41697 | −6535 |
| 13 | 44896 | 14223 | 30673 | 7986 | 36911 | 49307 | 6996 | 42310 | 557142 | 14223 | 28087 | 7168 | 42139 | −5228 |
| 14 | 47141 | 14934 | 32207 | 8395 | 38746 | 49307 | 7521 | 41786 | 549621 | 14934 | 26851 | 6749 | 42558 | −3812 |
| 15 | 49498 | 15681 | 33817 | 8825 | 40673 | 49307 | 8085 | 41222 | 541536 | 15681 | 25541 | 6305 | 43002 | −2329 |
| 16 | 51973 | 16465 | 35508 | 9276 | 42697 | 49307 | 8692 | 40615 | 532844 | 16465 | 24150 | 5840 | 43467 | − 770 |
| 17 | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] | [illegible] |
| 21 | 69649 | 22065 | 47584 | 12500 | 57149 | 49307 | 13414 | 35893 | 465159 | 22065 | 13828 | 2726 | 46581 | 10568 |
| 22 | 73132 | 23168 | 49963 | 13135 | 59996 | 49307 | 14420 | 34887 | 450739 | 23168 | 11719 | 2150 | 47156 | 12840 |
| 23 | 76788 | 24326 | 52462 | 13802 | 62986 | 49307 | 15501 | 33805 | 435238 | 24326 | 9479 | 1551 | 47756 | 15230 |
| 24 | 80627 | 25543 | 55085 | 14502 | 66125 | 49307 | 16664 | 32643 | 418574 | 25543 | 7100 | 926 | 48381 | 17744 |
| 25 | 84659 | 26820 | 57839 | 15238 | 69421 | 49307 | 17914 | 31393 | 400660 | 26820 | 4573 | 295 | 49012 | 20409 |
| 26 | 88892 | 28161 | 60731 | 16010 | 72882 | 49307 | 19257 | 30049 | 381403 | 28161 | 1889 | 0 | 49307 | 23575 |
| 27 | 93336 | 29569 | 63767 | 16820 | 76516 | 49307 | 20702 | 28605 | 360701 | 29569 | 0 | 0 | 49307 | 27209 |
| 28 | 98003 | 31047 | 66956 | 17671 | 80332 | 49307 | 22254 | 27053 | 338447 | 31047 | 0 | 0 | 49307 | 31025 |
| 29 | 102903 | 32600 | 70304 | 18565 | 84338 | 49307 | 23923 | 25383 | 314523 | 32600 | 0 | 0 | 49307 | 35031 |
| 30 | 108049 | 34230 | 73819 | 19503 | 88545 | 49307 | 25718 | 23589 | 288805 | 34230 | 0 | 0 | 49307 | 39238 |
| 31 | 113451 | 35941 | 77510 | 20489 | 92962 | 49307 | 27646 | 21660 | 261159 | 35941 | 0 | 0 | 49307 | 43655 |
| 32 | 119124 | 37738 | 81385 | 21523 | 97600 | 49307 | 29720 | 19587 | 231439 | 37738 | 0 | 0 | 493307 | 48293 |
| 33 | 125080 | 39625 | 85454 | 22610 | 102470 | 49307 | 31949 | 17358 | 199490 | 39625 | 0 | 0 | 49307 | 53163 |
| 34 | 131334 | 41607 | 89727 | 23750 | 107583 | 49307 | 34345 | 14962 | 165145 | 41607 | 0 | 0 | 49307 | 58277 |
| 35 | 137900 | 43687 | 94214 | 24948 | 112952 | 49307 | 36921 | 12386 | 128224 | 43687 | 0 | 0 | 49307 | 63646 |
| 36 | 144795 | 45871 | 98924 | 26205 | 118590 | 49307 | 39690 | 9617 | 88534 | 45871 | 0 | 0 | 49307 | 69283 |
| 37 | 152035 | 48165 | 103870 | 27526 | 124509 | 49307 | 42667 | 6640 | 45867 | 48165 | 0 | 0 | 49307 | 75202 |
| 38 | 159637 | 50573 | 109064 | 28912 | 130725 | 49307 | 45867 | 3440 | 0 | 50573 | 0 | 0 | 49307 | 81418 |
| | | | | | 2340058 | | | | | | | | 1746126 | 593932 |

Accordingly, *Zelensky* and the other seven cases in the criminal area, are consistent with this major Supreme Court direction. The only reason that *Zelensky* stands out, at first glance, as potentially inconsistent with the other cases, is that it is the only one in which the criminal law power was raised in the context of a federal statute. It is unlikely that a Criminal Code provision would be struck down by the Court as being outside Parliament's criminal law power. The present Court is balanced, flexible and tolerant in its consideration of all statutes, but particularly federal statutes. Its decision in *Zelensky* is representative of these judicial characteristics.

# ANNUAL SURVEY OF CANADIAN LAW

# JURISPRUDENCE

*John Underwood Lewis**



## I. INTRODUCTION

*Since the last jurisprudence survey was published,*[1] two important developments have taken place in the field of basic Canadian legal theory. These have determined both the scope and the outline of the present survey.

First, work in law reform has led to changes in the various "black letter" areas of academic law. This was a logical, although by no means a

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[1] Lewis, *Annual Survey of Canadian Law: Jurisprudence*, 8 OTTAWA L. REV. 426

Richard Murphy*

# Compensation for Victims of Crime: Trends and Outlooks

## *I. Introduction*

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

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

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

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

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

*LL.B. (Dal.) 1983.

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



## *II. Historical Perspective*

Societies treatment or emphases on the victim has shifted dramatically as time wears on. Schafer[2] identifies three distinct stages, the "golden age", the "decline of" and the "revival of" the victim.

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

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

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

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

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

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

and which ought to protect them, owes them an indeminity when its protection has been ineffectual.[3]

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

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

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

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

### *III. Anti-Victim Bias*

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

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

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

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

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

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



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

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

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

> The contribution of the victim to the genesis of crime and the contribution of the criminal to the reparation of the offence are the central problems of victimology.[8]

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

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

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

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

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

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

## *IV. Justifications and Rationals*

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

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

### *1. Legal Duty*

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

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

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



### *2. Moral Duty*

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

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

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

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

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

### *3. Benefit to the State*

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

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

10. Kirkham, *Compensation for Victims of Crime*, (Alberta: Institute of Law Research and Reform for the Province of Alberta, 1968). Note: discussion of workmen's compensation and unsatisfied judgments at 14-17.
11. Galaway & Hudson, *Perspectives on Crime Victims* (Toronto: C. V. Mosby Co., 1981) at 416.
12. *Id.* at 45 Note: A 1976 study revealed up to 50% non-reporting on certain types of violent offences.

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

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

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

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

### *V. Arguments Against Compensation*

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

13. *Id.* at 52. Article by Knudten "What Happens to Crime Victims in the Justice System".
14. *Id.* at 64.
15. Law Reform Commission, *supra* note 1 at 17.



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

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

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

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

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

16. Burns, *Criminal Injuries Compensation* (Vancouver: Butterworths & Co. Western Canada Ltd., 1980).
17. *Eg. Annual Report of the Commissioner of Penitentiaries for 1966* (Ottawa: Queens Printer, 1966) reports the total outlays for goods and services required by penitentiaries for the year at $54.7 million. McNeil and Vance, *Cruel and Unusual* (Deveau and Greenberg Publishers, 1978): see chapter 13 generally for cost figures. Note: The cost of incarceration is very much dependent upon which variables are included as an expense (*Eg* police, courts, prisons) And the statistics can easily be manipulated to arrive at correspondingly high, or low figures in computing cost per prisoner per year.

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

Several factors require examination in order to determine what the real rational of any legislature is in enacting this type of legislation.[18]

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

The funding provided to the various Canadian Boards thus far seem to indicate a real commitment to the scheme.[20]

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

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

18. Burns, *supra* note 16 at 132.
19. *Compensation for Victims of Crime Act*, S.N.S. 1975, c. 8.
20. Burns, *supra* note 16.
21. *Criminal Injuries Compensation Board Report*, Eleventh Report (Great Britain, 1978).
22. *The Eleventh Report of the Ontario Criminal Injuries Compensation Board 1980* at 5.



## VII. Alternatives

### *1. Restitution*

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

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

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

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

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

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

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

Cited as disadvantages and problems of restitution:

(1) insufficient deterrent to crime.

(2) advantage given to rich criminals.

(3) inappropriateness for victimless crimes.

(4) Canadian constitutional issue as to the division of criminal and civil proceedings.[23]

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

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

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

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

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

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

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

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

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

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

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



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

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

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

### 2. *Insurance*

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

### 3. *Tort Law*

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

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

(a) the criminal has no money or has it hidden and is thus "judgment-proof".

(b) the victim has to make a substantial outlay of cash for a lawyer and run the risk of losing in court.

(c) litigation is time consuming.

(d) court awards are often conservative and unpredictable.

(e) must first apprehend the offender.

(f) others may feel the victim is trying to profit from his victimization.

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

*4. Welfare*

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

## *VIII. Canadian Legislation*

Eleven out of the twelve provinces and territories now have very similar compensation schemes which are in force and operating.[37]

31. N.S. Act, *supra* note 19, s.28.
32. *Id.* s. 17.
33. *Id.* s. 22(1).
34. *Id.*
35. *Id.* Ontario recovered $9,788.42 by subrogation during its 79.80 fiscal year.
36. Osgoode, *supra* note 32 at 27: Other appropriate welfare schemes; Unemployment Insurance, Workmen's Compensation, Canada Pension Plan, M.S.I.
37. *Supra* note 6.



*1. Eligibility and Conditions*

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

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

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

*2. Types of Awards*

Under the enactments, lump sums, periodic payments, or combination of both types may be awarded[44] for:

(a) expenses actually and reasonably incurred or to be incurred as a result of the victim's injury or death;

(b) pecuniary loss or damages incurred by the victim as a result of total or partial disability affecting the victim's capacity for work;

(c) pecuniary loss or damages incurred by dependents as a result of the victim's death;

(d) pain and suffering;

38. N.S. Act, *supra* note 19.
39. Ontario S.O. 1971, c. 51., s. 5(a) refers to "a crime of violence constituting an offence against the Criminal Code (Canada), including poisoning, arson, criminal negligence, and an offence under s. 86 of that Act but not including an offence involving the use or operation of a motor vehicle other than by means of a motor vehicle."
40. Burns, *supra* note 16 at 33.
41. N.S. Act, *supra* note 19, s. 6(1)(b)(c).
42. Burns, *supra* note 16 at 46-66 for a discussion of some of the finer points on causation.
43. N.S. Act *supra* note 19, s.7.
44. *Id.* s. 27.

(e) maintenance of a child born as a result of rape;

(f) other pecuniary loss or damages resulting from the victim's injury and any expense that in the opinion of the board it is reasonable to incur.[45]

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

*3. Restrictions and Deductions*

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

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

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

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

45. Burns, *supra* note 16.
46. N.S. Act, *supra* note 19, s. 8.
47. *Id.* s. 28 sets out maximum lump and periodic awards while s.28(7) exempts good samaritians from these restrictions.
48. *Id.* s.2(1)(d).
49. N.S. Act, *supra* note 19, s. 25(2).
50. *Id.* s. 25(1).



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

*4. Administration and Procedure*

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

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

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

51. *Id.* s. 4(1). The present members of the N.S. compensation board are: Mr. David J. Waterbury (Chairman), Mr. Robert H. Bruce (Vice-Chairman), Dr. Benson Auld (Member).
52. *Id.* s. 12(4).
53. *Id.* s. 12(5).
54. *Morris* v. *Attorney General of N.B.* (1975), 12 N.B.R. (2d) 520 (N.B.C.A.)
55. (1973), 3 O.R. 508 (Ont. H.C.).
56. (1973), 33 D.L.R. (3d) 278 (Ont. H.C.). See also *Foholko* v *Criminal Injuries Compensation Board* (1983) unreported (NSCA).

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

### *IX. Great Britain*

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

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

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

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

57. *Criminal Injuries Compensation Board, Fourteenth Report* (Great Britain, 1978) at 33.
58. *The World Almanac and Book of Facts 1981* (New York: Newspaper Enterprise Assoc. Inc., 1980).



The cost breakdown for 1977-78 was:

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

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

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

### *X. Conclusion*

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

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

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

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

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

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

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

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

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

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

# Reviews

*The International Law of Pollution: Protecting the Global Environment in a World of Sovereign States*. By Allen L. Springer. Westport, Conn.: Quorum Books, 1983. Pp. xiv, 218. ($37.50).

A good book must have focus. This may not be the only criteria for evaluating a book, but it is certainly a *sine qua non*. A scholarly work such as Professor Springer's is a means of communicating ideas; the sharper its focus the clearer the message of its author and the better it and he communicates. When reading this book I wondered about its focus: was there a central unified objective? Having now completed the book, I can see that the author has painted us a useful, but blurred picture. He has not quite brought into focus his objective; much valuable information and many good ideas are obscured by the lack of a clear thesis. The book is not a repository or summing up of law; it does not provide reform or future-oriented suggestions; it does not argue for a particular point. What it does do is provide much interesting description on the theme of international pollution. But this is not the focus suggested by the author himself.

In his "Introduction" Professor Springer decries the "mass of ad hoc studies" in international environmental law which he feels has resulted in "a patchwork field created by individuals whose primary interests lie elsewhere". What is lacking is "any kind of systematic approach to the central questions of international environmental law"; what Professor Springer says his book attempts is "to create a more useful framework for the study of international environmental law through a detailed analysis of 'pollution'". He reemphasizes this objective by concluding his "Introduction" with the statement that "a clearer understanding is needed of how the pollution limits are and should be defined and of the nature of the process by which adherence to them is made to seem obligatory. By developing a comprehensive analytical framework for the discussion of pollution, this book attempts to contribute to that understanding."

Taking the book's own self-professed objective, one might be justified in anticipating that the author would pass beyond the descriptive to offer his views on how pollution limits should be

# THE CONSTITUTIONALITY OF THE COMPENSATION AND RESTITUTION PROVISIONS OF THE CRIMINAL CODE — THE PICTURE AFTER *REGINA v. ZELENSKY*

*James C. MacPherson**

## I. INTRODUCTION

### A. *The Social Background and Statement of Issues*

Compensation and restitution[1] are *formal* remedies available to a judge sentencing someone for breach of particular sections of the Criminal Code. The major sections of the Code which provide for compensation and restitution are sections 388, 653, 655 and 663.[2] In recent years some judges, unhappy with the ineffectiveness and perhaps the irrationality of the traditional criminal punishments of jail and fines, have shown a willingness to experiment with compensation and restitution as legitimate components of the sentencing process. It is likely that this trend will continue. For example, the Law Reform Commission of Canada recently recommended that restitution be accorded a central place in criminal sentencing policy.[3] The reasoning of the Commission is persuasive and should inspire a number of judges to test the Commission's thinking in the laboratories of their criminal courts.

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[1] The ordinary meaning of the terms "restitution" and "compensation" differs from the meaning assigned in the CRIMINAL CODE. Usually, restitution refers to the payment of money or goods *by the offender* to the victim; compensation refers to payment *by the state* to the victim. *See, e.g.*, LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION, WORKING PAPER 5, at 8 (1974). In the CRIMINAL CODE, restitution usually means the return of goods to the victim *by the offender*; compensation means the payment of money *by the offender* to the victim to compensate the victim for loss suffered on account of the actions of the offender. The Code meaning will be used in this article.

[2] CRIMINAL CODE, R.S.C. 1970, c. C-34, *as amended*.

[3] *Supra* note 1, at 1,5-8.

Compensation and restitution are gaining increased visibility and acceptance on a second front as well. They are being used by the police, particularly in the juvenile area, as *informal* punishments for minor offences, to be imposed on offenders in lieu of a charge, and ultimately conviction and traditional punishment.[4] In other words, compensation and restitution are central components of the theory and practice of diversion, a concept which appears to be gaining substantial acceptance in the criminal justice system.

Of course, compensation and restitution represent a departure, conceptually, from traditional sentencing theory. The focus of the criminal law has always been on the protection of public, not private, interests. Hence criminal sentencing policy has flowed from a balancing of the interests of the state and the offender; the needs of the third member of the criminal activity triangle, the victim, were lost in the shuffle. But modern sentencing theory recognizes the value of a three-dimensional approach to sentencing.[5] Compensation and restitution are simply the most visible and most effective methods of according, to the victim of a crime, a meaningful place in the sentencing process.

Because of the importance, originality and complexity of the compensation and restitution sections of the Criminal Code, the recent decision of the Supreme Court of Canada in *Regina v. Zelensky*[6] is of particular importance. It is a watershed in the discussion of innovative penalties in the Criminal Code, and, on its particular facts, is an authoritative statement of the constitutionality of some, and probably all, of the compensation and restitution sections of the Code.

Using the decision in *Regina v. Zelensky* as a foundation, the remainder of this article will be devoted to a consideration of three topics.[7] First, there will be a survey of some of the important provincial superior court decisions concerning the constitutionality of the various compensation and restitution sections of the Criminal Code. Secondly, those same sections will be considered, from a constitutional perspective, in light of the Supreme Court's decision in *Zelensky*. Thirdly, the decision in *Zelensky* will be discussed, briefly, against the backdrop of other recent Supreme Court decisions in the constitutional/criminal area. An attempt

[4] For a description of this development in a British Columbia context, *see* Alsop, *Making Punishment Fit Crime*, in The Province, October 31, 1978, at 9.

[5] "Justice. . .in focussing on the wrong done and the need to restore the rights of the victims, provides an opportunity to individualize the sentence and to emphasize the need for reconciliation between the offender; society and the victim." LAW REFORM COMMISSION OF CANADA, THE PRINCIPLES OF SENTENCING AND DISPOSITIONS, WORKING PAPER 3, at 3-4 (1974).

[6] [1978] 2 S.C.R. 940, 41 C.C.C. (2d) 97, 86 D.L.R. (3d) 179.

[7] *Zelensky* raises an important non-constitutional issue, *viz.*, the merits of judicial use of compensation and restitution. In the final pages of his judgment, Laskin C.J. set down some guidelines for the application of these penalties in future cases. *Id.* at 962-64, 41 C.C.C. (2d) at 112-14, 86 D.L.R. (3d) at 194-96. Because the focus of this paper is on



will be made to discern whether *Zelensky* is representative of, or inconsistent with, the direction of other decisions in this important area of the law.

Before turning to these issues it is necessary to describe briefly the factual background of *Regina v. Zelensky*.

## B. *Regina v. Zelensky — The Factual Background*

*Regina v. Zelensky* was an appeal on the sentence after a guilty plea on a charge of theft, with the sentence including orders for compensation and restitution pursuant to sections 653 and 655 of the Criminal Code and a term of imprisonment. The accused pleaded guilty to a charge of theft of money in the amount of $18,000 "more or less" and of merchandise worth $7,000 "more or less" following a plea bargain which had resulted in the dropping of some other charges. The accused, an employee of the T. Eaton Company, had taken advantage of her position by fraudulently making money orders payable to herself and some relatives. The Eaton Company had commenced civil proceedings at the same time as the criminal action and these continued throughout the trial. In spite of the guilty plea, the accused disputed the amount involved when the company applied for compensation and restitution of the money and goods. Counsel for the opposing parties were unable to agree on the amount (much to the dismay of the trial judge) but the application was granted and compensation and restitution were ordered in the sums of $18,000 and $7,000 (goods) respectively. The accused appealed the sentence, including these orders, arguing *inter alia* that section 653(1) was unconstitutional as it infringed the provincial power over property and civil rights (section 92(13) of the B.N.A. Act). The Manitoba Court of Appeal unanimously upheld the sentence of imprisonment. But, by a three-two decision, the court ruled that section 653(1) was unconstitutional and struck out the orders for compensation and restitution.[8]

The Crown appealed this decision. The Attorneys-General of Alberta and Quebec intervened to support the decision, the Attorney-General of Canada (and the Eaton Company) intervened to support the constitutionality of section 653(1). Judgment was pronounced on May 1, 1978. The Court had little difficulty restoring the order for restitution — the constitutionality of section 655 had not been challenged before either the Manitoba Court of Appeal or the Supreme Court of Canada. In any case, all nine justices of the Supreme Court of Canada considered section 655 to be constitutional. With respect to section 653(1), the Supreme Court reversed the decision of the Manitoba Court of Appeal. Six justices, in an

[8] Regina v. Zelensky, [1977] 1 W.W.R. 155, 33 C.C.C. (2d) 147, 73 D.L.R. (3d) 596 (Man. C.A. 1976). The two majority judgments were written by Matas J.A. (Hall J.A. concurring) and O'Sullivan J.A. The dissenting judgment was by Monnin J.A. (Guy J.A.

opinion written by Chief Justice Laskin, declared the section *intra vires*; Justices Beetz and Pratte joined in a dissent penned by Mr. Justice Pigeon.[9]

## II. Constitutional Issues

### A. *Compensation and Restitution — the Criminal Code Framework*

Although section 388(2) of the Criminal Code deals with compensation, its application is limited to situations in which property damage does not exceed fifty dollars. The significant Code provisions concerning compensation and restitution are sections 653,[10] 654, 655 and 663(2)(e).

Even though these provisions may provide for compensation in only "an imperfect and partial manner"[11] and although judicial application of the provisions may be anarchic,[12] it is still possible to discern a theme or underlying philosophy in these sections. As the Chief Justice put it, correctly, in *Zelensky*:

> It appears to me that ss. 653, 654 and 655, historically and currently, reflect a scheme of criminal law administration under which property, taken or destroyed or damaged in the commission of a crime, is brought into account following the disposition of culpability and may be ordered by the criminal court to be returned to the victimized owner if it is under the control of the court and its ownership is not in dispute or that reparation be made by the offender, either in whole or in part out of money found in his possession when arrested if it is indisputably his and otherwise under an order for compensation, where the property has been destroyed or damaged.[13]

[9] I doubt that there is any significance in the fact that the three dissenting justices were the Quebec justices on the Court. Even if there is merit in the suggestion that there may be substantial differences between civilian and common law-trained justices concerning the fundamental nature of Canadian constitutional law, the judgment by Mr. Justice Pigeon, which is narrow and technical in emphasis, does not reflect this potential difference.

[10] 653.(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 person 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 which 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 under subsection (1) may, if the court making the order is satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the accused and the court so directs, to be taken out of moneys found in the possession of the accused at the time of his arrest.

[11] Turcotte v. Gagnon, [1974] Que. R.P. 309, at 318 (C.S.) (*per* Hugessen A.C.J.).

[12] "Restitution in Canadian criminal law is in a near state of lawlessness in the sense that there are very few established principles governing its application." Chasse, *Restitution in Canadian Criminal Law*, 36 C.R.N.S. 201 (1977).

[13] *Supra* note 6, at 949, 41 C.C.C. (2d) at 103, 86 D.L.R. (3d) at 185.



One qualification should be made concerning the view that these sections are a schematic whole. Although such a view is acceptable from a substantive criminal law perspective, that does not mean that the sections, when viewed from a constitutional law perspective, do not pose constitutional problems of varying degrees of difficulty. It is not possible, and the courts have not tried, to consider the constitutionality of sections 653, 654, 655, and 663(2)(e) on a package basis. There are significant differences in the purpose and the wording of these sections, differences which require careful and separate judicial treatment. For example, the courts have had more difficulty with section 653 than with the other sections. This can be explained by two important and unique components of section 653. First, there is the fact that a judge can order compensation only on the application of the injured citizen; secondly, the compensation order can be enforced in a provincial superior court in a manner identical to the enforcement of a civil judgment. These and other differences underline the need for careful consideration of each section of the Code whose subject matter is compensation or restitution.

### B. *Provincial Superior Court Consideration of Compensation and Restitution*

The constitutionality of the compensation and restitution sections of the Criminal Code has been considered by a number of provincial superior court justices in recent years. Decisions, some of them of very high quality, in this area have been rendered in Quebec, Ontario and Manitoba.[14]

In *Turcotte v. Gagnon*[15] Associate Chief Justice Hugessen, of the Quebec Superior Court, was faced with a petition asking that a compensation order pronounced by a lower court, be entered as a judgment in the superior court, and enforced pursuant to section 653(2) of the Criminal Code. Hugessen A.C.J. had no difficulty upholding the constitutionality of those sections of the Code which permit a judge to order compensation or restitution as part of a criminal sentence. In his opinion, there was an important public interest to be served in focusing on the needs of the victim in the sentencing process.[16] Accordingly, since for Hugessen A.C.J., "a criminal prosecution is one in which the interests and protection of the body politic as a whole are concerned",[17] it followed that the Code sections establishing compensation and restitution were constitutional. He concluded that "an order for restitution to the victim of a crime

[14] *See* Regina v. Zelensky, *supra* note 8; Rex v. Cohen, 32 Man. R. 409, 38 C.C.C. 334, [1923] 1 D.L.R. 687 (C.A. 1922); Turcotte v. Gagnon, *supra* note 11; *Re* Torek, 2 O.R. (2d) 228, 15 C.C.C. (2d) 296, 44 D.L.R. (3d) 416 (H.C. 1974); Regina v. Groves, 17 O.R. (2d) 65, 37 C.C.C. (2d) 429, 79 D.L.R. (3d) 561 (S.C. Chambers 1977).

[15] *Supra* note 11.

[16] *Id.* at 317-18, quoting with approval from Law Reform Commission of Canada, *supra* note 5, at 31.

is not only incidental to criminal law and procedure; it may be an inherent part of the sentencing process''.[18]

Hugessen A.C.J. then proceeded to the issue raised by the actual fact situation in *Turcotte v. Gagnon*, namely, the constitutionality of the enforcement mechanisms in section 653(2). The argument against the validity of this section was that the enforcement proceedings which would take place pursuant to section 653(2) would, in effect, be civil actions between private litigants, a subject matter outside the scope of Parliament's criminal law power. Hugessen did not accept this argument. In reasoning that was quoted with approval by Chief Justice Laskin in *Zelensky*,[19] Hugessen A.C.J. stated:

> [I] take it that the superior court in which the order of the criminal court it [*sic*] filed is not called upon to exercise a judicial function in any normal sense of that word, but rather a purely administrative one, which has as its sole purpose to allow the civil execution process to be used to enforce what is already a binding order given by the criminal court.
>
> . . . .
>
> . . . Proceedings such as the present ones taken in a civil court in order to effect the execution of such an order do not cause it thereby to lose its criminal law character. In effect, all that Parliament has done is to impose upon the provincial superior courts, which are equipped for such purpose, the duty of providing for the execution of an order already given by a court of competent jurisdiction.[20]

The constitutionality of sections 653(1) and 663(2)(*e*) was tested and upheld in two recent Ontario cases.[21] The judgments by Justices Haines and O'Driscoll were comparable in both their general direction and high quality to that of Hugessen A.C.J. in Quebec.

In *Re Torek*[22] the validity of section 653 was challenged. Mr. Justice Haines conceded that the right to bring and defend an ordinary civil action is a civil right, which is normally within provincial legislative jurisdiction.[23] In addition, he acknowledged that section 653 deprives an accused of many of the protections he would have in an ordinary civil action, such as the right to have prior notice of the claim and the right to discovery.[24] But these considerations did not persuade Mr. Justice Haines that the section was *ultra vires*. Without stating it explicitly, Haines J. applied the aspect doctrine[25] and found a valid criminal purpose underlying section 653. For him, ''proceedings under s. 653 can be considered to be part of the sentencing process'';[26] this was sufficient to establish their constitutionality under section 91(27) of the B.N.A. Act.

The only criticism that may be made of Haines J.'s judgment, which generally is both thorough and well-reasoned, is his spurious reliance on section 601 of the Criminal Code as a prop for the constitutionality of section 653. He said: ''It is worth noting that in s. 601 . . .the word 'sentence' is defined to include an order made under s. 653.''[27] In a constitutional sense this fact is not at all worth noting; it is irrelevant, as both the Chief Justice[28] and Mr. Justice Pigeon[29] hinted in their judgments in *Zelensky*. Inclusion in a definition does not determine validity, particularly when, as in this case, the definition section is found in a completely unrelated part of the Code.[30]

The second recent Ontario case concerning the compensation and restitution provisions of the Criminal Code is *Regina v. Groves*.[31] In that case Mr. Justice O'Driscoll decided that section 663(2)(*e*) of the Code, which permits a judge to make a restitution order part of a sentence of probation, was *intra vires* Parliament's criminal law power. The judgment, which was rendered after the decision of the Manitoba Court of Appeal in *Zelensky*, but before that of the Supreme Court, is remarkable for its anticipation, not only of the result in *Zelensky*, but also of the broad outlines of the reasoning advanced in the Chief Justice's opinion. Using as starting points the presumption of constitutionality[32] and the breadth of Parliament's criminal law power,[33] O'Driscoll J. easily concluded that sentencing is part of that power and section 663(2)(*e*) was part of sentencing. But he recognized, correctly, that this did not conclude the matter:

> To say that s. 663(2)(e) is part of sentencing does not remove the necessity of determining its constitutional validity. . . .
>
> To answer this question one must examine how the concepts of ''restitution'' and ''reparation'' relate to the principles of sentencing. If the whole purpose of the provision in s. 663(2)(e) were to save the victim the necessity and expense of a civil suit, such would render the provision *ultra vires* because it would not be in ''pith and substance'' legislation in relation to criminal law.[34]

O'Driscoll J. then embarked on an examination of the purposes of section 663(2)(*e*) and their relationship to the accepted purposes of

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[18] *Id.* at 317.

[19] *Supra* note 6, at 958-59, 41 C.C.C. (2d) at 109-10, 86 D.L.R. (3d) at 191-92.

[20] *Supra* note 11, at 312, 318.

[21] *Re* Torek, *supra* note 14; Regina v. Groves, *supra* note 14.

[22] *Supra* note 14.

[23] *Id.* at 230, 15 C.C.C. (2d) at 298, 44 D.L.R. (3d) at 419.

[24] *Id.* at 229-30, 15 C.C.C. (2d) at 298, 44 D.L.R. (3d) at 418.

[25] This is one of the oldest and most important principles of constitutional interpretation. It was first enunciated in Hodge v. The Queen, 9 App. Cas. 117, at 130, 53 L.J.P.C. 1, at 6 (1883), where the Privy Council stated that ''subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91''.

[26] *Supra* note 14, at 230, 15 C.C.C. (2d) at 298, 44 D.L.R. (3d) at 419.

[27] *Id.*

[28] *Supra* note 6, at 955, 41 C.C.C. (2d) at 107-08, 86 D.L.R. (3d) at 189-90.

[29] *Id.* at 984, 41 C.C.C. (2d) at 128, 86 D.L.R. (3d) at 210, citing Regina v. Scherstabitoff, 40 W.W.R. 575, [1963] 2 C.C.C. 208, 39 C.R. 233 (B.C.C.A. 1962).

[30] *Id.* at 955, 41 C.C.C. (2d) at 107-08, 86 D.L.R. (3d) at 189-90. The definition is found in the part of the Code relating to appeals.

[31] *Supra* note 14.

[32] *Id.* at 74, 37 C.C.C. (2d) at 439, 79 D.L.R. (3d) at 570.

[33] *Id.* at 69, 37 C.C.C. (2d) at 433, 79 D.L.R. (3d) at 565.

[34] *Id.* at 70-71, 37 C.C.C. (2d) at 435, 79 D.L.R. (3d) at 566-67.

sentencing policy. He concluded that the three purposes of section 663(2)(*e*) were rehabilitation of the offender, deterrence and protection of the public. All of these are legitimate goals of criminal sentencing.[35] Hence the constitutional nexus between section 663(2)(*e*) of the Criminal Code and section 91(27) of the B.N.A. Act was established.

The picture, therefore, in Quebec and Ontario was one of judicial acceptance of the constitutionality of the various compensation and restitution sections of the Code. In Manitoba, prior to *Zelensky*, there was a similar picture. In an early case, *Rex v. Cohen*,[36] Chief Justice Perdue remarked (albeit clearly *obiter*) that section 91(27) of the B.N.A. Act supported the compensation and restitution sections of the Criminal Code.[37] More recently, in 1970, the Manitoba Court of Appeal upheld the predecessor of the present section 663(2)(*e*).[38]

So, as the Manitoba Court of Appeal began its deliberations in *Zelensky*,[39] it did so against a background of judicial acceptance of three different compensation and restitution sections, in three different jurisdictions, including Manitoba itself. Yet the Court of Appeal declared in *Zelensky* that section 653(1) of the Code was unconstitutional. The decision was three-two;[40] the judgments unremarkable in either organization or depth of analysis.

The dissenting judgment of Monnin J.A. (Guy J.A. concurring) was relatively simple. He cited *Regina v. Littler*,[41] *Turcotte v. Gagnon*[42] (quoting *Rex v. Cohen*[43]) and *Re Torek*[44] as cases supporting the validity of the section. He also supported the reasoning of *Torek*. He concluded:

> In pith and substance s. 653 is part and parcel of the sentencing process set out in the Criminal Code of Canada. If it were not, the hands of our courts would be sadly tied and the victims of crimes would of necessity have to seek recovery of property and moneys illegally taken away from them through civil courts on the basis that one cannot mix that which is criminal with that which is civil, and on the further basis that provincially appointed judges are not fit persons to deal with matters of civil law. Can one think of a more ridiculous proposition and one bound to bring the entire legal process — already badly challenged — in disrepute? Distinctions for the sake of distinctions have no place in courts of law.[45]

Although one may sympathize with the general sentiments expressed by Mr. Justice Monnin in the last two sentences of this passage, it is doubtful that the first two sentences are particularly persuasive in

[35] *Id.* at 74, 37 C.C.C. (2d) at 429, 79 D.L.R. (3d) at 570.
[36] *Supra* note 14.
[37] *Id.* at 411, 38 C.C.C. at 335, [1923] 1 D.L.R. at 688-89.
[38] Regina v. Butkans (unreported, Man. C.A., June 18, 1970).
[39] *Supra* note 8.
[40] *See id.* for identification of majority and dissenting justices.
[41] 27 C.C.C. (2d) 216, 65 D.L.R. (3d) 443 (Que. C.A. 1974).
[42] *Supra* note 11.
[43] *Supra* note 14.
[44] *Id.*
[45] *Supra* note 8, at 160, 33 C.C.C. (2d) 152-53, 73 D.L.R. (3d) at 602.



establishing the constitutionality of section 653(1). If we are to be convinced that section 653(1) is part of the sentencing process of the Code, then it would have to be on the basis that compensation meshes with some of the traditional and accepted goals of sentencing. Basically, those goals are rehabilitation, deterrence and punishment or retribution — all of which are primarily *offender*-focused. But Monnin J.A. did not tie section 653 to any of these goals; rather, his reason for upholding section 653(1) was *victim*-focused — it relieved the victim from having to go to the civil courts to recover property or money taken from him. Even though in policy terms this is undoubtedly desirable, it hardly relates to sentencing and, therefore, does not support the conclusion Monnin J. reached in the first sentence.

The majority judgments were written by O'Sullivan J.A. and Matas J.A. (Hall J.A. concurring). Matas J.A. commenced by quoting Lord Atkin's statement in *Attorney-General of British Columbia v. Attorney-General of Canada* that the only limitation on the federal criminal power was that Parliament could not enact legislation in the guise of criminal law which encroached on provincial jurisdiction.[46] Next, he pointed out three differences between section 653(1) and section 655(1). First, section 653(1) uses the verb "may", whereas section 655 uses "shall"; secondly, section 653 requires an application by the victim; and thirdly, section 655 refers to property before the court which was capable of restoration to the victim, whereas there is no such limitation in section 653.[47] These distinctions led Matas J.A. to the consideration of section 653 in isolation.

Matas J.A. considered the key issue to be whether the procedure for compensation was necessarily incidental to the criminal law power.[48] While acknowledging that Parliament must have wide powers over sentencing with the changing times, he still felt an examination was in order to determine whether the legislation was a valid criminal function or merely an expedient conjunction of civil and criminal remedies.[49] He then proceeded to consider the appropriateness of compensation, mentioning the lack of discovery and the possibility of the accused being deprived of the right to make full answer and defence.[50] It seems that his views on these functions were very important to his decision. He agreed that compensating victims was a worthy goal and that a valid object of sentencing was preventing the criminal from profiting from his crime. But he felt that the former did not necessarily flow from the latter. Instead, he mentioned using fines to prevent profits and using other means of compensating victims.[51] All of this led Matas J.A. to the conclusion that

[46] *Id.* at 172, 33 C.C.C. at 162, 73 D.L.R. (3d) at 611, citing with approval Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 368, at 375-76, 67 C.C.C. 193, at 195, [1937] 1 D.L.R. 688, at 690 (P.C.).
[47] *Id.* at 173, 33 C.C.C. (2d) at 163, 73 D.L.R. (3d) at 612-13.
[48] *Id.* at 175, 33 C.C.C. (2d) at 164-65, 73 D.L.R. (3d) at 614.
[49] *Id.* at 175-76, 33 C.C.C. (2d) at 165, 73 D.L.R. (3d) at 614.
[50] *Id.* at 178-79, 33 C.C.C. (2d) at 167-68, 73 D.L.R. (3d) at 616-17.
[51] *Id.* at 180, 33 C.C.C. (2d) at 168, 73 D.L.R. (3d) at 617-18.

section 653(1) was not supported by section 91(27) or by the necessarily incidental doctrine; rather it was an encroachment on the provincial property and civil rights power.

Matas J.A.'s judgment suffers throughout from a fundamental error, namely confusion between the *constitutionality* of compensation and the *merits* of compensation. This confusion is clearly manifested when he states the following:

> No doubt compensating victims of crime is a worthy goal. And I agree with the statement by Haines J. in *Torek*, that it is a valid object in sentencing "to prevent a convicted criminal from profiting from his crime by serving a jail term and then keeping the gains of his illegal venture". . . .[52]

In terms of constitutional analysis he needed to go no further. He had established a valid nexus between compensation (the impugned section) and an accepted purpose of sentencing (punishment). Since sentencing has always been accepted as a component of Parliament's criminal law power, this should have concluded the matter in favour of the constitutionality of section 653(1). Yet, Mr. Justice Matas continued: "But the two objectives do not need to be tied together. . . . There are other constitutionally valid ways of accomplishing this purpose."[53] Here Matas J.A. crossed the line dividing jurisdictional considerations from considerations of the wisdom of legislation. The existence of other methods, or the merits of those methods, are irrelevant from a constitutional perspective. Rather, the sole question is whether there is a rational connection between the method chosen by Parliament to accomplish a purpose, and one of its heads of legislative power. Having specifically found that there was such a connection in this case, Matas J.A. unfortunately failed to recognize that this concluded his judicial function.

The short concurring judgment of O'Sullivan J.A. seemed to be based on the assumption that section 653 conferred "a right" on the victim of a crime to claim compensation from the offender.[54] What O'Sullivan J.A. failed to recognize was that even if the victim established his claim, he would not be automatically entitled to compensation. In a civil court, the establishment of entitlement and award of damages are closely connected; if you prove you lost $100 because of the actions of the defendant, then you will be awarded $100. Such is not necessarily the case under the compensation and restitution sections of the Code. There, because these orders are components of the sentencing process, the judge imposing sentence focuses on the offender, not the victim. Accordingly, the amount the victim lost may be only one factor in the judge's mind as he imposes sentence. The victim has no "right" to recovery as he would have in an ordinary civil case if he established his claim. Rather, under section 653, his recovery is dependent entirely on the discretion of the judge, who may or may not attach significance to his loss.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 183-84, 33 C.C.C. (2d) at 170-71, 73 D.L.R. (3d) at 629-31.



In summary then, none of the judgments in *Zelensky* at the Court of Appeal level was particularly strong. An impartial observer, however, keeping in mind both the substantial provincial superior court support for the constitutionality of a variety of compensation and restitution sections in the Code, and the traditional support of the Supreme Court of Canada for federal legislation generally,[55] could not with any confidence have predicted that the decision of the Manitoba Court of Appeal would have been upheld.[56]

### C. *Regina v. Zelensky — Supreme Court of Canada*

The Supreme Court of Canada, in a six-three decision, reversed the decision of the Manitoba Court of Appeal.[57] The dissenting judgment by Mr. Justice Pigeon was a strong judgment, although perhaps top-heavy in its description of the facts.[58] It was well-organized and dealt clearly and separately with the two potential bases — the criminal law power and the necessarily incidental doctrine — for the validity of section 653.

As for the criminal law power, Pigeon J.'s conclusion that it did not support section 653 flowed from two dominant features of his judgment — first, his characterization of section 653; secondly, the importance he attached to the unique civil consequences of section 653(1). His characterization was brief: "As to the nature of the enactment, it obviously deals with a matter that is *prima facie* within provincial jurisdiction 'satisfaction or compensation for loss of or damage to property' ".[59] His analysis of the features of section 653(1) was more complete:

> Unlike practically every other procedural provision of the *Criminal Code*, the remedy contemplated in s. 653 has the characteristics of a civil remedy. It is available only "upon the application of a person aggrieved". It is not sanctioned by a penalty but is "enforceable . . . as . . . a judgment rendered . . . in civil proceedings". In short the substance of s. 653 is that it enables a person who has suffered loss of or damage to property by the commission of an indictable offence, to obtain from the court of criminal jurisdiction a civil judgment against the offender.[60]

This characterization and analysis led Pigeon J. to the conclusion that section 653(1) was outside the ambit of section 91(27) of the B.N.A. Act.

[55] Since 1949, only two minor sections of two federal statutes have been declared unconstitutional by the Court: s. 7(e) of the Trade Marks Act, R.S.C. 1970, c. T-10 and s. 2(2) of the Agricultural Products Marketing Act, R.S.C. 1970, c. A-7. *See* MacDonald v. Vapour Canada Ltd., [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1 (1976); Reference *re* Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

[56] The author made the rash prediction to his Constitutional Law class that the Court of Appeal decision would be reversed 9-0.

[57] *Supra* note 6.

[58] The judgment is twenty pages in length. Thirteen pages are devoted to a description of the facts and some analysis of non-constitutional points.

[59] *Supra* note 6, at 979, 41 C.C.C. (2d) at 124-35, 86 D.L.R. (3d) at 206-07.

There is much to admire in Pigeon J.'s discussion. Section 653(1) does have distinct provisions which, at first blush, appear to be primarily civil in nature. He presents clearly the arguments to support such a finding. But, the judgment loses much of its force by failing to deal with the arguments on the other side. For example, it is not "obvious" that the subject matter of section 653(1) is compensation for loss of or damage to property. Certainly that is one possible characterization. However, section 653 is found in the sentencing chapter of the Criminal Code and the actual words of section 653(1) clearly refer to compensation in a sentencing context. Consequently, Pigeon J. should have, at a minimum, acknowledged the possible sentencing *cum* criminal law characterization of section 653(1), and attempted to rebut the characterization.

Likewise, it is true that one possible analysis of "the substance" of section 653(1), is that it enables a victim to obtain a civil judgment from a criminal court. But surely, before coming to that conclusion, some discussion of other potential "substances" would be appropriate. Could not the essence of section 653(1) be criminal sentencing? Is compensation not consistent with the traditional goals of sentencing — deterrence, punishment, rehabilitation? For example, in *Zelensky* itself, could not an order for compensation and restitution, in the amount of $25,000, be considered a very significant punishment and deterrent *to the offender*, irrespective of any attention the court might pay to the victim? In other words, it is not obvious, as Pigeon J. seemed to think, that there is not even an arguable nexus between compensation and criminal sentencing. His conclusions would have been much stronger if he had acknowledged the potential strength of the arguments in support of constitutionality, and had tried to rebut them.

A similar criticism can be levelled against that part of Pigeon J.'s judgment dealing with the possible application of the necessarily incidental doctrine to section 653(1). He took two pages to set out, carefully, the nature of that doctrine and to establish its applicability to section 91(27) of the B.N.A. Act.[61] Having done that, though, he leaped directly to his conclusion:

> I cannot find anything which would made it possible for me to consider subss. (1) and (2) of s. 653 of the *Criminal Code* as necessarily incidental to the full exercise by Parliament of its authority over criminal law and criminal procedure. A compensation order is nothing but a civil judgment.[62]

With respect, this conclusion is not at all self-evident. The same considerations suggested above, in the discussion of the criminal law power, apply here. Is there not, arguably, a rational connection between a compensation order and a valid sentencing objective such as punishment or deterrence? Or, is there not a potentially rational connection between those compensation and restitution sections of the Code which were admittedly good (Pigeon J. himself strongly hinted that all of these sections except



section 653(1) and (2) were valid), and those which were alleged to be *ultra vires*? These issues should have, at least, been canvassed before Mr. Justice Pigeon reached his conclusion that he "cannot find anything" to tie section 653(1) and (2) to a subject matter necessarily incidental to the full exercise of Parliament's criminal law power. Without this analysis, his conclusion is unsupported and unpersuasive.

In summary, Pigeon J.'s judgment was a significant improvement over the majority judgments in the Manitoba Court of Appeal. He avoided, rigourously, the major pitfall of those judgments, namely, confusion between considerations of jurisdiction (legitimate for judicial attention) and of merits (not legitimate). The main strength of his judgment was his analysis of the effects and potential effects of the distinct civil characteristics of section 653(1) and (2). This was valuable because those distinct characteristics cast doubts on the nexus between that section and valid criminal law purposes. Unfortunately, Pigeon J. looked only at the civil side of the coin. If he had supplemented this analysis with an identification and rebuttal of the arguments denying the importance of these civil characteristics (for example, if he had responded to some of the reasoning by Hugessen A.C.J., Haines and O'Driscoll J.J. in *Turcotte*, *Torek* and *Groves* or, even better, to the views of Laskin C.J. in this case), his conclusion of *ultra vires* would have been more persuasive — although still, in my view, incorrect.

The first point which can be made about the Chief Justice's majority judgment in *Zelensky* is that it differed markedly, in terms of style, from Pigeon J.'s judgment. Whereas the emphasis in Pigeon J.'s judgment was on a close, almost technical, analysis of section 653, Laskin C.J.'s judgment was more broadly conceived. He made an historical analysis of the compensation and restitution sections of the Code,[63] was prepared to consider those sections as a comprehensive scheme[64] and appeared to attach significance to the thinking of the Law Reform Commission in this area.[65] This is, of course, typical of the Chief Justice's approach in most constitutional cases. His policy-oriented (at times philosophical) approach to constitutional issues is in sharp contrast to the Austinian analytical framework which characterizes the judgments of such justices as Martland, Ritchie and Pigeon JJ.

In substantive terms, the chief merit of Laskin C.J.'s judgment was the thorough framework he established before considering section 653. This framework consisted of four components and contributed substantially to the persuasiveness of his ultimate conclusion that section 653 was constitutional. The first component of the background framework was an historical analysis of the Code sections dealing with compensation and restitution. Secondly, there was a review of the case law defining the scope of Parliament's criminal law power. This examination established

[63] *Id.* at 948, 41 C.C.C. (2d) at 102, 86 D.L.R. (3d) at 184.

that this power is broad,[66] capable of growth[67] and includes criminal sentencing. Thirdly, Chief Justice Laskin reviewed all of the compensation and restitution provisions of the sentencing chapter of the Code. He concluded that they constituted a scheme of criminal law administration under which property taken, destroyed or damaged during an offence is accounted for after culpability is determined and returned to the victim.[68] Finally, he reviewed a number of leading cases in which the constitutionality of other non-traditional penalties or sanctions was upheld.[69] This four-pronged analysis established a background conducive to a favourable examination of section 653, an examination to which the Chief Justice then turned.

Although he had concluded that section 653 was part of a broad Criminal Code scheme of compensation and restitution and that these were valid parts of the sentencing process, he recognized that there were distinct features of section 653 which called for separate treatment. The two problematic features of section 653 — which for Pigeon J. were determinative of invalidity — are that the trigger for a compensation order is an application by the victim, not the court acting on its own motion and, secondly, that the compensation order can be registered and enforced in a civil court as if it were a civil order.

The Chief Justice, relying heavily on Associate Chief Justice Hugessen's judgment in *Turcotte v. Gagnon*, effectively answered the second problem. He concluded that section 653 was not invalid because it relied on provincial superior courts for automatic enforcement. Citing Hugessen A.C.J., he stated:

> [T]he fact that Parliament has made the compensation order enforceable as a judgment in a civil action is more a call on the administrative side of the Superior Court than on the judicial side but it is, in any event, a means open to Parliament to provide for the execution of an order validly made. . . .
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> . . . .
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> . . . *This . . . is machinery which cannot control the issue of validity*.[70]

This is surely correct. Assuming the compensation order is a valid criminal order, it does not lose its criminal nature because, subsequently,

[66] *Id.* at 950-51, 41 C.C.C. (2d) at 104, 86 D.L.R. (3d) at 186.

[67] *Id.* There is some eloquence in the Chief Justice's articulation of this view: We cannot, therefore approach the validity of s. 653 as if the fields of criminal law and criminal procedure and the modes of sentencing have been frozen as of some particular time. New appreciations thrown up by new social conditions, or re-assessments of old appreciations which new or altered social conditions induce make it appropriate for this Court to re-examine courses of decision on the scope of legislative power when fresh issues are presented to it, always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the *British North America Act*.

[68] *Id.* at 949, 41 C.C.C. (2d) at 103, 86 D.L.R. (3d) at 185.

[69] *Id.* at 953-58, 41 C.C.C. (2d) at 105-10, 86 D.L.R. (3d) at 187-92.

[70] *Id.* at 958, 959, 41 C.C.C. (2d) at 109, 110, 86 D.L.R. (3d) at 191, 192



another arm of the judicial process needs to be invoked for enforcement purposes. Once the court has declared the purposes of a legislative enactment to be constitutional, the choice of means to implement those purposes is solely a function of that legislature.

The Chief Justice's response to the first problem of section 653 was brief. He compared sections 653(1) and 663(2)(*e*) of the Code and concluded: "I find little to choose, *except on the side of formality*, in the requirement of s. 653 that the compensation order must be based on an application by the person aggrieved rather than be made by the Court *suo motu*. . .".[71] The underlined passage captures, succinctly, the essence of the insignificance of the factual distinction between the two sections. Both sections deal with compensation or restitution in a sentencing context, and authorize a judge, *at his discretion*, to include these punishments in a sentence. Presumably, in so doing, the judge will adopt the traditional offender-focus and assess compensation or restitution in the context of the accepted purposes of sentencing — punishment, deterrence and rehabilitation. The fact that under section 653(1) this whole process is initiated by the victim does not deny the essential criminal law features of the section — namely, *offender-orientation* and *judicial discretion* in making the order.

Having rebutted the arguments in favour of the essential nature of section 653, and having established a general background conducive to a finding of validity (these are two points of excellence in the judgment), the Chief Justice concluded that "s. 653 is valid as part of the sentencing process".[72]

However, in spite of the two strengths of the judgment, the conclusion of constitutionality would have been more persuasive if the judgment had been clearer or more thorough in two respects. The first, and minor, criticism is that the Chief Justice never clearly separated the criminal law and the necessarily incidental basis for validity. Although one suspects that the Chief Justice prefers not to rely on the necessary incident doctrine if it is at all possible to uphold a statutory provision under a specific head of power,[73] and although most of the judgment is clearly concerned with a discussion of section 91(27) of the B.N.A. Act, the combination of Laskin C.J.'s failure to specifically mention the doctrine, while at the same time talking in terms of rational connections between admittedly valid and challenged parts of legislation (the accepted formulation of the doctrine) and his citation of *Papp v. Papp*,[74] leave the reader wondering whether Chief Justice Laskin might invoke the doctrine to uphold the legislation.

[71] *Id.* at 954, 41 C.C.C. (2d) at 107, 86 D.L.R. (3d) at 189 (emphasis added).

[72] *Id.* at 960, 41 C.C.C. (2d) at 111, 86 D.L.R (3d) at 193 (emphasis added).

[73] *See, e.g.*, Tomell Investments Ltd. v. East Marstock Lands Ltd., [1978] 1 S.C.R. 974, 77 D.L.R. (3d) 145 (1977), wherein Chief Justice Laskin upheld the validity of s. 8(1) of the federal Interest Act, R.S.C. 1970, c. I-18, under s. 91(19) of the B.N.A. Act. Seven members of the Court, instead, invoked the ancilliary doctrine to uphold the section.

[74] [1970] 1 O.R. 331, 8 D.L.R. (3d) 389 (C.A.). This is the leading case on the

Because of the distinct civil features of section 653, its validity was more doubtful than the other compensation and restitution sections of the Code. Judicial validation of section 653, thus, carries with it an implicit validation of all the Code sections dealing with these subject matters. Accordingly, *Zelensky* stands for the proposition that the constitution will permit, under section 91(27), experimentation with new forms of sentencing such as compensation and restitution. This is good news for those law reformers, legislators and judges who think that the traditional punishments such as jail and fines are not effective in some cases. These people should now feel comfortable in searching for, and applying, new sanctions in the knowledge that these sanctions will be upheld, provided they mesh with the same valid objectives of sentencing.

### D. *Zelensky as Representative of, or Inconsistent with, a Pattern of Decisions in the Constitutional/ Criminal Area*

There has been a large number of cases in recent years raising constitutional issues in a criminal law context.[82] For example, the Supreme Court of Canada has delivered seven significant decisions in cases in which provincial statutes were attacked as infringing Parliament's criminal law power. In *Attorney General for Canada v. Dupond*[83] a city by-law which granted a local committee authority to prohibit the holding of assemblies, parades and gatherings if the committee has reason to believe that the public peace or safety was endangered, was held not to be a criminal law, even though the provincial enactment consisted of a prohibition and made failure to observe the prohibition an offence. In *Faber v. The Queen,*[84] the Court held that a provincial coroner's inquest was not a proceeding in a criminal matter. In *Di Iorio v. Warden of the Common Jail of Montreal*[85] and in *Keable v. Attorney General for Canada,*[86] provincial inquiries into criminal activity were upheld as falling within the administration of criminal justice. In *Nova Scotia Board of Censors v. McNeil,*[87] the Court upheld a provincial movie censorship regime, and declared that the regulation of public morals was not necessarily legislation of a criminal nature. Finally, in two slightly earlier decisions, *Ross v. Registrar of Motor Vehicles*[88] and *Bell v. Attorney*

[82] This is not the place to discuss in detail the recent decisions of the Supreme Court of Canada in the constitutional/criminal law field. For a more comprehensive discussion (although now somewhat dated) *see* J. MacPherson, Developments in Constitutional Law 58-67 (1978); *see also* Arvay, *The Criminal Law Power in the Constitution: And Then Came McNeil and Dupond,* in this volume.

[83] [1978] 2 S.C.R. 770, 5 M.P.L.R. 4, 84 D.L.R. (3d) 420.

[84] [1976] 2 S.C.R. 9, 27 C.C.C. (2d) 171, 65 D.L.R. (3d) 423 (1975).

[85] [1978] 1 S.C.R. 152, 35 C.R.N.S. 57, 73 D.L.R. (3d) 491 (1976).

[86] [1978] 2 S.C.R. 135, 41 C.C.C. (2d) 489, 87 D.L.R. (3d) 708.

[87] [1978] 2 S.C.R. 662, 25 N.S.R. 128, 84 D.L.R. (3d) 1.



*General for Prince Edward Island,*[89] the Court upheld sections of provincial legislation which provided for automatic suspension of a driver's licence after a conviction for "drunk driving" offences under the Criminal Code.

Was there, then, a trend before *Zelensky* away from the traditional broad definition of Parliament's criminal law power? At first instance, the decision and the language in *Zelensky* seem inconsistent with the decisions in the seven cases listed above, and, in particular, with some of the reasoning in cases such as *McNeil* and *Dupond* which appeared to restrict the scope of section 91(27) of the B.N.A. Act.

The question just posed, however, must be answered in the negative. The Court's decision in *Zelensky* is in fact reflective of a broader trend in the life of the present Court, namely, functional concurrency, or the trend to uphold almost all statutes enacted by both levels of government. Thus, in the criminal law area, section 91(27) has not proved useful as a shield against provincial legislation. But that fact does nothing to deny the strength of section 91(27) as an effective sword in the federal hand, one which the courts seldom stay.

This judicial tolerance of the legislation of both levels of government flows directly from open judicial attachment to both the aspect doctrine and the presumption of constitutionality. The aspect doctrine,[90] probably the seminal principle of Canadian constitutional law, directs courts to view legislation, if possible, from a perspective or "aspect" which will result in its validity. The presumption of constitutionality, although not cited by the courts as frequently as the aspect doctrine, has an ancient Canadian pedigree — it was enumerated by Mr. Justice Strong in *Severn* v. *The Queen*,[91] the first Canadian constitutional case. Recently, a number of the current justices, including Dickson J. in *CIGOL*[92] and Ritchie J. in *McNeil*,[93] have professed the importance of this principle.

The effects of the application of the aspect doctrine and the presumption of constitutionality have been particularly evident in the Supreme Court's treatment of federal legislation. Since the Supreme Court became our final court, only two very minor sections of two major federal economic statutes have been declared unconstitutional.[94] Provincial statutes have not fared quite as well,[95] but still the overall picture is one of substantial judicial tolerance.

[89] [1975] 1 S.C.R. 25, 5 N. & P.E.I.R. 173, 42 D.L.R. (3d) 82 (1973).

[90] *Supra* note 25.

[91] 2 S.C.R. 70, at 103, 1 Cart. B.N.A. 414, at 446-47 (1878).

[92] Canadian Indus. Gas & Oil Ltd. v. Government of Saskatchewan, [1978] 2 S.C.R. 545, at 573-74, [1977] 6 W.W.R. 607, at 630, 80 D.L.R. (3d) 449, at 468 (1977).

[93] *Supra* note 87, at 687-88, 25 N.S.R. at 152, 84 D.L.R. (3d) at 20.

[94] *Supra* note 55.

[95] The decisions in *CIGOL*, *supra* note 92, and Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42, 23 N.R. 481 (1978), indicate that