Redress for victims of crime in South Africa: A comparison with selected Commonwealth jurisdictions

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Summary

In terms of the Constitution every person has the right to freedom and security of the person. This includes the right to be free from all forms of violence from either public or private sources. The state is charged with the duty to protect the individual from such harm. While the Constitution refers to the protection of victims of crime in broad and general terms without indicating how these rights should be protected, it makes meticulous and detailed provision for the rights of arrested, detained and accused persons. This leads to the popular belief that the Constitution protects the criminal and not the victim, engendering public dissatisfaction with the status quo, which is amplified by the fact that South Africa’s current legal dispensation for victims of crime does not embody the requirements of ubuntu and African customary law, which the Constitution declares to be binding on South African courts. This study analyses the means that exist in South African law for the victim of crime to obtain redress for criminal acts and proposes effective avenues through which victims can obtain redress, should the existing machinery prove to be inadequate. The term restitution is used to indicate recompense obtained from the perpetrator, while the term compensation refers to recompense obtained from the state. A comparative study is conducted to ascertain how the legal position of victims of crime in South Africa compares with that of victims of crime in Great Britain, India and New Zealand, respectively.

South Africa does not have a state-funded victim compensation scheme such as those which exist in most developed countries. The respective proposals of the South African Law Commission for a victim compensation scheme and revised legislation to deal with offender/victim restitution are considered critically, inter alia, in the light of the findings of the comparative study.

Proposals are made regarding changes to the South African legal system to bring it in line with international developments regarding restitution and compensation to victims of crime, attention being given to the meaning, significance and implementation of the doctrine of restorative justice when dealing with the aftermath of criminal injury.

In addition to a complete revision of South African legislation dealing with offender/victim restitution, this study recommends the consolidation of the Road
Accident Fund and the Compensation Fund operating in terms of the Compensation for Occupational Injuries and Diseases Act. These two bodies should be amalgamated to create a unified Compensation Scheme to compensate victims of crime, as well as victims of traffic and industrial injuries. General qualifying criteria for claimants would be drafted, with specific criteria applying in cases of traffic, industrial and crime related injuries, respectively.

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Chapter 1

Nature, extent and structure of the study

1.1 Statement of problem

“Victimisation constitutes a violation of human rights.”

In terms of the Constitution every person has the right to freedom and security of the person. This includes the right to be free from all forms of violence from either public or private sources. The reference to private sources makes it clear that this right of the individual is protected not only against interference by the state, but also against violation by other individuals; what Devenish refers to as “explicit horizontal application.” Devenish further cites assault as an example of the harm against which the individual is protected and includes not only physical harm but also psychological harm under the aegis of the protection afforded. The fact that there is no direct reference to freedom from violence in the interim Constitution emphasises the importance which the legislators attached to this provision when drafting the final version of the Constitution. The duty is placed on the state to protect the individual from such harm. Only the state has the power to use force against individuals. This power is limited by two principles, namely that:

- The use of force should be sufficient to justify its use; and
- The least degree of force be used to bring about the necessary results.

The Bill of Rights safeguards the right to bodily/physical and psychological integrity and grants the individual the right to *inter alia* security and control over his or her body.

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2 S 12(1)(c) of the Bill of Rights, Ch 2 of the Constitution of the RSA 108 of 1996.
4 Constitution of the RSA Act 200 of 1993. Referred to as the interim Constitution.
6 This refers to the premeditated application of coercion, excluding isolated situations where one individual may legally apply force against another, e g in cases of self defence, or in terms of the rule *volenti non fit iniuria*.
7 De Waal *et al* *Bill of Rights Handbook* 201.
8 S 12(2).
The Bill of Rights states: “No person may be deprived of property except in terms of law of general application…” This is not limited to immovable property and includes personal rights like pensions, unemployment security and medical benefits; not just tangibles. Children (persons under the age of 18) have the right to protection from maltreatment, neglect, abuse or degradation. The Bill of Rights is to be construed so as to promote “an open and democratic society based on human dignity, equality and freedom.”

Thus the highest law of the land enshrines the safety and dignity of each person and the safety of his or her property as fundamental rights. Giving effect to this protection is one of the duties of the state.

It is, however, notable that the provisions cited above do not give any specific indication of the means by which violations of person and property are to be redressed in favour of the victim. The Constitution places the obligation on the organs of state, through legislative and other measures, to ensure the impartiality, independence, dignity, accessibility and effectiveness of the courts. Do the courts possess sufficient means to be effective in redressing the harm done to victims of crime and can this task be left to the courts alone? This question will be addressed in this research. The fact that reference is made to the effectiveness of the courts means that provision must be made to ensure this functioning, which further means that structures must be created to bring about this effectiveness, if they do not exist. The vastly varying nature of these structures, both extant and potential, will be explored in this research.

While the Constitution refers to the protection of victims of crime in broad and general terms without indicating how these rights should be protected, it makes meticulous and detailed provision for the rights of arrested, detained and accused persons, protecting no fewer than twenty-nine rights of the suspected offender. This leads to the popular belief that the Constitution protects the criminal and not the victim:

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9 S 25(1).
10 S 25(4)(b).
11 Devenish A Commentary on the SA Bill of Rights 351.
12 S 28(d).
13 S 39.
14 S 165(4).
15 S 35.
It has become a refrain among many who lack an appreciation of the virtues of our constitutional state that the Bill of Rights ‘is there to help criminals, not the victims of crime.’ It is a refrain that, regrettably, has been taken up even by senior justice and police officials and their political heads.\(^{16}\)

And

In the Bill of Rights of the South African Constitution, the rights of offenders are clearly stipulated while victims are not even once singled out as a group of people having any rights.\(^{17}\)

The victim of crime may well “lack an appreciation of the virtues of our constitutional state” when faced with the devastation of apparently unredressed criminal acts.

The Criminal Procedure Act\(^{18}\) contains numerous provisions safeguarding the rights of suspected offenders. It is beyond the scope of this work to enumerate these provisions as this research deals with the protection of the rights of the victim of crime and not those of the alleged perpetrator. Section 28 of the Act serves as an example of the protection of the suspected perpetrator: It authorises a court sitting in a criminal hearing to make an order for damages against a police official who enters premises or conducts a search or seizure without the necessary search warrant. While the person unfairly accused of a crime is also a victim and deserving of protection, this does not explain why this particular victim should receive so much explicit legislative protection while the “ordinary” victim of crime receives so little recognition. Some might argue that it precisely this phenomenon, namely that the suspected perpetrator is cast in the role of victim, while the “real” victim is forgotten, that lies at the root of the problem. However, it does give rise to the issue of whether the victim ought to be compensated when he or she is also involved in a criminal act at the time of injury, for example the burglar who is assaulted by an accomplice when dividing the spoils. This matter will be dealt with in the course of the discussion of state funded victim compensation schemes, both those existing in other jurisdictions and in the scheme proposed for South Africa.

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\(^{16}\) Editorial “A salutary precedent” Business Day 20 August 2001. See also van As H J “Legal Aid in Mexico: Visions of SA’s future?” (2004) 15 Stellenbosch Law Review 137. Legal Aid Board Annual Report 2003/4 20 states that 88% of all new cases dealt with by justice centres during the relevant period were criminal cases and 12% civil.


\(^{18}\) 51 of 1977.
South Africa has an extremely high rate of crimes aimed at the individual.\textsuperscript{19} This notwithstanding the fact that crime statistics released by the Department of Safety and Security show a reduction in seventeen of the South Africa's most serious crime categories for 2004/2005. Minister of Safety and Security, Charles Nqakula, is quoted as saying: "The future to me looks very rosy in terms of the fight against crime and criminality in South Africa."\textsuperscript{20} Statistics show that while instances of certain crimes might be declining, those of a violent crime like rape are rising. It is clear that violent crime in South Africa remains a serious problem.

The official figures do not reflect the entire picture, as many crimes are unreported. Two of the main reasons for the non-reporting of crimes are, firstly, that members of less privileged communities have little expectation of assistance from the authorities and, secondly, that the victim – particularly in the case of rape – is subjected to a humiliating invasion of privacy. Violent crime constitutes one of the greatest sources of productivity loss in South Africa and places a heavy burden on the health care system. It is thus in the public interest that the plight of the victim of crime be addressed effectively by the legal system. Violence perpetrated against an individual constitutes an attack on the fibre of society itself.\textsuperscript{21}

Aside from humanitarian considerations, the growth of the South African economy is being stunted by the high cost of crime:\textsuperscript{22}

\begin{quote}
Unless crime is confronted and addressed vigorously and without compromise, there is little hope of developing SA to its full potential.
\end{quote}

The status of South Africa as a participant in the international community is jeopardised by its image of being a society where the consequences of crime are not adequately addressed. Articles in the press support this:\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{20} Murder statistics declined by 5,6\%, attempted murder by 1,8\% and serious assault by 4,5\%. Robbery with aggravating circumstances was 5,5\% lower and burglary at residential and non-residential premises dropped by 8,1\% and 13,6\% respectively. However, rape increased by 4\% and indecent assault by 8\%. Drug-related crimes increased by 33,5\%.
\item \textsuperscript{21} "Nqakula paints rosy picture of crime levels” 22 September 2005 Independent Online. (September 2005) http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=qw1127307960209B265
\item \textsuperscript{22} See previous 2 footnotes.
\item \textsuperscript{23} Bouwer T quoted in “Crime could impede SA’s growth” Business Day 25 March 2002.
\item Jenvey N “High costs of crime are turning investors of SA” Business Day 19 February 2002.
\end{itemize}
(Deloitte and Touche forensic services manager Rupert Haw) said at a recent conference on crime in the workplace that expenses related to criminal activity including the cost of theft, fraud, corruption, insurance, recovery and crime prevention were all factors militating against investment.

When members of society feel that the state is not sufficiently protecting them from the consequences of crime, one of the results is the occurrence of vigilantism and the loss of respect for the authority of the state. The growth of the People Against Gangsterism and Drugs (PAGAD) movement in the Western Cape is a prime example of this phenomenon. This in turn leads to the further erosion of regard for the forces of law and order.

1.2 Aims of this research

The general aim of this research is to:

- Analyse the means that exist in South African law for the victim of crime to obtain redress for the criminal violation of his or her rights enshrined in the Constitution; and
- Propose effective means through which victims can obtain redress should the existing means prove to be inadequate.

Internationally, the burgeoning concept of restorative justice is inextricably linked with the issue of victims’ rights. Restorative justice programmes have the common characteristic of underscoring the role of victims of crime in the criminal justice process. Not only are victims’ rights emphasised, but victims also have an input in deciding the sentence of the offender. This work will concentrate on those programmes which seek to redress by pecuniary means the harm done to the victim.

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25 Merten M “Gangsterism goes on trial in Cape” Mail and Guardian 8 June 2001. (June 2002) http://www.mg.co.za

26 Concerning restorative justice, see Ch 2 Par 2 3 (infra).
The United Nations defines a restorative justice programme as one that uses restorative processes. A restorative process is described as follows:27

(A)ny process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

Restorative justice includes the concept of restitution,28 as evidenced by the following definition of restorative outcome:

(A)n agreement reached as the result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.29

While restorative justice represents a new direction in criminal justice, its objectives are not necessarily different from those of traditional criminal justice systems. Both regimes favour the prevention of re-offending by the perpetrator. Restorative justice aims to achieve this by re-integrating the offender into society, while traditional criminal justice relies on deterrence to achieve this objective.30

This research conducts a comparative study to ascertain how the legal position of victims of crime in South Africa compares with that of victims of crime in Great Britain (more specifically, England and Wales)31, India and New Zealand respectively. The reason for a comparative study is to be found in the fact that South Africa does not have a state-funded victim compensation scheme such as those which exist in many other countries. The value of a comparison of domestic and foreign law for the constructive development of a country’s legal system is universally acknowledged.32 Specific advantages of the comparative study of foreign legal systems are:33

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International Centre for Justice and Reconciliation (April 2002)
28 See par 1 3 1 (infra) for a definition of restitution.
29 See previous footnote.
31 See Ch 2 Par 2 2 3 (infra).
32 Venter F et al Regsnavorsing: Metode en Publikasie (1990) 206 et seq.
33 See previous footnote.
- It gives the researcher better insight into reforms required in his or her own legal system. The fact that South African law requires reform, is fundamental to the research undertaken in this work.
- It prepares the way for social changes that have occurred elsewhere. The fact that many countries have victim compensation schemes while South Africa has none, is indicative of the fact that a general consciousness of this need will soon arise in South Africa, if it has not in fact already arisen.34
- It fosters insight into foreign legal systems, thus assisting in outlining policy considerations in evolving domestic law.
- It encourages insight into legal methodology by showing the social function of the law and its role in society. It has been shown in this chapter that there is a growing social awareness of the plight of victims of crime.
- It assists in finding a satisfactory solution to an existing problem; its value extends beyond a simple quest for knowledge.

The International Crime Victim Compensation Program Directory35 lists twenty-nine countries which have state-funded victim compensation schemes. The reasons for the choice of Great Britain, India and New Zealand for a comparative study are inter alia the following:

- The other three countries, together with South Africa, form part of the Commonwealth.
- Great Britain and New Zealand have well-developed compensation systems for victims of crime,36 while India is much less developed in this respect.
- All four countries share English as an official language.37
- India, New Zealand and South Africa all experienced British influence in their development into modern states.

34 Consider the work of the SALC in this regard as set out in par 14 (infra) and Ch 5 (infra).
The International Crime Victim Compensation Program Directory is compiled by the United States’ Department of Justice’s Office for Victims of Crime.
37 See Venter F *et al Regnsnavorsing* 227 – 228 regarding the problems encountered in legal comparison when various languages are involved.
A balance will be achieved by comparing South African with an “Old World” country (Great Britain) and other “New World” countries (India and New Zealand).

Both India and South Africa are developing countries with acute levels of crime. New Zealand, while sharing their colonial past, does not have an equal crime problem.  

While both Great Britain and New Zealand have highly developed victim compensation schemes, there is an important and fundamental difference between Britain’s Criminal Injuries Compensation Scheme and New Zealand’s Accident Compensation Scheme. While the former deals exclusively with victims of violent crime, the latter deals on the same footing with all victims of accidental injury (not necessarily injury inflicted by criminal acts).

Great Britain and New Zealand were the first countries in the world to institute victim compensation schemes.

Although sources of foreign law are limited in South Africa, this is not seen as a problem:

Die insig dat die vergelykingsbewerking grootliks vry van waardeoordele verloop bring mee dat daar geen sisteemnoodwendige beperkings op die aantal elemente wat by die vergelyking betrek word rus nie. Dit stel die navorser in staat om die elemente vir sy ondersoek te kies bloot met inagneming van praktiese oorwegings, soos die beskikbaarheid van tyd, geld, bronne, taalvaardigheid en die oogmerk wat hy met sy navorsing wil bereik.

When presenting the data collected during comparative investigations, the researcher is confronted by two options: The information can be arranged either by reference to the legal systems separately or by taking a particular element and

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39 See Ch 5 (infra). Hutchison D B Accident Compensation: New Zealand shows the way Inaugural lecture delivered on 15 August 1984 at the University of Cape Town. See Ch 2 par 2 2 (infra).
40 Venter F et al Regsnavorsing 209. The fact that the process of comparison takes place mainly without value judgments, has the result that there are no system essential limitations on the number of elements that are incorporated in the comparison. This enables the researcher to select the elements of his research considering simply practical considerations, such as the availability of time, money, sources, linguistic skill and the aim which he wishes to achieve with his research.
comparing the manner in which it is approached in each legal system.\textsuperscript{42} In this research a combined approach is followed as specific aspects of victim redress are dealt with in different chapters, but within those chapters separate paragraphs are dedicated to the relevant aspect of victim redress in each country separately.\textsuperscript{43} This \textit{modus operandi} then permits a comparison of like aspects at the end of each chapter.

Attention is given to the problem of augmenting the legal means at the disposal of victims of crime in South Africa as it will be shown that their rights do not receive protection equal to that found in some other systems of law.

The proposals of the South African Law Reform Commission for a victim compensation scheme\textsuperscript{44} are considered critically in the light of the findings of the comparative study.

Having critically considered the data collected, proposals are made regarding changes to the South African legal system to bring it in line current international developments.

\subsection*{1.3 Research methodology and assumptions}

\subsubsection*{1.3.1 Research methodology}

If one were to visualise a continuum of research methods with quantitative research (which is explanatory in nature employing the disinterested voice of the scientist) at one end and qualitative research (which has a reconstructive and formative nature employing a more participant, passionate voice) at the opposite end of the continuum, a positivist paradigm approach would be at the quantitative end of the continuum, while the critical theory paradigm would be near the qualitative end. In this research the positivist paradigm is adhered to chiefly in so far as a dispassionate exposition of the current legal situation will be made, but there will also be elements of the critical theory paradigm in so far as a degree of critique and suggestions for the transformation of the current situation will be present.\textsuperscript{45}

\begin{thebibliography}{99}
\bibitem{42} Venter F \textit{et al} Regsnavorsing 238.
\bibitem{43} As set out in par 1 4 \textit{(infra)}.
\bibitem{44} See n 19 \textit{(supra)}.
\bibitem{45} Denzin N K & Lincoln Y S (ed) \textit{The landscape of qualitative research – Theories and issues} (1998).
\end{thebibliography}
In broad terms the following *modus operandi* will be followed to achieve the stated aims of this research:

- A literature study of published and unpublished studies and texts relevant to the subject area will be undertaken.
- The delictual rights of and existing legal enactments relating to victims of crime, as well as the efficacy of these measures, will be analysed.
- Relevant bills and court cases will be analysed in order to assess how relevant legal prescriptions are applied in practice.
- A comparative study will be undertaken in order to compare the position of victims of crime in Great Britain, India, New Zealand and South Africa. In keeping with established practice this will consist of the:
  - Investigation of relevant phenomena of the foreign legal systems on their own;
  - Analysis of relevant phenomena of the foreign legal systems against the background of their unique legal and social milieus; and
  - Consideration of both corresponding and differing aspects of the foreign legal systems and the South African legal system in order to reach a synthesis which will achieve the purposes of utilising the comparative method.

Unless otherwise indicated, the term *restitution* will be used to indicate recompense obtained from the perpetrator, while the term *compensation* will refer to recompense obtained from the state. This is in line with accepted practice:

> Compensation... relates to the procedures established by the State that aim to compensate victims from a state fund, while restitution relates to legal remedies available to the victim to claim restitution from the offender by means of a court order, either in civil suit or a criminal action.

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46 Venter F *et al Regsnavorsing* 219.

47 “Man muss die zu vergleichenden Elementen kennen, um sie zu verstehen und man muss sie verstehen, um sie vergleichen zu können.” *One has to know the to be compared elements to understand them and one has to understand them in order to compare them.* Constantinesco L *Rechtsvergleichung II – Die Rechtsvergleichende Methode* (1972) 137 – 138.

48 SA Law Reform Commission *Sentencing (A compensation scheme for victims of crime in SA)* Project 82 Discussion paper 97 (2001) Definitions vii. Restitution can take the form of *punishment* (e.g. imposition of a fine), in which case the state is seen as the benefactor rather than the victim: Sheldon R G & Brown W B *Criminal justice in America – a critical view* (2003) 241.
However, it must be conceded that the South African legislature does not generally adhere to this terminological distinction.\footnote{An example is to be found in s 300 of the Criminal Procedure Act 51 of 1977 which refers to “compensation” which an offender can be ordered to pay to the victim of a crime. See Ch 4 par 4.2.1.2 (\textit{infra}).}


Thus, the process of restorative justice seeks to redefine crime, interpreting it not so much as breaking the law, or offending against the State, but as an injury or wrong done to another person. It encourages the victim and the offender to be directly involved in resolving conflict and thereby becoming central to the criminal justice process with the State and legal professionals becoming facilitators, supporting a criminal justice system which aims at offender accountability, full participation of both the victim and the offender and making good or putting right the wrong.

As part of this process, restorative justice demands consideration of approaches such as that of offering compensation, where appropriate, to the victims and empowering victims in their search for recognition through direct participation in the criminal justice system.

While the arrangement of the subject matter of this research will be based on the distinction between restitution and compensation,\footnote{See par 1.4 (\textit{infra}) regarding the subject matter of individual chapters.} the distinction is not in all cases absolute. An example is the Indian Motor Vehicle Act\footnote{59 of 1988.} which creates a system of statutory insurance. On the one hand it may be argued that this should be seen as a form of restitution, as the function of compulsory insurance is to effect restitution to the victim for which the 	extit{offender} would normally be liable; on the other hand it may be argued that the Act should fall under compensation as the 	extit{state} has taken a role in ensuring recompense to the victim. This and other analogous instances will be dealt with under the aegis of compensation. Restitution will be restricted to instances where the offender is held personally liable.
13.2 Assumptions

It is assumed that the incidence of crime in South Africa exceeds boundaries acceptable to the majority of its population.53

It is, furthermore, assumed that victims of crime in South Africa are granted insufficient recompense for the violation of their rights.54

South Africa is far behind the rest of the world in respect of victim support in general and victim compensation in particular. From the information available to the Commission it appears that the introduction of a central compensation scheme for victims of crime in South Africa has become a matter of urgency. The right of a victim to recover damages by way of civil action is of little comfort to a victim having regard to the financial position of most criminals, their ability to compensate victims and the unprecedented crime wave that is sweeping our country.

14 Outline of the thesis

The thesis comprises of six chapters:

- Chapter 1 sets out the statement of the problem,55 the aims of the research,56 the methodology57 applied, and an outline of the research.
- Chapter 2 considers the influence of history on the treatment of victims of crime in the four countries targeted, as well as the concept of restorative justice and the influence thereof.
- Chapter 3 focuses on delictual claims victims of crime have against offenders. Regarding each country, three avenues will be explored:
  - Common law of delict;
  - Punitive damages; and
  - Delictual liability of the state.

55 Par 1 1 (supra).
56 Par 1 2 (supra).
57 Par 1 3 (supra).
Chapter 4 analyses and compares relevant primary legislation, secondary legislation and state-initiated programmes dealing with restitution for victims of crime in each of the four countries. Consideration will be given to the draft bill proposed by the South African Law Reform Commission\(^{58}\) dealing with reparation (as opposed to state-funded compensation).

Chapter 5 analyses and compares state-funded compensation for victims of crime in the four countries. Consideration will also be given to the recommendations of the South African Law Reform Commission\(^{59}\) regarding a state-funded victim compensation scheme.

Chapter 6 evaluates the current legal dispensation in South Africa and recommends changes for its improvement.

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Chapter 2

Historical influences and restorative justice

2.1 Introduction

This chapter looks at the influence of history on the treatment of victims of crime and the growth of restorative justice. As former colonies, South Africa, India and New Zealand reflect the influence of England’s approach to victims of crime. Despite sharing this commonality, however, each country’s system is also the result of its own pre-colonial history and current circumstances. All four countries have widely differing indigenous belief and value systems which of necessity contribute to forming their legal dispensations. This is particularly relevant as the treatment of victims of crime is an emotive, ethical issue in South Africa. The period since the 1970s has seen a renewed interest in the rights of victims of crime; the main manifestation of this has been the advent of restorative justice which reinstates the victim as a central figure in the criminal justice process.1 The meaning attached to restorative justice and its influence on criminal justice systems will be canvassed below.

2.2 History

2.2.1 General

Ancient legal systems were based on a concept akin to the biblical concept of an eye for an eye; in other words, vengeance or retribution, which includes the concept of restitution.2 The progression of restitution can be divided into six discernable historical stages:3

- Private (individual) vengeance – the concept of lex talionis;
- [Further stages can be described here if needed]

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2 Retribution includes the concept of recompense which has the meaning of compensation, or – in the parlance of this research – restitution. Retribution also refers to the punishment of the individual according to what he or she deserves. As will be shown below, as time passed, punishment became the realm of the state (criminal law), while ensuring restitution fell to the individual (civil law). See Webster’s Third New International Dictionary of the English Language (Unabridged) (1966). See also Ch 1 Par 1 3 1 (supra).
Collective vengeance – vengeance effected by the victim’s group on the perpetrator’s group;
Negotiation between the perpetrator and the victim and the effecting of restitution by the perpetrator – a form of mediation;
Payment of a predetermined quantum of restitution by the perpetrator;
Intervention by rulers claiming their percentage; and
Disappearance of restitution from criminal law.

However, there is also an element of state-funded compensation in various ancient enactments. For example, in what is considered the oldest recorded criminal code, the Babylonian Code of Hammurabi of the eighteenth century BC, mention was made not only of restitution, but also of instances where the state (community) would be liable to compensate the victim of a crime where the perpetrator was unable to do so. An example of restitution (or what in modern terms may be seen as a compensatory fine) was to be found in Law 4 of the Code which translates as:

If it satisfies the elders to impose a fine of grain or money, he shall receive the fine that the action produces.

Law 23 of the Code embodied a basic form of compensation:

If the robber is not caught, then shall he who was robbed claim under oath the amount of his loss, then shall the community… on whose ground and territory and in whose domain it was, compensate him for the goods stolen.5

(Emphasis added)

And

If it was a life that was lost, the city and governor shall pay one mina of silver to his heirs.5

While this did not equate to a victim compensation scheme, the underlying idea was present.

Roman Law in the Lex duodecim tabularum of circa 450 BC relied heavily on the principle of restitution. The Lex duodecim tabularum determined that the thief had to

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pay the victim double the value of the goods stolen.\textsuperscript{6} This was a combination of punishment and restitution used as a form of punishment. The \textit{Lex duodecim tabularum} distinguished between crimes against individuals and crimes against the state. Table VIII dealt generally with the violation of individual interests, such as defamation, casting evil spells, assault, theft, arson, bearing false witness and – surprisingly – a ban on holding meetings by night in the city,\textsuperscript{7} while Table IX dealt with treason and murder.\textsuperscript{8}

The Germanic invasions of Europe caused primitive Germanic law to overwhelm Roman law. Under Germanic law restitution was prominent, with the social status of the victim playing a prominent role in the determination of \textit{quantum}. The perpetrator who could not effect restitution would be banished from society and forego the protection afforded by being a member of the group. England also followed this system.\textsuperscript{9}

The Treaty of Verdun of 843 typified the feudal age and the end of the age of the victim. The concept of fines payable to the state was embraced by feudal overlords. Feudal philosophy held that a crime was a violation of the \textit{King's peace}, thus underplaying the loss suffered by the victim of the crime. During the Germanic invasions of Europe the concept of a commission or fine payable to the state was endorsed. Feudalism brought about the dispersal of larger kingdoms, creating small communities each with its own law crafted to suit the feudal lord’s wishes.\textsuperscript{10}

During the period of the Inquisition – which extended from 1231 when Pope Gregory IX established the Inquisition to prosecute heretics, up to the decree of 1834 which terminated the Spanish Inquisition – an inquisitorial system was followed which placed little emphasis on restitution, compensation or the position of the victim in general.\textsuperscript{11} The emphasis was on punishing the heretic who had denied an article of faith of the Roman Catholic Church and was thus an enemy of the community.

\begin{thebibliography}{9}  
\bibitem{6} Herrington L H “Dollars and Sense: The value of victim restitution” (1986) 48 \textit{Corrections Today}.
\bibitem{7} One would expect to find this under Table IX as it does not deal with the violation of an individual’s rights \textit{per se}, but rather the interests of the community.
\bibitem{8} Translations of the entire text by Warrington E H “Remains of Old Latin III, circa 450 B C” (April 2002) http://members.aol.com/pilgrimjon/private/LEX/12tables.html
\bibitem{9} Cilliers C H \textsc{'n Penologiese studie rakende die vergoeding aan slagoffers van misdaad} (1984) D Litt et Phil thesis University of SA.
\bibitem{10} Korn R R & McCorkle L \textit{Criminology and Penology} (1959).
\bibitem{11} History of the Inquisition (April 2002) http://es.rice.edu/ES/humsoc/Gallileo/student_work/Trial96/loftis/overview.html
\end{thebibliography}
Interest in the woes of the victim was revived in the nineteenth century as a direct consequence of the writings of Jeremy Bentham\(^{12}\) with his philosophy of Utilitarianism which held that the function of the law was to promote “the greatest happiness for the greatest number” and that morality could be derived from “enlightened self-interest” which implied that a person who always pursued his or her own maximum satisfaction in the long run always acted in a morally correct way.\(^{13}\)

During the nineteenth century various international congresses – held to consider the treatment of criminals – emphasised the interests of the victim.\(^{14}\) Thus the position of victims of crime in the criminal justice process was a concern long before the advent of restorative justice. During 1895 the International Prison Congress in Paris noted concerns that a vacuum still existed regarding restitution to victims of crime pointing out that legislation in various countries prejudiced the victim of crime in favour of the perpetrator. The following resolution was accepted at the termination of the Congress:\(^{15}\)

The congress believes that there is a reason to take into serious consideration the propositions which have been submitted to it with regard to allowing the injured party a portion of the earnings realised by the work of the prisoner in the course of his detention, or with regard to constituting a special fund derived from fines from which aid should be granted to the victims of penal offences...

State-funded victim compensation and social security grew from the concept of workers' compensation, which was pioneered in nineteenth century England. The Workmen’s Compensation Act of 1897 granted a worker (or the worker’s dependants) a right to claim damages for an accident arising out of and in the course of employment. Prior to the passing of this Act, tortious claims of injured employees were usually thwarted by the doctrines of\(^{16}\) common employment,\(^{17}\) contributory negligence\(^{18}\) and \textit{volenti non fit iniuria}.\(^{19}\) The Act prohibited employers from

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\(^{12}\) 1748 – 1832.

\(^{13}\) Biographies: Jeremy Bentham (April 2002) http://www.blupete.com/Literature/Biographies/Philosophy/Bentham.htm

\(^{14}\) The most important congresses were in Stockholm (1878), Rome (1885), St Petersburg (1890), Christiana (1891), Paris (1895) and Brussels (1890). Van den Berg C E \textit{'n Penologiese studie rakende restitusie as 'n bevel aan die slagoffer van misdaad Ch 3.}

\(^{15}\) Cilliers C H \textit{'n Penologiese studie rakende die vergoeding aan slagoffers van misdaad 32.}

\(^{16}\) Cane P \textit{Atiyah’s Accidents, Compensation and the Law} 6 ed (1999) 273.

\(^{17}\) In terms of which a claim based on the negligence of a co-worker was denied the injured party.

\(^{18}\) In terms of which the employee’s own negligence was a complete defence to a claim.
contracting out of its provisions, but had limited application and provided meagre benefits. The common law continued as an alternative, permitting a worker to sue for damages rather than accept compensation under the Act. Employers usually took out insurance to cover this liability. Legislation creating and enforcing a system of compulsory insurance was passed. The original Act did not provide for full compensation, on the principle that employer and employee should share the burden equally. Over time this principle was eroded as benefits increased. In 1930 the Road Traffic Act introduced compulsory third party insurance for traffic injuries.

Society became still more sensitised to the plight of the victim as a result of events such as two World Wars and the Holocaust. In 1951 Margery Fry’s book *Arms of the Law* had a decisive influence advocating direct restitution from the perpetrator to the victim. In the late 1950s Fry refined her thesis and campaigned for the institution of state funded schemes to compensate victims of crime. This movement culminated in the introduction during the latter half of the twentieth century of victim compensation schemes in the form in which they exist in various states today. The first modern victim compensation schemes were introduced in Great Britain and New Zealand in the 1960s, New Zealand’s being the first, commencing operation on 1 January 1964. Compensation schemes vary vastly in their scope. Some countries, for example Israel, offer compensation only in cases of political crimes or terrorism, while other countries, for example Great Britain, offer benefits to cover virtually all crimes in which the victim has suffered some personal injury. The degree of compensation offered is generally quantified by the economic wealth of the particular country and the public awareness of its populace.

19 Which denied the employee of a claim where injuries arose from a known risk situation.
20 Reinforced by the Employers' Liability Act of 1880.
21 See Ch 5 Par 5 3 1 (infra).
22 By 1940 the employee could be compensated by so much as seven-eighths of the loss of earnings. *Social Insurance and Allied Services* Report by Sir William Beveridge (Cmdnd 6404 1942) Par 99 217 – 217.
23 See Ch 5 Par 5 3 1 (infra).
26 The history summarised in the preceding paragraphs is analysed in detail in van den Berg C E *n Penologiese studie rakende restitusie as 'n bevel aan die slagoffier van misdaad* Ch 3. Although the work quoted deals primarily with restitution, as its title indicates, mention is also made of compensation.
Similarly to Great Britain, South Africa and India developed compensation schemes for victims of industrial and traffic injuries\textsuperscript{28} (but – unlike Britain – no comprehensive compensation schemes for victims of crime). However, New Zealand perceived that compensation for industrial, traffic and criminally caused injuries are all aspects of the same phenomenon, namely state-funded compensation for victims of misfortune. Consequently in New Zealand all three are now compensated by one authority, the Accident Compensation Corporation.\textsuperscript{29}

The late twentieth century also witnessed the emergence of restorative justice as an ideology which places the victim at the centre of the criminal justice process.\textsuperscript{30}

\subsection{2.2.2 South Africa}

Having been colonised successively by Holland and England, South Africa’s legal system is largely a legacy of its colonial past. In common with both colonising systems, African indigenous law universally emphasises restitution.\textsuperscript{31} The criminal and delictual aspects of a crime are dealt with simultaneously, and punishment is accompanied by an award of damages to the victim. The lack of adequate provision for restitution in the current legal system is viewed as a shortcoming.\textsuperscript{32} The Constitutional Court has expressed the opinion that there is a general erosion of the hitherto rigidly held distinction maintained by academics between public and private

\footnotesize{
\begin{itemize}
\item[28] See Ch 5 Par 5.2 and 5.4 (\textit{infra}).
\item[29] See Ch 5 Par 5.5 (\textit{infra}).
\item[30] See Par 2.3 (\textit{infra}). While restorative justice is generally seen to represent a resurgence of the principles of ancient law, for example the \textit{Lex duodecim tabularum}’s edict (see above in this paragraph) that the thief had to pay the victim double the value of the goods stolen (Wikipedia (June 2006) http://en.wikipedia.org/wiki/Restorative_justice#History), some writers see it as a new concept viewing claims to its historical roots with scepticism (Sylvester D G “Myth in Restorative Justice” (2003) 1 \textit{Utah Law Review} 471).
\item[31] Consider the \textit{makgotla} procedure discussed in Schärf W & Nina D \textit{The Other Law – Non-state Ordering in South Africa} (2001) Ch 7.
\item[32] Mina R F Compensation of the victim as an aspect of criminal law in SA with reference to expectations inherent in indigenous law systems (1989). Although the word “compensation” is used in the title of the dissertation, what is referred to is in fact restitution in the meaning ascribed to that term in this work. See Ch 1 Par 1.3 (\textit{supra}); Oko Elechi O \textit{Human Rights and the African Indigenous Justice System} Paper for presentation at the 18\textsuperscript{th} International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada 23. (March 2005) http://www.isrcl.org/Papers/2004/Elechi.pdf
\end{itemize}
}
law\textsuperscript{33} – a view that seems to be in accord with that of indigenous African law and the
Roman law of the \textit{Lex duodecim tabularum}.\textsuperscript{34} In indigenous African law the
kraalhead can be held liable for the theft of cattle, in addition to the liability of the
perpetrator.\textsuperscript{35} There is, thus, a precedent for the idea of the liability of the community
head vis-à-vis the victim of crime. Indigenous (customary) law enjoys constitutional
recognition\textsuperscript{36} and is not merely an interesting historical phenomenon: Section 39(3)
of the Constitution\textsuperscript{37} states:

\begin{quote}
(3) The Bill of Rights does not deny the existence of any other rights or
freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent
with the Bill.
\end{quote}

Section 211(3) of Chapter 12\textsuperscript{38} reads:

\begin{quote}
(3) The courts must apply customary law when that law is applicable,
subject to the Constitution and any legislation that specifically deals
with customary law.
\end{quote}

Reflecting governmental concern regarding the plight of victims of crime, the South
African Law Reform Commission\textsuperscript{39} has generated two documents:

\textsuperscript{33} "It is both undesirable and unnecessary, for purposes of this case, to attempt to do
that which has seemingly eluded scholars in the past and given rise to wide
differences of opinion among them, namely, the drawing of a clear and permanent
line between the domains of private law and public law and the utility of such efforts.
Much of this interesting debate is concerned with an analysis of power relations in
society; the shift which has taken place in the demarcations between ‘private law’ and
‘public law’; how functions traditionally associated with the state are increasingly
exercised by institutions with tenuous or no links with the state; how remedies such
as judicial review are being applied in an ever widening field and how legal principles
previously associated with private legal relations are being applied to state
institutions. Suffice it to say that it could be dangerous to attach consequences to or
infer solutions from concepts such as ‘public law’ and ‘private law’ when the validity of
such concepts and the distinctions which they imply are being seriously questioned."
(Emphasis added) Ackermann J in \textit{Fose v Minister of Safety and Security} 1997 7
BCLR 851 (CC) 881 [57].

\textsuperscript{34} See previous paragraph.

\textsuperscript{35} \textit{Sitole v Kumalo} 1938 NAC (N & T) 257; \textit{Tusini v Ngubane} 1948 NAC (N & T) 17.

\textsuperscript{36} See also Devenish G E \textit{A Commentary on the SA Bill of Rights 11; In re
194 where the Constitutional court held: "(T)he fact that they (traditional leaders) are
declared to be subject to the New Text merely underlines the point that in a
constitutional state, no-one exercises power or authority outside of the constitution.”

\textsuperscript{37} Forming part of the Bill of Rights.

\textsuperscript{38} Ch 12 of the Constitution acknowledges the role of traditional leaders.

\textsuperscript{39} SA Law Reform Commission \textit{Sentencing Restorative Justice (Compensation for
Victims of Crime and Victim Empowerment)} Issue paper 7 Ch 1 1.
For a full discussion see Ch 4 Par 4317 and Ch 5 Par 522 (infra).
Issue Paper: Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment), and

To date the recommendations in these documents have not found their way into legislation.

2.2.3 Great Britain

Terminologically, the use of the term “Great Britain” in the context of this work is inaccurate. What will be discussed herein is English law, the law in force in England and Wales. Having said this, however, the Criminal Injuries Compensation Scheme provides benefits for Scotland as well. England is the largest constituent country of the United Kingdom and has more than 83% of the total United Kingdom population. It occupies most of the southern two-thirds of the island of Great Britain. England and Wales share the same legal system and are considered a single jurisdiction or state for purposes of the law. The other countries of the United Kingdom, namely Scotland and Northern Ireland are also separate jurisdictions or states (except under public international law), each having its own legal system. "Great Britain" means England,

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40 Issue paper 7. “In order to secure community participation at an early stage, the Commission has decided to introduce, in appropriate circumstances, the publication of an issue paper as the first step in the consultative process. The purpose of such a paper is to announce a particular investigation (already included in the Commission's programme), to elucidate the problems that have given rise to the investigation, to point to possible options available for solving those problems and to initiate and stimulate debate on identified issues.” Website of the SA Law Reform Commission (April 2002) http://wwwserver.law.wits.ac.za/salc/function.html

41 Discussion Paper 97. “After considering the comment received on an issue paper and further research conducted under the direction and guidance of the project leader or, if applicable, the project committee, the researcher responsible for the investigation prepares a draft discussion paper which usually contains the following:
  A definition of the problems requiring solutions;
  The existing state of the law in relation to the problems;
  A comparative legal study;
  Possible preliminary solutions to rectify the problems identified;
  A summary of the preliminary proposals;
  A proposed draft Bill in which the proposals are embodied.” Website of the SA Law Reform Commission (April 2002) http://wwwserver.law.wits.ac.za/salc/function.html


43 See Ch 5 Par 5 3 2 (infra).

44 Website of CICA: (July 2006) http://www.cica-criminal-injuries-compensation.co.uk/

45 Plus dependencies such as the Isle of Man and the Bailiwicks of Jersey and Guernsey.
Wales and Scotland\textsuperscript{46} and "United Kingdom" means Great Britain and Northern Ireland.\textsuperscript{47}

Before the Norman Conquest of 1066 the early Anglo-Saxons used blood feuds to avenge wrongs. This collective guilt effected retribution, not only restitution.\textsuperscript{48} Customary rules developed to impart a semblance of order to the whole process. By the time of Alfred the Great\textsuperscript{49} it was possible to demand money in lieu of the blood feud\textsuperscript{50} and thus restitution was placed on a legal footing: Anglo-Saxon law formulated a tariff for personal injuries.\textsuperscript{51} Because the law provided no means of enforcement, lawlessness ensued. More serious offences were considered botless, that is punishable by mutilation or death, because a monetary fine was considered inadequate. The Articles of Eyre\textsuperscript{52} of 1194 established the concept of Pleas of the Crown\textsuperscript{53} which were considered to be personal affronts to the king, resulting in a revenue-generating fine becoming payable to the king. Initially acts against the king and acts against the individual were seen as being based on the same principle, the violation of individual rights. As the concept of statehood developed, the idea arose that the state had its own rights which were worthy of protection and that it was no longer simply a question of the king’s personal rights. Initially the victim of a wrongful act could institute action only if there was a specific writ coinciding with the facts. Up to the fourteenth century personal actions were usually based on some variant of the writ of trespass, for example trespass to the person, land or goods. After the fourteenth century new writs were acknowledged,\textsuperscript{54} but the writ system disappeared under the Common Law Procedure Act of 1852. Plaintiffs could thereafter set out the facts upon which their claims were based and the court could then decide whether they deserved a remedy, without claimants having to shoehorn their claims into some

\textsuperscript{46} Plus its adjacent territorial waters and the islands of Orkney and Shetland, the Hebrides, and Rockall (by virtue of the Island of Rockall Act 1972).
\textsuperscript{47} Plus their adjacent territorial waters. It does not include the Isle of Man; nor the Channel Islands whose independent status was discussed in \textit{Rover International Ltd v Canon Film Sales Ltd} (1987) 1 WLR 1597 and \textit{Chloride Industrial Batteries Ltd v F & W Freight Ltd} (1989) 1 WLR 823.
\textsuperscript{49} 871 – 899.
\textsuperscript{51} The Laws of Alfred the Great state: ‘(If) a great toe be struck off, let twenty shillings be paid to him as \textit{bot}... if the little toe be struck off, let five shillings be paid to him.’
\textsuperscript{52} Art 20.
\textsuperscript{53} Knight B “History of the Medieval English Coroner System” 1 3. (September 2003) www.britannia.com/history/arts/coroner1.html
\textsuperscript{54} Such as libel and nuisance.
pre-existing set of norms, known as torts.\textsuperscript{55} Thus a rigid distinction between crime and tort arose. During the nineteenth and twentieth centuries various Acts were passed to address the needs of the victim:\textsuperscript{56}

<table>
<thead>
<tr>
<th>Year</th>
<th>Act</th>
<th>Pertinent aspects</th>
<th>Source of payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1826</td>
<td>Criminal Law Act (repealed in terms of the Criminal Justice Act 1988)</td>
<td>Section 28 of this Act authorized courts to order the bailiff to pay an amount of money which could be considered reasonable and sufficient to compensate the victim of a crime. Section 30 provided that the bailiff would have to pay compensation to the widow of a man killed while attempting to apprehend an offender. The courts had a free discretion in stipulating the amount to be paid.</td>
<td>State (Bailiff)</td>
</tr>
<tr>
<td>1870</td>
<td>Forfeiture Act</td>
<td>This Act authorised the courts to recover an amount of money from the offender to effect restitution to the victim of the crime committed. The amount recoverable was limited to certain amounts.</td>
<td>Offender</td>
</tr>
<tr>
<td>1886</td>
<td>Real Act</td>
<td>Money was drawn from the police budget to compensate victims of unlawful unrest.</td>
<td>State (Police budget)</td>
</tr>
<tr>
<td>1914</td>
<td>Criminal Justice Act</td>
<td>Victims of property-related crimes were to be compensated from the police budget.</td>
<td>State (Police budget)</td>
</tr>
<tr>
<td>1948</td>
<td>Criminal Justice Act</td>
<td>Magistrates’ courts were authorised to grant orders of restitution up to a maximum of £100.</td>
<td>Offender</td>
</tr>
</tbody>
</table>

These – largely co-existing – Acts contained elements of both compensation (insofar as it was sometimes the state that compensated the victim) and restitution (in cases where the offender made restitution to the victim),\textsuperscript{57} but fell short of what could be termed a unified system of either restitution or compensation.

The major recourse options currently at the disposal of victims of injury can be illustrated as follows:

\textsuperscript{55} Curzon L B \textit{English Legal History} (1968) 223 et seq.
\textsuperscript{56} Under the influence of Jeremy Bentham’s works. See Par 2 2 1 (supra).
\textsuperscript{57} Van den Berg C A \textit{‘n Penologiese studie rakende die vergoeding aan slagoffers van misdaad} 114 – 115.
While statutory insurance can be seen as a form of restitution – it effects restitution for which the offender would normally be liable – it is also a form of compensation as the state has taken a role in ensuring recompense to the victim.58

2 2 4 India

The legal history of India reflects four distinct – but sometimes overlapping – periods:59

Hindu
1500BC

Muslim
700AD

British
1600-1950

Independence
1950

58 See Ch 1 Par 1 3 1 (supra).
59 Kulshreshtha V D Landmarks in Indian Legal and Constitutional History 5 ed (1981)
1. Unless otherwise indicated, all information in this paragraph is derived from this work. As Hindu and Muslim law still have (limited) application in India, these periods are left open ended. The diagram is not drawn to scale.
**2 2 4 1 Hindu period (from c 1500 BC)**

The Hindu period was dominated by rigid enforcement of the caste system. The king was considered the source of justice and there was a complex structure of courts. In the ancient Hindu period punishment for crime was intended to reform the offender’s character, providing satisfaction to the victim, retaliation for the offence, deterrence from further offending and spiritual redemption of the offender. Fines and other forms of punishment were encountered and sometimes courts were empowered to grant restitution to victims in addition to the punishment meted out. In certain cases the whole village was held liable for theft. The king or his local representative – being responsible for the maintenance of law and order – could be held liable to pay for the missing property. For committing murder the offender was sentenced to deliver cattle to the king, the number rising in keeping with the caste of the deceased. The king gave the cows to the relatives of the deceased and kept a bull as a fine.

While ancient Western legal systems do not distinguish strictly between criminal law and the law of delict, this is not the case in ancient Hindu law where the king could take cognisance of crimes, mero motu ordering restitution and punishment.

**2 2 4 2 Muslim period (from c 700 AD)**

From the eighth century Muslim Afghans and Turks conquered the Hindu kingdoms. During the Muslim period every criminal court had a public prosecutor or Mohtasib and applied Islamic law or Sharia, based on the Quran. Muslim (Mohammedan) criminal law is thus based on religion, according to which it is the duty of the ruler to punish criminals on behalf of the deity. Offences against individuals were also

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60 The Brahmins were the uppermost class and produced Hindu priests and scholars. The Kshatriyas were the nobles and warriors. The Vaisyas were the merchants and traders, and the Sudras, the workers. Membership of a caste was determined by birth.

61 The restitution/penalty for theft would be between 8 and 64 times the value of the stolen object depending on the caste of the offender, the higher castes being penalised more severely than the lower.


63 Priya Nath Sen Tagore Law Lectures on Hindu Jurisprudence (1918) Lecture XII 264 – 266. See Kulshreshtha V D Landmarks in Indian Legal and Constitutional History 15.

64 Called chalas, padas and aparadhas. For crimes like theft, assault, adultery, rape and manslaughter the Smriti text prescribes both corporeal punishment and restitution.
punishable. As the laws of the Quran were found to be inadequate to serve the needs of a large and developing community, rules based on religious precepts—known as Sunna—were passed. Three forms of punishment were imposed:

- **Hadd** provided for a fixed punishment in cases like theft, robbery and defamation.65 No benefit was granted to the victim.
- **Tazir** was a form of punishment for cases like minor theft, assault and counterfeiting coins.66 Courts were free to invent new forms of punishment as these were uncodified crimes.
- **Qisas**, a blood fine, was applied in cases of homicide and serious injury. The state intervened only when an aggrieved party requested this. The latter would have a private claim for restitution which could be waived. The aggrieved person or family could effect physical retaliation. As the law developed, only the blood money could be claimed as a restitutionary fine. These crimes are also called restitution crimes.67

Mohammedan criminal law was not highly developed. In some respects it was vague, and in others, highly technical. Its classification of crimes was unsatisfactory and there was no clear distinction between civil and criminal law; usually action against the offender was left in the hands of the victim, or his or her family. The concept of a crime being an act against the interests of the state, as opposed to merely the individual, was not recognised.68

### 2243 British period (1600 – 1950)

On 31 December 1600 Queen Elizabeth I granted a Charter to the English East India Company authorising it to trade with India and Africa. The Charter also authorised the Company to legislate for its employees.69 In 1618 representatives of the

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65 These were regarded as the most serious crimes because they were identified in the Quran.
66 They were seen as the least serious crimes: Kulshreshta V D Landmarks in Indian Legal and Constitutional History 34.
68 Kulshreshta V D Landmarks in Indian Legal and Constitutional History 266 – 267.
69 This authority was renewed in different forms by successive English monarchs. The
Company negotiated a treaty with the Mughal emperor granting self-government to the English in India. Gradually the influence of the Company spread and it became a political force, ultimately yielding its power to the English Crown in the mid-nineteenth century.\(^70\) In 1860 the Indian Penal Code\(^71\) codified the criminal law. It was based on English criminal law, without any influence from indigenous law.\(^72\) Although it has undergone many amendments, this Code – together with the Code of Criminal Procedure\(^73\) and certain sections of the Indian Evidence Act\(^74\) – forms the essence of India’s criminal law.\(^75\) This legislation has been interpreted and developed by a substantial body of case law and commentaries.\(^76\)

### 2244 Independence (1950 onwards)

In terms of its Constitution,\(^77\) India was declared a **Sovereign Democratic Republic**\(^78\) on 26 January 1950. The Constitution guarantees certain fundamental rights\(^79\) to citizens and also lays down certain Directive Principles of state policy. The Constitution\(^80\) preserves all law in force before its commencement. This includes English common and customary law, Hindu law\(^81\) and Mohammedan (Muslim) law.\(^82\)

\(^70\) In 1858 the Government of India Act finally transferred the governing of India from the East India Company to the English Crown.

\(^71\) 45 of 1860. The Penal Code consists of 511 sections.


\(^73\) 1973 (2 of 1974). See Ch 4 Par 4 2 3 (infra).

\(^74\) 1 of 1872.


\(^76\) Kulshreshtha V D *Landmarks in Indian Legal and Constitutional History* 281 – 282.

\(^77\) 1950.

\(^78\) Amended to “Sovereign Socialist Secular Democratic Republic” by s 2 of the Constitution (Forty-second Amendment) Act 1976.

\(^79\) Part III.

\(^80\) Art 372.

\(^81\) Bhattacharjee A M *Hindu Law and the Constitution* 2 ed (1994) 86. Hindu law is applied to Hindus in India in matters of inheritance and religious usages and institutions. In terms of specific legislation (Hindu Marriage Act 1955; Hindu Succession Act 1956; Hindu Adoptions and Maintenance Act 1956; Hindu Minority and Guardianship Act 1956) Hindu law is also applied in the following fields: Adoption, maintenance, marriage, succession, minority, guardianship, family relations, wills, gifts and partition.

\(^82\) Purohit N *The Principles of Mohammedan Law* 2 ed (1998) 63 – 64. Mohammedan law is applied to Mohammedans in their personal matters by the Indian courts in terms of the following legislation: Bombay Regulation IV 1827; Punjab Laws Act 1872; Madras Civil Courts Act 1873; Central Provinces Laws Act 1875; Oudh Laws Act 1876; Ajmer Law Regulation III 1877; Bengal, Agra and Assam Civil Courts Act 1887; Laws Act 1905; Government of India Act 1915; Government of India Act 1935; N W Province Muslim Personal Law
Aspects of Hindu and Muslim life are governed by Hindu and Muslim law. However, Indian criminal law and procedure, law of contract and torts and other general legal rules are applicable to all citizens.\textsuperscript{83} The Constitution of India limits the law-making power of the union and state governments. The criminal justice system is based on the English system.\textsuperscript{84}

In India the prevalence of life threatening events (often criminal) is significant.\textsuperscript{85} The following editorial illustrates the frustration which this engenders:\textsuperscript{86}

\begin{quote}
The Surajkund tragedy which claimed three lives on Sunday like most disasters in India was simply waiting to happen. Those responsible… will, of course, be tried for gross negligence. However, the larger issue which we as responsible citizens need to address is our collective lack of concern for safety in whatever we do.
\end{quote}

The high crime rate is also a large-scale problem in India.\textsuperscript{87} These factors have led to the following consequences:\textsuperscript{88}

Governments have relied on \textit{ex gratia} discretionary payments to meet the demands of victim-creating situations. Administrative schemes, for instance, for victims of militancy are executive-administered…

Statutory insurance, which makes insurance compulsory, generally requires a user of a victim-causing process or product to insure against injury or death being caused to a third person.

In \textit{Delhi Domestic Working Women’s Forum v Union of India},\textsuperscript{89} the Supreme Court asked the National Commission for Women to draft a proposal for a Criminal Injuries Compensation Board. To date, this request has not been fulfilled.\textsuperscript{90}

\begin{itemize}
\item [(Shariat) Application Act XXVI of 1937; Cutchi Memons Act X of 1938; West Punjab Muslim Personal Law (Shariat) Application Act IX of 1948; Madras Muslim Personal Law (Shariat) Application Amendment Act XVIII of 1949.
\item Raghavan R K \textit{World Factbook of Criminal Justice Systems} 2. The most senior court in a state is the High Court and the Supreme Court is the highest court in the country, having both original and appellate jurisdiction.
\item Events like the Bhopal Gas disaster mentioned in Ch 3 Par 3 2 4 (infra) are examples.
\item National Crime Records Bureau (NCRB). (October 2002) http://www.ncrbindia.org/
\item 1995 SCC 14.
\end{itemize}
India was a member of the Economic and Social Council when the *Basic Principles on the Use of Restorative Justice*\(^\text{91}\) was passed. There is also evidence of reference to restorative justice as a significant force in India’s criminal justice philosophy.\(^\text{92}\)

2 2 5 New Zealand

The reception of English law was effected in 1840.\(^\text{93}\) During the second half of the nineteenth century most remnants of indigenous law were erased. For some time the British Parliament legislated for New Zealand, but from 1865 New Zealand received limited legislative powers of its own.\(^\text{94}\) Traditionally New Zealand looked to England for legislative and judicial precedent. English judgments are still cited, but where legislation is concerned, New Zealand has adopted an international outlook with an American bias.\(^\text{95}\) New Zealand’s criminal law was codified by the Criminal Code Act.\(^\text{96}\) Currently crimes of a more serious nature are governed by the Crimes Act,\(^\text{97}\) while the Summary Offences Act\(^\text{98}\) legislates over a variety of lesser offences.

2 3 Victims of crime and restorative justice

2 3 1 Fundamental concepts of restorative justice

Though this thesis is not primarily a study of restorative justice, no consideration of the legal position of victims of crime can take place without reference thereto – thus

\(^\text{91}\) Full title: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (United Nations) 2000

\(^\text{92}\) See for example Chockalingam K *Position of Victim Support Schemes in India* in Tatsuya O (ed) *Victims and Criminal Justice: Asian Perspective* (2003) Keio University Tokoyo Hogaku-Kenkyu-Kai 63 – 82 where the author shows that the victim support movement in India advocates a restorative justice policy to address crime, granting comprehensive services that serve both the needs of victims and offenders. He also argues that the state is responsible for making reparation to crime victims as a matter of social justice, since the state is responsible for protecting its citizens.

\(^\text{93}\) On 14 January 1840 the Treaty of Waitangi was signed between the Crown and various indigenous Maori chiefs. See Young Warren *World Factbook of Criminal Justice Systems* (November 2002) http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnew.txt


\(^\text{96}\) 1893.

\(^\text{97}\) 1961.

\(^\text{98}\) 1981.
what follows is a concise consideration of the meaning and significance of restorative justice, bearing in mind that there are many divergent interpretations thereof. Circumstances – including the political agenda of governments – influence the meanings attached thereto.99

The conventional definition of crime is cited as contributing to the negation of the rights of victims: Traditional criminal law defines crimes as acts which are injurious to the interests of the state and which are punishable by the state.100 The victim is not mentioned and this exclusion can be seen as a cause of victim injustice.101 Thus there is a trend to define crimes as acts in conflict with, or detrimental to, the normal life and survival of individuals.102 Restorative justice promotes the view that crime is a violation of relationships rather than a simple breaking of the law and that the appropriate response should go beyond punishment and encompass putting right the wrong caused to victims and society.103 Zehr, a prominent writer on restorative justice, used the following vocabulary in an early article on the subject: Restitution, atonement, community, victim, accountability, victim involvement in outcome, re-integrative shaming, repairing damage and problem solving.104 Restorative justice aspires to helping the victim recover from the crime’s effects, promoting offender appreciation of the impact of the crime (on the victim and the community), facilitating the making of reparation by the offender to the victim and, generally, repairing the damage caused to the community.105 In the South African context, the concept of ubuntu – which underpins the Constitution – is synonymous with humaneness, social justice and fairness, the rehabilitation of offenders and the maintenance of law and order, and represents the opposite of victimisation, grievous crimes and cruel and inhuman treatment.106 In S v Makwanyane Langa J stated that ubuntu “… recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part

103 See, for example, one of the initial works on restorative justice, Zehr H Changing Lenses (1990).
of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."\textsuperscript{107} There is thus a marked similarity between the values of restorative justice and \textit{ubuntu} as both emphasise the harmonisation of damaged relationships within the community in a way which is fair to all parties – “fair” not necessarily being synonymous with “lenient.”

While the relationship between victim and offender is paramount in the restorative justice equation, the community is also represented as a collective third party to prevent restorative justice from turning into a reformulation of the civil law of delict/tort and mixture thereof with criminal law. The community fulfils the role of enforcer and co-victim.\textsuperscript{108} Prior to the emergence of restorative justice (in the late twentieth century) the prevailing philosophy behind sentencing legislation in countries such as England and the United States of America required that offenders receive their “just deserts” – thus retribution, with culpability serving as a mitigating or aggravating circumstance (depending on the circumstances), determined sentence.\textsuperscript{109} The rise of the pro-victim movement resulted in legislation which granted victims rights to state-funded compensation, enhanced rights to restitution and an input in sentencing. It can thus be said that there has been a movement away from individualising the offender to individualising the victim – what can be referred to as the \textit{Participatory Model} of criminal justice.\textsuperscript{110} However, while the granting of procedural rights giving victims the right to give input in the sentencing process may be indicative of a restorative justice approach; this is not necessarily the case, as this input can just as well form part of a conventional punitive system. A criminal justice system must be assessed \textit{as a whole} to determine whether it has adopted the

\begin{itemize}
\item \textsuperscript{107} \textit{Supra} [224].
\end{itemize}
principles of restorative justice.\textsuperscript{111} The transition from the victim movement to restorative justice came about when the focus shifted purely from the rights of victims in conflict with offenders to the broader goal of improving the whole social, personal and juridical position of those victimised, chiefly through constructive interaction between victim and offender.\textsuperscript{112}

According to Zehr,\textsuperscript{113} the \textit{pillars} of restorative justice are, firstly, the harms and needs of victims (and also communities), secondly, the obligations of offenders (and also communities) to put matters right and, thirdly, the engagement of stakeholders (victims, offenders and communities). “Put right” refers to addressing \textit{harms} (to victims as well as communities) and addressing \textit{causes} at personal, interpersonal, environmental and societal levels.\textsuperscript{114}

According to van Ness and Strong,\textsuperscript{115} the \textit{values} of restorative justice are:

- Encounter: Creation of opportunities for victims, offenders and community members to meet for discussion of the crime and its effects;
- Amends: Expectation that offenders will take steps to repair the harm caused;
- Reintegration: Seeking to restore victims and offenders as responsible members of the community;
- Inclusion: Provision of opportunities for parties with a stake in a specific crime to participate in its resolution.

\textit{Programmes} identified with restorative justice are classified as follows:\textsuperscript{116}

- Victim offender mediation: This refers to meetings where trained mediators assist victims and offenders to resolve the conflict by conceiving an approach that they deem appropriate in remedying the wrong caused by the crime.

\begin{flushright}
\textsuperscript{113} Zehr H \textit{The Little Book of Restorative Justice} (2002) 23.
\textsuperscript{114} Zehr H \textit{The Little Book of Restorative Justice} (2002) 34.
\textsuperscript{116} Restorative Justice Online (June 2006) http://www.restorativejustice.org/ and the sources quoted there.
\end{flushright}
Conferencing: This refers to victim-offender mediation programmes that include families, community support groups, police, social welfare officials and attorneys.

Circles: This refers to conferencing between victims and offenders, but including the community in the decision making process. The community may be represented by criminal justice staff members or anyone in the community concerned about the crime. All participants are given a voice.

Victim assistance: Victim assistance programmes support victims in recovering from crime and proceeding through the criminal justice system. While some programmes lobby for victims' rights (particularly the rights of victims to have a primary role in the administration of criminal justice), others address the harm suffered by individual victims.

Ex-offender assistance: These programmes reintegrate offenders into the community, educating them in constructive conflict-resolution skills that replace anti-social behaviour and foster accountability.

Restitution: Restitution can take the form of both monetary payments and in-kind services rendered to the victim, thus repairing the financial (and perhaps relational) consequences of crime; restitution also has the potential/goal of turning the offender into a productive person.

Community service: While restitution repairs the harm to the individual, community service repairs the harm to the community, the secondary victim.

While state funded victim compensation is not listed as a separate programme in terms of this classification, it is commonly referred to in the context of restorative justice. The growing interest in compensation signifies a transformation of the philosophy of criminal justice, where the primary concern of society in response to crime lies in addressing the needs of the victim as opposed to the traditional concern with punishing the offender.117

2 3 2 Evaluation of restorative justice

Batley118 raises – and refutes – certain criticisms that are voiced against restorative justice:

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Restorative justice ignores the need for punishment and offers the offender a soft option: Restorative justice does not preclude the utilisation of punitive measures and can, in fact, be combined with them in a constructive way.\(^{119}\)

Restorative justice applications have lacked the creativity and sophistication to address the issues it claims to address: Facing the victims of their crimes can be very difficult for offenders and forces accountability on them; punishment can be and is combined with restorative justice sentences. If practical applications have proved to lack creativity, this is a shortcoming in practice and not principle.

Many victims are not prepared to participate in restorative justice processes and prefer retribution to restitution: Victims are never forced to participate against their will; retribution and restitution are not mutually exclusive and can be combined in a single sentencing response to the offence.

The level of anger in South Africa is so high that the populace demands crime to be dealt with summarily and is not ready for restorative justice programmes: The Truth and Reconciliation Commission\(^{120}\) has shown that victims are often prepared to participate in restorative processes and extend forgiveness to perpetrators. In *S v Makwanyane and Another*\(^{121}\) Chaskalson P said:

> The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance… We have long outgrown the literal application of the biblical injunction of “an eye for an eye, and a tooth for a tooth”. Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The State does not put out the eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist, by castrating him and submitting him to the utmost humiliation in gaol.

Restorative justice is inappropriate in the case of serious crimes, such as rape, minimising the seriousness of the crime: Restorative justice gives victims the opportunity to feel that they have been heard and that perpetrators are confronted with the real consequences of their actions; besides, restorative justice does not preclude robust punitive measures being taken


\(^{120}\) See Ch 5 Par 5 2 1 4 (*infra*).

\(^{121}\) 1995 6 BCLR 665 (CC) 717 [129].
against offenders. In the words of Archbishop Tutu, “Forgiveness does not mean condoning what has been done. It means taking what has happened seriously and not minimising it…” Tutu has expressly cited the Truth and Reconciliation Commission as an example of the operation of restorative justice. In New Zealand restorative justice procedures are used for serious and persistent offenders, though mainly in the youth justice system. In North America Umbreit has used victim-offender mediation in cases of homicide and sexual assault, even holding a mediation session between the family of a murder victim and the killer, shortly before his execution.

In order to address the perceived shortcomings of restorative justice, Herman proposes a parallel justice system that combines the strengths of both restorative justice and the traditional retributive approach to criminal justice. Walgrave and Aertsen also state that restorative justice should be an integral part of the criminal justice system. Herman’s parallel system advocates two separate paths of justice, namely one for victims and one for offenders. Whereas society has traditionally devoted its energies to prosecuting offenders, this approach suggests a parallel set of victim-oriented responses. The response of the South African criminal justice system will determine whether a successful integration takes place that harnesses the strengths of both approaches, or whether restorative justice remains an awkward, added-on aspect of criminal justice. It is submitted that this will depend to a great extent on the attitude of those involved actively in the criminal justice system.

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123 See Ch 5 Par 5 2 1 4 (infra). He states this in his Foreword to Consedine J C Restorative Justice: Healing the Effects of Crime (1997).
127 In S v Makwanyane and Another (supra) 717 [129] Chaskalson P stated: “Retribution is one of the objects of punishment, but it carries less weight than deterrence.”
Burchell\textsuperscript{130} points out that the success of informal reconciliation requires, firstly, the willingness of the parties before the tribunal to become involved in the catharsis of reconciliation, and secondly, their commitment to ascertaining the unembellished truth; in the absence of these preconditions the process of healing will fail. Hoyle and Young aver that the participation of both victim and offender is often not really willingly given as victims participate motivated by feelings of civic duty and offenders do so with an expectation of reduced punishment.\textsuperscript{131} Making an unpopular decision must then be delegated to an independent and qualified tribunal holding the necessary authority. Though there is dissent as to whether the state ought to enforce the restorative outcome,\textsuperscript{132} it is submitted that Marshall is correct when he says that restorative justice “is complementary to criminal justice, not antithetical to it.”\textsuperscript{133} Besides, it is difficult to see how the criminal justice system would deal with so-called “victimless crimes,” were the entire criminal justice process to be left exclusively to interaction between victim and offender. The success of restorative justice thus depends – likewise as in the case of retributive justice – on the exercise of state authority, and care must be brought to bear as this exercise of power is largely unfettered by normal due process safeguards and the protection afforded by human rights norms.\textsuperscript{134} Divorcing restorative justice from the criminal justice system would create an area of practice where the accused loses the protection of due process with its procedural safeguards; trampling the accused’s rights cannot tie in with the lofty ideals of restorative justice.\textsuperscript{135} As Hoyle and Young put it:\textsuperscript{136}

One obvious role of the state – in any functional system – is to provide due-process checks and balances on both the process and outcome of the administration of justice."

\begin{itemize}
\item[130] See previous footnote.
\item[132] See source quoted in previous footnote at 527 – 530.
\end{itemize}
Another caveat is that civil law has over many centuries evolved a highly refined system of restitution as victims of wrongdoing need prove their claims only on a balance of probabilities. Civil procedure is also better suited to determining quantum. Also, in the realm of civil law restitution, quantum is based purely on the aggrieved party’s loss. Some writers on restorative justice express fears of disproportionate reparation agreements being out of reasonable proportion with the wrongdoing; the plaintiff at civil law need not fear a claim being reduced in proportion to the degree of culpability of the defendant.

In the short term restorative justice has proved to be expensive in the range and level of resources necessary for success. However, experience in Canada, Australia, New Zealand, parts of the United States of America and other countries has shown that proper investment can secure significant long-term and widespread savings to the community in the reduction of crime – including the reduction of court sittings and the closure of penal institutions.

The following statement of Hoyle and Young summarises the current situation:


Across the world restorative justice is evolving in different jurisdictions, in some cases quite rapidly, with different types of advocates driving its progress. It appears that it is here to stay, at least for the foreseeable future. What this will mean in practice, however, is still to be determined. It will almost certainly develop in diverse ways in a variety of settings, dependent on the perceived problems of each jurisdiction and the methods for dealing with those problems that statutory and voluntary bodies have traditionally used. The danger has to be that, in the rush to introduce restorative interventions into different systems, programmes will be developed which are poorly thought out and badly implemented. There will be a proliferation of schemes calling themselves restorative justice, many of which will be anything but restorative in their aims and practices... Restorative justice should be given the chance to be tried and tested on its own merits rather than being marketed as a complete alternative to established criminal justice.

A clue to the suitability of restorative justice to a country with South Africa’s heterogeneous population profile can be found in the words of a senior judge of the

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137 See Ch 3 Par 3 2 2 (infra).
British Court of Appeal, where he says of restorative justice: “Interestingly, a number of these examples can be found in areas where indigenous people have suffered as a result of the imposition of western legal systems without common reference points.”

The sources quoted above reveal the most significant objection to restorative justice in principle as being the lack of procedural safeguards protecting the accused, particularly where the victim has an input in determining sentence. The issue of pecuniary redress (which forms the basis of this thesis) does not attract this controversy and is invariably accepted as an undisputed right of the victim. In fact, criminal justice rules could have the effect of reducing the offender’s liability as private law judges a person’s liability on the basis of the loss inflicted and factors such as affordability do not limit quantum. As pointed out above, blameworthiness can limit the offender’s liability in the criminal justice system. Schärf discusses extra-judicial community courts in South Africa, stating “…the two systems are fairly compatible as long as the community courts stay within the boundaries of what western justice calls dispute resolution, where the parties agree to the decision-making person/body and agree to honour the agreed outcome.” It is where community courts deal with criminal matters that they can fall foul of constitutional due-process protection. What the author goes on to suggest as the best solution is that community courts not be incorporated in the criminal justice system, but that the state should endeavour to tutor these tribunals regarding constitutional constraints. The state should hold a watching brief and allow them to deal with both civil and criminal matters which fall within the boundaries of problem solving. The author does not state exactly at what point criminal cases ought to be reserved for the criminal justice system, passing beyond simple problem solving. It is suggested that the dividing line should be based on the question of whether the disruption of the public

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142 In terms of S 130(11) of the British Powers of Criminal Courts (Sentencing) Act the court considers the means of the accused when determining the amount payable and should not impose an order in excess thereof: R v Stanley (1989) 11 Cr App R (S) 446; R v Kirk [2001] EWCA Crim 2122. See Ch 4 Par 4 2 2 5 (infra). “The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.” Trotman v Edwick 1951 1 SA 443 (A) at 449 B – C. No mention is made anywhere of limiting the amount due to affordability by the defendant.

143 See footnote 138 (supra).


145 Source in previous footnote: 66 – 70.
interest can be dealt with adequately between the parties, or whether larger public issues are involved which demand state intervention.

With the lessons learnt from the pioneering work done by the Truth and Reconciliation Commission in South Africa and the heritage of ubuntu, combined with the experience gleaned in community courts, there is the prospect that a positive local contribution can be made to the international practice of restorative justice.

2 3 3 Recognition of restorative justice in South Africa

Before considering the recognition accorded to restorative justice by the South African government, it is worth noting that restorative justice is already flourishing in the – uniquely South African – informal justice system of community courts referred to in the previous paragraph. Perceived advantages of community courts are the absence of court fees and legal costs, the existence of victim-friendly processes and the focus on compensation coupled with a respect for established customary values. In addition to community courts sanctioned by local communities, there is the reality of vigilante groups dispensing summary, mob-style justice in urban townships. Both forums deal with criminal matters, sometimes dealing with the most serious of offences if the population does not trust the efficacy of the police. In community courts, justice dispensed takes the form of restitution, service to the aggrieved party, reimbursing lost income and medical costs, or the rendering of service to the community. In rural areas, Matgotlas and Chief’s Courts dispense justice in a way similar to community courts. Restitution is seen to harmonise damaged relationships more effectively than the imposition of punishment, which is perceived as perpetuating permanent rifts between parties who have to live in close proximity with one another. Sometime members of the police and other functionaries in the criminal justice system assist, acknowledging – albeit unofficially – that these forums are more effective in addressing problems occasioned by offending than the conventional criminal justice system. Magistrates in rural areas try to reconcile the customary dispensation with the formal requirements of the legal system.

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Turning to the government’s stance, South Africa, as a member of the international community, has professed its commitment to restorative justice. When the Economic and Social Council called for comment on the preliminary draft Basic Principles on the Use of Restorative Justice,\(^\text{149}\) South Africa was one of thirty-seven countries commenting.\(^\text{150}\) In 2002 the Group of Experts on Restorative Justice\(^\text{151}\) of the United Nations Commission on Crime Prevention and Criminal Justice\(^\text{152}\) formulated recommendations\(^\text{153}\) concerning restorative justice. On 18 April 2002 the

\(^{149}\) Full title: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (United Nations) 2000
International Centre for Justice and Reconciliation (April 2002)

\(^{150}\) International Centre for Justice and Reconciliation April 2002)
SA pointed out, *inter alia*, that traditional retributive criminal justice systems do not provide the best outcomes in resolving conflicts among victims, offenders and members of the community. Victims, who suffer most from crime, remain unsupported, without receiving effective remedies. Restorative justice measures can lead to satisfaction for the victim and prevent future offending and can produce viable alternatives to short terms of imprisonment and fines. Reference was made to the Truth and Reconciliation Commission (See Ch 5 Par 5 2 1 (infra)), the draft bill (as it then was) on juvenile justice (See Ch 4 Par 4 3 1 5 (infra)) and a pilot project (1996 – 1997) on family group conferences for child offenders as examples of SA’s implementation of the aims of restorative justice. Reference was also made to the work of the SA Law Reform Commission (See Ch 5 Par 5 2 2 (infra)) encouraging the incorporation of restorative justice principles into SA law. Support was expressed for the idea of developing an international instrument on restorative justice. SA recommended amendment of the wording in order to place the onus on courts to encourage parties to resort to restorative justice measures; the state should also provide programmes to engender social responsibility in young offenders and to prevent recidivism. The final wording does not directly include SA’s suggestions, but reflects the spirit thereof; however, specific reference is made to the fact that the victim must not be coerced into taking part in restorative justice procedures against his or her will. Arguably, the latter suggestion is canvassed in the provision that constant research must be conducted to match restorative justice procedures to changing circumstances. See generally: United Nations Economic and Social Council Commission on Crime Prevention and Criminal Justice 2002 Restorative Justice: Report of the Secretary-General E/CN.15/2002/5 (July 2003) http://www.unodc.org/pdf/crime/commissions/11comm/5e.pdf

\(^{151}\) Jabu Sishuba of South Africa being one of the seventeen experts.


\(^{153}\) The main recommendations were:
Research must be conducted and disseminated amongst all Member States and other interested parties;
The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters should be reviewed periodically to take account of developments;
Member States should exchange useful information with one another;
Member States should provide technical and financial assistance to developing countries in the implementation of restorative justice policies;
The widest possible dissemination should be given to the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.
Commission on Crime Prevention and Criminal Justice\textsuperscript{154} recommended to the Economic and Social Council the adoption\textsuperscript{155} of a draft resolution which encourages member states to establish guidelines and standards for restorative justice, with legislative authority where necessary. South Africa is a member of the Commission on Crime Prevention and Criminal Justice.\textsuperscript{156}

There is ample evidence of the recognition of restorative justice in domestic South African criminal justice policy:

- Section 155 of the White Paper for Social Welfare\textsuperscript{157} requires that welfare programmes for offenders, victims of crime and their families “must aim at restorative justice by taking into account the victims’ perspectives and by involving the community in justice processes, thus promoting reintegration and social cohesion.”

- In terms of the Probation Services Act\textsuperscript{158} the Minister of National Health and Welfare may establish programmes dealing with, \textit{inter alia}, the assessment, care, treatment, support, referral for and provision of mediation in respect of victims of crime,\textsuperscript{159} the compensating of victims of crime\textsuperscript{160} and restorative justice as part of appropriate sentencing and diversion options.\textsuperscript{161} Restorative justice is defined as “the promotion of reconciliation, restitution and responsibility through the involvement of a child, and the child’s parents, family members, victims and the communities concerned.”\textsuperscript{162}

\textsuperscript{154} Eleventh Session – Vienna 16 – 25 April 2002.
\textsuperscript{155} The resolution was adopted on 24 July 2002 (Resolution 12 of 2002) at the 37\textsuperscript{th} plenary meeting of the Economic and Social Council.
\textsuperscript{156} Press release 25 April 2002 United Nations Office on Drugs and Crime.
\textsuperscript{158} Section 3(d).
\textsuperscript{159} Section 3(h).
\textsuperscript{160} Section 3(l).
\textsuperscript{161} S 1.
\textsuperscript{162} S 1.
One of the goals enumerated in the preamble to the Child Justice Bill\textsuperscript{163} is “to entrench the notion of restorative justice in respect of children.” Section 2(b)(iii) states an object of the Bill to be “supporting reconciliation by means of a restorative justice response,” while Section 1 defines restorative justice as “the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child’s parent, the child’s family members, victims and communities.”

In the Foreword to the Victims’ Charter\textsuperscript{164} – drawn up in terms of the government initiated Victim Empowerment Programme – the Minister for Justice and Constitutional Development states that the document complies with the spirit of the South African Constitution\textsuperscript{165} and adheres to the tenets of restorative justice.

The South African Law Reform Commission’s Report\textsuperscript{166} on sentencing in criminal cases states that “(a)n ideal system should…allow victim participation and restorative initiatives…

Discussion Paper 97 of the South African Law Reform Commission deals with the implementation of a state-funded victim compensation scheme in South Africa.\textsuperscript{167} It calls for the implementation of such a system relying, \textit{inter alia}, on the fact that restorative justice emphasises victim empowerment in the criminal justice process.

Perhaps the most profound and successful manifestation of the principles of restorative justice in South Africa is to be found in the deliberations of the Truth and Reconciliation Commission\textsuperscript{168} of which Tutu said:\textsuperscript{169}

\begin{quote}
Having looked the beast of the past in the eye, having asked and received forgiveness and having made amends, let us shut the door on the past – not in order to forget it but in order not to allow it to imprison us."
\end{quote}

\begin{flushright}
\textsuperscript{163} B49 of 2002. See Ch 4 Par 4 3 1 5 (\textit{infra}).
\textsuperscript{164} See Ch 4 Par 4 3 1 6 (\textit{infra}).
See Ch 4 Par 4 3 1 7 (\textit{infra}). See also Neser J “Restorative Justice – A New Dimension of Sentencing in SA Courts” (2001) 14 \textit{SA Journal of Criminal Justice} 46 51.
\textsuperscript{167} See Ch 5 Par 5 2 2 (\textit{infra}).
\textsuperscript{168} See Ch 5 Par 5 2 1 4 (\textit{infra}).
\textsuperscript{169} Truth and Reconciliation Commission Final Report Chairperson’s Foreword Vol 1 Ch 1 Par 91.
\end{flushright}
2.4 Comparison

Despite the common influence of English law, the four countries differ vastly in their historical development. This is the result of disparate ethnic\textsuperscript{170} influences. Restitution is a common denominator long preceding the influence of English law (in the case of the three ex-colonies); it is justifiable to state that victim-driven restitution was the precursor of criminal law systems controlled by the state. All systems have isolated examples of the state being held liable to compensate victims of crimes committed by individuals not acting as organs of state. The precedent set by state-funded compensation schemes for those injured in industrial and traffic accidents led to the idea of general, state-funded compensation schemes for victims of crime. Today the two more affluent states, Great Britain and New Zealand, both have compensation schemes for victims of crime; South Africa and India do not. However, Great Britain and New Zealand differ fundamentally in that the latter has a \textit{unified} scheme compensating victims of \textit{all} injuries, while Great Britain has retained separate schemes for victims of work-related injuries, traffic injuries and crimes, respectively. All four states, however, share a commonality in recognising the desirability of compensating victims of criminal injury, and all four states compensate victims of traffic and industrial injuries; it is where victims of crime are concerned that the distinction persists. Setting aside the extra-juristic question of affordability, consideration will have to be given to the suitability of separate schemes – following the British precedent – or a unified scheme – following the New Zealand precedent – to South African conditions.\textsuperscript{171}

Restorative justice is inseparably interwoven with the subject of victims of crime. While restorative justice receives recognition in all four countries, it is applied much more rigorously in the two developed countries; this conclusion is evidenced, \textit{inter alia}, by the existence of state-funded victim compensation in Great Britain and New Zealand. However, the concept of restorative justice covers a very broad spectrum which extends beyond redress for the victim; in certain restorative justice programmes the victim’s input is also, to a lesser or greater extent, considered when punishment is meted out. In other words, the victim plays an active role as opposed

\textsuperscript{170}“An ethnic group is a human population whose members identify with each other, usually on the basis of a presumed common genealogy or ancestry. Ethnic groups are also usually united by common cultural, behavioural, linguistic, or religious practices. In this sense, an ethnic group is also a cultural community.” Wikipedia (July 2006) http://en.wikipedia.org/wiki/Ethnic

\textsuperscript{171}See Ch 6 Par 6.2.4 (\textit{infra}).
to a merely passive role. This tendency bears a resemblance to the historical roots of the matter where the enforcement of justice against wrongdoers was put squarely in the hands of the victim and his or her group. The assumption by the victim of an active role in the criminal justice system results in restorative justice being criticised on the basis that the accused’s due-process rights can be diluted, for example, where restorative programmes influence sentencing. While this problem is acknowledged and will have to be addressed in due course by all civil/fundamental rights based legal systems, the fact that the this thesis concentrates on redress for victims of crime – as opposed to the involvement of the victim as a participator in deciding the punishment to be meted out to the offender – means that the due-process question does not play a major role in the current area of focus.

In South Africa the phenomenon of community courts serves as a working example of restorative justice principles in operation. The country stands before the challenge of demarcating the spheres of influence of community courts and the formal criminal justice system in a way that is conducive to the constitutional administration of justice, respecting the role and interests of the victim and the due-process rights of the accused.

In the following chapter, the rights of victims against perpetrators and the state will be investigated and compared in order to evaluate the rights of redress extended to victims in terms of the law of delict/tort and constitutional law in the four jurisdictions.
Chapter 3

Delictual rights of victims of crime

3 1 Introduction

Having considered historical trends in the treatment of victims of crime and the doctrine of restorative justice in the previous chapter, this chapter focuses on the delictual claims victims have against offenders. Three avenues are explored:

- Common law of delict/tort;
- Punitive damages; and
- Delictual/tortious liability of the state.

3 2 Common law of delict

3 2 1 Introduction

While all four countries researched have a common law foundation to their respective legal systems, South Africa’s common law is based on Roman Dutch law, while the other three countries all base their common law on the English system. This leads to certain differences in the ambit of claims under the respective jurisdictions.

While all four countries acknowledge the common law delictual/tortious right of the victim to sue the offender, New Zealand’s legal system has virtually nullified this right as the victim has only a claim against the Accident Compensation Scheme.1

3 2 2 South Africa

A person who has suffered a violation of his or her subjective rights has the right to claim redress from the wrongdoer providing the latter is identifiable and the former can prove that some harm has unlawfully been inflicted on him or her.2 This violation

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1 The Injury Prevention, Rehabilitation, and Compensation Act 2001 deprives the person who has suffered a personal injury due to an accident – which includes a criminal act – of a tortious claim against the wrongdoer in respect of the injuries suffered. See Par 3 2 5 (infra).
of rights can lead to a claim in terms of the *actio legis Aquiliae* for *damnum iniuria datum* (patrimonial losses) and/or a claim in terms of the *actio iniuriarum* for *iniuria* (violations of the personality).

The victim must prove that the harm was inflicted unlawfully. The benchmarks for unlawfulness are not the same in criminal law and private law: In criminal law public interest is the guiding dynamic, while private law protects individual interests. The fact that a criminal penalty is prescribed for the commission of a certain act does not preclude the delictual liability of the perpetrator. The criminal penalty does not take the place of the delictual award (or *vice versa*) because both have different objectives: The former to penalise, the latter to effect redress. Whatever the position is apropos the importance of the distinction between public and private law, there are instances where legislation authorises a criminal court to make restitutionary orders in criminal cases.

When the accused effects restitution, “society should not come under the impression that a rich man can use his relative wealth to obtain for himself a lesser sentence of imprisonment than that which a poorer man would receive in the same circumstances.” Restitution should not replace punishment and the differing objectives of the two concepts should be borne in mind by courts.

The situation regarding damage caused by an illegal act resulting from the breach of a statutory duty was set out as follows in *Patz v Greene & Co* by Solomon J:

> Every one has the right, in my opinion, to protect himself by appeal to a court of law against loss caused to him by the doing of an act by another, which is expressly prohibited by law. Where the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damned,

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3 Neethling, Potgieter & Visser *Deliktereg* 5 – 6.
4 Unless this is clearly indicated in the relevant legislation - *Da Silva v Coutinho* 1971 3 123 (A) 135 – 136.
5 These instances are discussed below in Ch 4.
6 *S v Sehlako* 1999 1 SACR 67 (W) 71e. See discussion of this case in “Recent cases” (1999) 12 SA Journal of Criminal Justice 279, where a plea is made for the courts not to ignore the value of imposing a suspended sentence conditional on restitution. See Ch 4 Par 4 2 1 (*infra*).
7 While restitution aims to effect reparation to the victim, the guidelines for the imposition of punishment were formulated as follows in *S v Zinn* 1969 2 SA 537 (A) 540G: “What has to be considered is the triad consisting of the crime, the offender and the interests of society.” No mention is made of the victim.
8 1907 TS 427 433.
but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy.

Despite the last sentence, courts do not generally grant civil remedies in the case of statutes enacted in the public interest or general welfare, and not for the protection of individual interests.\(^9\) Whether the breach of a statutory duty gives rise to a cause of action depends on the intention of the legislature;\(^10\) the fact that a duty carries a criminal sanction does not indicate any intention to exclude a civil remedy.\(^11\)

The victim seeking redress by way of the common law faces three – often insurmountable – problems, namely:

- The financial inability of most offenders to effect redress (especially if sentenced to serve a period of imprisonment);
- The high cost and uncertainty of litigation coupled with problems in the South African legal aid system;\(^12\)
- Secondary victimisation and traumatisation of the victim, especially in rape cases; and
- South African courts are conservative and tend to make lower awards than are expected.\(^13\)

Even if the accused has been found guilty in a criminal court, a civil court cannot accept the record and conviction of the criminal court as proof of the facts. The finding of the criminal court is merely an opinion and the case against the perpetrator

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9. \(Hall \text{ and Another v } Edward \text{ Snell & Co Ltd \立马 1940 NPD 314; Woolfson and Others v } Simpson \text{ Bros & Co Ltd \立马 1940 NPD 314. See also } Boucher \text{ v Cape Divisional Council 1941 CPD 291; Knop v Johannesburg City Council \立马 1995 (2) SA 1 A 31.}\)

10. \(Hall \text{ and Another v } Edward \text{ Snell & Co Ltd } \text{(supra);} \text{ Woolfson and Others v } Simpson \text{ Bros & Co Ltd } \text{(supra).}\)

11. \(Da \text{ Silva v Coutinho } \立马 1971 (3) SA 123 A 134 135 – 136. \text{ See also } Salisbury \text{ Bottling Co (Pvt) Ltd v Central African Bottling Co (Pvt) Ltd \立马 1958 (1) SA 750 FC; Ellis v Vickerman \立马 1971 3 SA 123 (A) 134.}\)

12. \See generally van As H J \text{Regsverteenwoordiging as element van Regstoeganklikheid }\立马 1999.\)

13. \There might be a turning of the tide, however. \text{G Q v Yedwa }\立马 1996 (2) SA 437 Tk GD stated that awards for personal injury arising out of an assault, had been very small and often insignificant and should be increased substantially. \text{RAF v Marunga }\立马 2003 (5) SA 164 SCA 170 E – G approved recent willingness to award a higher quantum of damages in personal injury cases. \text{See Jordi P “Compensation for Victims of Crime in a Civil Context” Paper delivered at Criminal Justice Conference of Centre for the Study of Violence and Reconciliation February 2005.}\) (July 2006) \text{http://www.csvr.org.za/confpaps/jordi.htm}\)
must be proved *de novo*. On the other hand, a court hearing a civil suit has the full civil procedure system with its network of pleadings at its disposal to make an accurate assessment of liability and *quantum*. In a criminal case, a distinct line is drawn between the proceedings up to judgment – when the guilt of the accused is determined – and the sentencing stage when a suitable penalty is determined and the extent of the harm inflicted on the victim becomes relevant. This procedural distinction is not drawn in a civil case where quantum is relevant from the outset: A plaintiff suing for damages must provide sufficient information to "enable the defendant reasonably to assess the quantum." Furthermore, civil procedure allows a defendant to institute a counterclaim (claim in reconvension) and the Apportionment of Damages Act provides for a weighing up of the respective degrees of fault of the parties in assessing quantum. Where the amount of the loss is not capable of swift assessment in a criminal matter, the courts have stated that the criminal trial must not be transformed into a quasi-civil case.

323 Great Britain

Like Roman law, English law of torts follows a casuistic approach. The victim can sue the violator only if the latter’s actions comply with a certain set of predetermined criteria. The applicable principles are summarised by the European Court of Human Rights as follows:


15 For example, the Summons, the Request for Further Particulars (in the Magistrates’ Court), the Plea and the Replication.


17 See High Court Rules Rule 24.

18 34 of 1956.

19 R v Kurayi 1959 2 SA 62 (R); R v Mazonko 1962 2 SA 366 (R).

20 Rogers W V H Winfield and Jolowicz on Tort 13. The law consists of a number of separate torts each governed by its own, unique rules.

21 DP and another v United Kingdom, (App no 38719/97) [2003] 1 FLR 50, [2002] 3 FCR 385 [93] – [94]. At [97] the court says that this *numerus clausus* of torts can be extended by the courts "incrementally and by analogy with decided categories." However, this development is restricted by the fact that the decision finding that a duty of care exists in a particular instance is seen as a binding precedent. As
In England and Wales, there is no single tort which imposes liability to pay compensation for civil wrongs. Instead there are a series of separate torts, for example, trespass, conversion, conspiracy, negligence and defamation.

Although much has been written regarding the difficulty of defining torts in general terms, the following statement is representative:22

Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

The emphasis is on a breach of the law, not on a violation of the subjective rights of another person.23 Torts are traditionally grouped under the headings *Intentional invasion of personal and proprietary interests;*24 *Interests in economic relations, business and trading interests;*25 *Interests in intellectual property;*26 *Negligent interference with personal, proprietary and economic interests;*27 *Further protection of personal and property interests;*28 *Reputation;*29 and *Due process.*30 Depending on the nature of the conduct, the resulting tortious claim of the victim can fall under any one (or more) of the abovementioned forms of tort. Changing circumstances and the development of new technology necessitate the expansion of existing remedies, a task undertaken by Parliament and the Courts.

opposed to this, SA law follows a system based on general principles (a generalised system), though the English law of tort has been absorbed in some areas. A generalised system facilitates the protection of new interests as and when they arise. Neethling, Potgieter and Visser *Deliktereg* 5. Van der Merwe N J and Olivier P J J *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 18 – 20; Van der Walt J C and Midgley J R *Delict: Principles and Cases* (1997) 18.

22 Rogers W V H *Winfield and Jolowicz on Tort* 3. See also Murphy J *Street on Torts* (2003) 3.

23 Compare this with the following definition of a delict in SA law: “Die uitdrukking onregmatige daad dui onder meer aan dat een persoon skade of nadeel aan ’n ander moes veroorsaak het…” The expression delict indicates inter alia that one person must have caused damage or harm to another person. (Emphasis added) Neethling, Potgieter and Visser *Deliktereg* 29.

24 Historically the most important form of tort, consisting of interference with goods, and trespass in its various forms.

25 For example deceit, passing off, interference with contractual relations, conspiracy and intimidation.

26 Besides copyright and patent, new fields are breach of confidence, for example breach of patient confidentiality and disclosing trade secrets.

27 A fast developing field of law, for example where the protecting of economic interests is concerned.

28 For example, the strict liability for injuries caused by defective and dangerous goods introduced into British law at the behest of the European Community.

29 For example, libel and slander.

30 For example, malicious prosecution and abuse of process. A developing form is abuse of administrative process.
Originally, the evidence and conviction in a criminal case could not be used as evidence in the civil case arising from the same facts. The tort had to be proved without reference to the criminal case, but the Civil Evidence Act\(^{31}\) changed the situation in favour of the victim by stating that proof of a conviction in a criminal case is admissible in a civil case as evidence that the person committed the offence.\(^{32}\) The offender “is taken to have committed that offence unless the contrary is proved,”\(^{33}\) thus creating a *prima facie* presumption in favour of the victim. Where a statutory provision has both criminal and tortious consequences, a defence to the criminal charge will not necessarily constitute a defence in a civil case, as differing degrees of proof are required.\(^{34}\) However, a victim of crime is subject to the normal rules regarding contributory negligence in cases where an offender is sued for damages.\(^{35}\)

The Courts have had to consider whether a statute that imposes a criminal sanction automatically creates a right to claim damages in tort. In *Lonrho Ltd v Shell Petroleum Co Ltd*\(^{36}\) Shell Petroleum and others had constructed an oil refinery in Southern Rhodesia (now Zimbabwe) while Lonrho had built a supply pipeline. In November 1965, the government of Southern Rhodesia declared unilateral independence, whereupon Great Britain passed legislation\(^{37}\) making it a criminal offence to supply oil to Southern Rhodesia. The House of Lords accepted that Shell had covertly continued to supply oil, thereby prolonging the state of independence and thus the period during which Lonrho’s pipeline was out of use. Lonrho sued Shell for losses arising from the non-utilisation of its pipeline. Lord Diplock found that no civil right of action arose from legislation imposing criminal sanctions, except in two instances, namely:

(W)here… it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals...\(^{38}\)

\(^{31}\) 1968.

\(^{32}\) S 11(1) states:
In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom... shall... be admissible in evidence for the purpose of proving... that he committed that offence...

\(^{33}\) S 11(2).

\(^{34}\) *Potts (or Riddell) v Reid* [1943] AC 1 31.

\(^{35}\) In *Meath v McCremer* [1985] 1 All ER 367 the plaintiff’s claim was reduced by 25% because he had been a willing passenger in a car driven by a drunken person.

\(^{36}\) [1982] AC 173.

\(^{37}\) Southern Rhodesia Act 1965.

\(^{38}\) 185.
And

(W)here the statute creates a public right... and a particular member of the public suffers... ‘particular, direct and substantial’ damage ‘other and different from that which was common to all the rest of the public.’

In C v Cairns a victim of childhood sexual abuse sued a doctor who had not reported the abuse. The victim’s claim in this case was unsuccessful due to the long time that had passed before the institution of the legal suit, but the court made the following statement:

First, a question was raised as to whether a doctor could ever be liable in these circumstances where the act causing the later damage was the criminal act of a third party... If the non-negligent performance of the act (or omission) complained of would have prevented (indeed would have been intended to prevent) later foreseeable criminal conduct then arguments as to remoteness or novus actus are unlikely to succeed.

The case clarifies the test for causation:

Had the defendant acted differently (non-negligently) would (has it been proved that) the claimant have been spared further damage?

At times, the development of the law of tort has aided the administration of criminal justice, for example in the former rule that prosecutions for a felony had to precede an action for tort on the same facts. The granting of exemplary (punitive) damages is another example of this synergy.

The tort system is based on the tenet that those who have sustained harm due to a wrong should be restored to their pre-injury position by the wrongdoer. In England, however, tort damages reach very few victims of injury and at a high cost. This cost is met by a large sector of society contributing to liability insurance. Thus the problems encountered in enforcing the delictual liability of the offender in South Africa occur equally in an affluent country such as Great Britain.

39 185.
41 From 1975 to 2000.
42 Ibid. [47].
43 Ibid. [48].
44 Murphy J Street on Torts 579 – 582. “Exemplary damages” refers to the awarding of damages with a punitive rather than a merely restitutionary objective. See Par 3 3 (infra).
The viability of the suit for tortious damages is further limited by the provisions of the Offences against the Person Act. A person convicted of common assault at a summary trial who has received a probation order, been discharged, or has served the sentence of imprisonment and paid any fine and costs imposed, cannot be sued on the same cause in a civil court. The same applies where a charge of common assault has been summarily heard and dismissed. This applies only where the case was dismissed on the merits and the criminal proceedings were instituted by or on behalf of the person aggrieved. The court will then issue a certificate of dismissal stating the grounds for the dismissal. The conviction or discharge only protects the person actually convicted or acquitted from further action and not, for example, his or her employer. The practical solution to the victim’s dilemma is to sue first and prosecute later.

3 2 4 India

Criminal restitution in tort functions substantially as in England and Wales. However, the frequent occurrence of major disasters in India has given rise to the concept of the mass tort. Most of the acts giving rise to mass tort cases are criminal in nature and the distinction between crime and tort is relaxed. The liability of industry has occupied the attention of the Supreme Court.
There is a call for international law remedies – based on the violation of human rights – against large corporations.\(^{58}\)

Casting the Bhopal injuries in terms of human rights violations underscored the sense of irreparable harm. If the right to life is absolute and inalienable, it cannot be bought and sold on the open market of civil liability… (especially) where the prospect of low tort damages encourages companies to risk accidents rather than investing in safety equipment. The human rights language also holds the appeal of universality, so that a human who is injured by industrial hazards should have the same rights to care and compensation no matter where (in the world) the injury occurs.

The Indian Supreme Court has developed the concept of mass tort in cases where hazardous substances or processes are involved. The following statement in *M C Mehta v Union of India* indicates the Court’s attitude in this regard: \(^{59}\)

We in India cannot hold our hands back and I venture to evolve a new principle of liability which English Courts have not done. We have to develop our own law… if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen… on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy… We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken… (If) any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part… Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise… indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on a no fault basis to persons affected. This Act will be canvassed in Ch 8 (infra) which deals with state funded compensation in India. While statutory insurance is not concerned primarily with the issue of victims of crime, in many cases the two issues will coincide if the loss is occasioned by a criminal act. For example, the "Bhopal Gas Tragedy," which is the locus classicus of mass tort cases, led to the criminal prosecution of the company (Union Carbide), its directors and managers (in addition to the civil case for restitution): Ramanathan U *Business and Human Rights: Issues in India* Paper delivered at International Council on Human Rights September 2000. (July 2002) http://www.cleanclothes.org/ftp/beyond_voluntarism.pdf

See the above-mentioned website for a document prepared by the International Council on Human Rights entitled *Beyond Voluntarism* in which the international law responsibility of large corporations is discussed in the light of their human rights responsibilities.


the ground that the enterprise alone has the resource to discover and guard against hazards or dangers and to provide warning against potential hazards. (Emphasis added)

This liability is not based on fault, but arises as a concomitant element of being involved for profit in a hazardous industry.

The restitution granted by the courts is not limited to the payment of damages in fiscal form.\(^6^0\) In (a different case of) *M C Mehta v Union of India*\(^6^1\) the court made an order in terms of which workers who had been laid off in the course of the relocation of a hazardous industry would be entitled to remain in their residences for a period of one and a half years (in addition to the payment of financial restitution).

In the “landmark judgment”\(^6^2\) of *Bodhisattwa Gautam v Subhra Chakraborty*\(^6^3\) the Supreme Court ordered the accused to pay interim damages of a basic monthly amount to a rape victim, pending a final award at the criminal trial,\(^6^4\) holding that fundamental rights are enforceable even against private bodies and individuals.\(^6^5\)

Turning to the enforcement of the tortious rights of the victim, provision for legal aid in India is not effective. In addition to this, India is presumably the only country in the world that penalises civil litigants by imposing a form of taxation on civil actions. Court fees are calculated as a percentage of the amount claimed.\(^6^6\) The quantum of awards in tort cases is usually low.\(^6^7\) Obtaining and enforcing judgments is problematical, time-consuming and prohibitively costly.\(^6^8\)

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\(^6^0\) The issue of punitive damages will be discussed below in Par 3.


\(^6^2\) Mundrathi *Law on Compensation: To Victims of Crime and Abuse of Power* 161.


\(^6^4\) When any shortfall between the final award and the interim amount (from the date of filing the complaint) would also become payable.

\(^6^5\) See Par 3 4 4 (*infra*) where it is shown that the general rule is that fundamental rights are not enforceable against ordinary legal subjects in India, but only against the state.

\(^6^6\) Van As *Regeringsvraei en Element van Regsteganklikheid: 301 et seq: In Kerala court fees are 10% of the amount claimed.


3 2 5 New Zealand

New Zealand’s law of tort is based on English law of tort.69 One act can have criminal as well as civil consequences.70 A criminal conviction is admissible in a civil case as evidence of the fact that the offender committed the offence,71 but does not give rise to any presumption that the offence was committed.72 Where the breach of a statutory duty amounts to both a crime and a tort, a defence in a criminal prosecution will not necessarily amount to a defence against a civil claim.73

The question whether a statutory crime gives rise to a tortious cause of action is answered in accordance with the British case of Lonrho Ltd v Shell Petroleum Co Ltd,74 namely that no civil claim arises from legislation imposing criminal sanctions, except:

- When it is apparent that the obligation was imposed for the benefit of a particular class of individuals; or
- Where the statute creates a public right and a particular member of the public suffers damage different from that suffered by the rest of the public.

New Zealand is unique among the countries in this research, in that its legal dispensation does not permit a rigid distinction to be drawn between the liability of the offender to effect restitution to the victim, on the one hand, and compensation provided by the state, on the other. The Injury Prevention, Rehabilitation, and Compensation Act75 deprives the person who has suffered a personal injury due to an accident – which includes a criminal act – of a tortious claim against the wrongdoer in respect of the injuries suffered.76 The victim thus has only a claim against the Accident Compensation Scheme, which is dealt with in the same way as

69 See Ch 2 Par 2 2 5 (supra).
71 S 23 of the Evidence Amendment Act (No 2) 1980 which abolished the rule in Hollington v F Hewthorn & Co [1943] KB 587 CA.
74 Supra. See Par 3 2 3 (supra). Todd S M D The Law of Torts in New Zealand 333.
75 2001. See s 317. The Injury Prevention, Rehabilitation, and Compensation Act – which regulates the Accident Compensation Scheme – will be discussed in Ch 5 Par 5 5 2 (infra).
76 This provision was already present in s 27 of the Accident Compensation Act of 1982. Todd S M D The Law of Torts in New Zealand 27.
claims in respect of industrial and traffic related injuries. Restitution and compensation are thus linked by legislation. The victim does not, however, lose the tortious claim for damage to property.

3 3 Punitive damages

3 3 1 Introduction

This refers to an amount of money paid to the aggrieved party, not only to compensate the latter for harm suffered, but also to punish the wrongdoer and discourage future violations. This fusion represents a combination of the received functions of private law and public (criminal) law respectively. For this reason the award of punitive damages is frowned upon by many authorities as this constitutes an unwelcome fusion of these criteria.

3 3 2 South Africa

In *Salzmann v Holmes* the same principle was accepted without further consideration. In the case of damages for adultery it has been accepted that a punitive aspect is still present.

In *Fose v Minister of Safety and Security* the right to claim punitive or constitutional damages for the infringement of fundamental rights in the interim Constitution received judicial attention. The matter arose from an alleged assault suffered by the applicant at the hands of the police. In the court a quo the respondent had successfully excepted to the claim for constitutional damages, contending that “an action for damages in the nature of constitutional damages does not exist in law, and

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77 See Ch 2 Par 2 2 2 n 34 (supra) and Par 3 2 2 (infra).
78 Neethling, Potgieter & Visser Deliktereg 8 n 28 and the authorities cited therein.
79 1914 AD 471 480 483.
80 1969 (2) SA 442 A 458 D – E.
81 *Bruwer v Joubert* 1966 (3) SA 334 A 338C – D.
82 1997 (7) BCLR 851 CC.
83 S 10 deals with the person’s right to human dignity, while s 11 deals with the right to freedom and security of the person and s 13 deals with the right to privacy.
84 *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 W per van Schalkwyk J.
an order for payment of damages does not qualify as appropriate relief contemplated in section 7(4)(a) of the interim Constitution.” The Constitutional Court\textsuperscript{85} held that the term constitutional damages refers to a public law remedy existing in addition to normal delictual damages under private law. The aim is to vindicate the fundamental constitutional rights violated, deterring such assaults in future, punishing the state organs involved – thus fulfilling a punitive and preventative role – and also compensating the victim. The normal (delictual) common law remedies address only the last stated objective. The applicant’s contention was that section 7(4)(a) of the interim Constitution\textsuperscript{86} created a public law right to claim constitutional damages. On the facts the court declined to make an award of constitutional damages in addition to the normal delictual awards, though not ruling out the possibility that in future and in appropriate circumstances such an award might find a place in South African law.\textsuperscript{87} Normal damages would sufficiently compensate the applicant and the court doubted that history had proved that an award of constitutional damages would serve much of a punitive effect. In order to be effective (in a punitive and preventative sense) such an award would have to be substantial,\textsuperscript{88} thus granting the victim a benefit in the nature of a windfall over and above normal damages and placing a heavy burden on the fiscus, something undesirable in a financially beleaguered country such as South Africa.

Despite the refusal to extend the existing law in this particular instance, the court stated:

\begin{quote}
If necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.\textsuperscript{89}
\end{quote}

And

\textsuperscript{85} The majority judgment was handed down by Ackermann J. Didcott J, Kriegler J and O’Regan J each gave separate judgments, but all concurred in the final order.

\textsuperscript{86} Supra. S 7(4)(a) reads: “When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in par (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.” (Emphasis added)

\textsuperscript{87} See the discussion of this judgment in Stein A “Constitutional Jurisprudence” 1997 Annual Survey of SA Law 45 79. Although the tendency of the judgment is negative regarding the awarding of constitutional damages generally, the judgment should not be understood to say that constitutional damages cannot ever be awarded.

\textsuperscript{88} In this case the amount claimed for constitutional damages was R200 000, the normal (delictual) damages claimed amounting to R130 000.

\textsuperscript{89} P 862 [19]. The “all important rights” refer to the Bill of Rights.
The South African common law of delict is flexible and under section 35(3) of the interim Constitution should be developed by the courts with 'due regard to the spirit, purport and objects' of Chapter 3.\(^\text{90}\)

The court doubted whether the distinction between private law and public law has much relevance today. The last quotation above and the gist of the judgment show clearly that the court did not have any problem with a delictual (private law) remedy being used on its own to redress a violation of the Bill of Rights.\(^\text{91}\) The court went on, however, to express its disapproval of the use of an order of damages for a punitive purpose.\(^\text{92}\)

The court referred with apparent approval to “the creative fashioning of constitutional remedies which do not sound in money”\(^\text{93}\) in suitable cases, but did not elaborate on the nature of these remedies as the current facts did not require this.

### 3.3.3 Great Britain

Though the granting of punitive or exemplary damages has been the subject of much criticism, the phenomenon survives.\(^\text{94}\) In *Rookes v Barnard*\(^\text{95}\) Lord Devlin stated that exemplary damages constituted an unwarranted fusion of the rules of private and public (criminal) law, but retained them on grounds of precedent, identifying three categories:

- Oppressive, arbitrary or unconstitutional action by servants of the state;
- Wrongful conduct benefiting the defendant beyond the amount of damages payable to the plaintiff; and
- Where authorised by statute.

Restricting the granting of exemplary damages even further, Lord Devlin held that they could be granted only in respect of causes of action for which they had been granted prior to 1964.\(^\text{96}\)

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90. P 882 [58].
91. See also 883 [60-61].
92. P 889 [70].
93. P 890 [74].
94. Murphy J *Street on Torts* 579 – 582. See also *Kralj v McGrath* [1986] 1 All ER 54; Burrows A S *Remedies for Torts and Breach of Contract* (1987) 202 – 211.
95. [1964] AC 1129.
96. The year of the judgment – see previous footnote.
The British Law Commission has recommended that exemplary damages should be
retained – preferring the term *punitive damages* – for cases where the "defendant
deliberately and outrageously disregarded the plaintiff's rights," thus releasing them
from the three rigid categories set out above. The restriction to pre-1964 causes of
action should also be abolished.  

3.3.4 India

The following statement in *M C Mehta v Union of India* indicates the judicial attitude
regarding punitive damages:

> We would also like to point out that the measure of compensation... must be
correlated to the magnitude and capacity of the enterprise because such
compensation must have a deterrent effect. The larger and more prosperous
the enterprise, the greater must be the amount of compensation payable...
(Emphasis added)

The reference to the deterrent effect of the amount of damages awarded indicates
approval of the concept of punitive damages in cases involving large organisations
dealing with hazardous substances. In *M C Mehta v Kamal Nath*, the court stated
that “the object and purpose of such levy of exemplary damages was … to serve as a
deterrent for others not to cause pollution in any manner.” Punitive damages can thus
overlap with the objective in imposing a criminal penalty on the offender. However,
in *Charan Lal v Union of India* the granting of punitive damages was censured:

> It was urged that it is time in order to make damages deterrent the damages
must be computed on the basis of the capacity of a delinquent to pay such
damages... and not on the basis of actual consequences suffered by the
victims. This is an uncertain promise of law. On the basis of evidence
available and on the basis of the principles so far established, it is difficult to
foresee any reasonable possibility of acceptance of this yardstick. And even if

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184.


99 WP 182/1996 (2002.03.15) (Beas River Case) at 8. Full text of case available at:
(July 2002) http://www.elaw.org/resources/regional.asp?region=Asia

100 *M C Mehta v Kamal Nath* (supra) 9:
> Keeping in view all these and the very object underlying the imposition of
imprisonment and fine under the relevant laws to be not only to punish the
individual concerned but also to serve as a deterrent to others to desist
from indulging in such wrongs which we consider to be almost similar to the
purpose and aim of awarding exemplary damages... (Emphasis added)

In this case the amount of the punitive damages imposed by the court was limited as
the defendant had undertaken to do costly work in rectifying the ecological harm
inflicted on the environment.

101 AIR 1990 SC 1480 1545.
it is accepted, there are numerous difficulties of getting that view accepted internationally as a just basis in accordance with law. (Emphasis added)

In *Union Carbide Corporation v Union of India*\(^\text{102}\) the Supreme Court held that this passage was *obiter*. However, the opposite view was held in *Indian Council for Enviro-Legal Action v Union of India and Others.*\(^\text{103}\) The precise status of the law on this point has thus not been settled.

As will be seen below\(^\text{104}\) the granting of punitive damages often coincides with the state being held liable for the acts of its servants.

### 3.3.5 New Zealand

Though New Zealand’s criminal practice is similar to that of England, the limitations created by *Rookes v Barnard*\(^\text{105}\) have expressly been rejected.\(^\text{106}\)

Exemplary damages can be claimed irrespective of whether the Accident Compensation Scheme has compensated the victim or not.\(^\text{107}\) In *Donselaar v Donselaar*\(^\text{108}\) the Court of Appeal held that as the no-fault regime only compensates a victim, it is still possible to claim exemplary damages for personal injuries as

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\(^{102}\) AIR 1992 SC 248 at 261.

\(^{103}\) 3 SCC 212 241 – 246:

We on our part find it difficult to say, with great respect to the learned Chief Justice, that the law declared in Oleum Gas Leak Case is obiter. It does not appear to be unnecessary for the purposes of that case.

\(^{104}\) Par 3 4 4 (*infra*).

\(^{105}\) Supra. See Par 3 3 3 (*supra*). The case stated that exemplary damages can be granted only in the three instances existing prior to 1964:

- Oppressive, arbitrary or unconstitutional action by servants of the state;
- Wrongful conduct benefiting the defendant beyond the amount of compensation payable to the plaintiff; and
- Where authorised by statute.


\(^{107}\) See Ch 5 Par 5 5 2 (*infra*).

\(^{108}\) [1982] 1 NZLR 97. The granting of exemplary damages is criticised by an author attached to the University of Auckland, New Zealand (Beever A “The structure of aggravated and exemplary damages” (2003) 23 *Oxford Journal of Legal Studies* 87) as follows:

Private law has a structure that does not provide for punishment - it is a basic tenet of private law that the claimant cannot expect to be put in a better position than he or she would have been in had he or she not been wronged. The duty that, when breached generates compensatory damages, is owed to a specific claimant; the duty that, when breached leads to exemplary damages, is owed to society as a whole. Thus the liability that gives rise to compensatory damages is not the same as the liability that produces exemplary damages.
exemplary damages arise from the conduct of the wrongdoer (and not from the injury);\(^{109}\) in serious cases it is considered to be appropriate to punish the perpetrator, in addition to compensating the victim. The decision was in part based on the statutory prohibition on claims for personal injury and the perceived inadequacy of existing financial compensation. In *X v Attorney-General*,\(^ {110}\) Williams J said:

> As to the law, in the pithy phrase employed by the learned authors of Hewston and Buckley: Salmond and Hewston on the Law of Torts…: ‘Aggravated damages are given for conduct which shocks the plaintiff; exemplary damages for conduct which shocks the jury.’

The judge continued:\(^ {111}\)

> As to punitive or exemplary damages… it is enough to note that such damages are only awarded to punish the defendants because of the outrageous or contumelious way in which they have conducted themselves in committing the tort for which they are sued… (E)xemplary damages must be ‘fairly and reasonable commensurate with the gravity of the conduct thus condemned.’

Initially, exemplary damages could be claimed only in cases of intentional conduct, but, pursuing precedents set by foreign courts,\(^ {112}\) the New Zealand High Court now also awards exemplary damages in cases where the level of negligence amounts to an extreme disregard for the victim’s safety, warranting condemnation and punishment.\(^ {113}\) However, in *Ellison v L*,\(^ {114}\) the Court of Appeal held:

> We are prepared to accept for the sake of argument, though leaving the matter to be decided on another occasion, that in some cases of negligence exemplary damages may be awarded. But because negligence is an unintentional tort those cases are likely to be rare indeed.

The court made it clear that exemplary damages will be awarded in cases of negligence only where there is an extreme degree of negligence, and not in cases of ordinary negligence.\(^ {115}\)

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109 This principle is acknowledged in s 319(1) of the Injury Prevention, Rehabilitation, and Compensation Act. See Ch 5 Par 5 5 1 (*infra*).

110 (1996) 2 NZLR 623 at 630.

111 Supra 631.


114 (CA 287/96 19 November 1997).

In cases of intentional, unlawful injuries or acts of a sexual nature, courts have awarded exemplary damages.\[116\] One of the largest awards was in a case involving prolonged, serious domestic violence in breach of court orders and undertakings, where the award was $100 000.\[117\]

3 4 Liability of the state

3 4 1 Introduction

Opinions differ as to whether the basis of the state’s liability for the actions of its agents is delictual or constitutional.

3 4 2 South Africa

_Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)\[118\]_ arose from a serious assault suffered at the hands of an individual with a history of assault who had been granted bail on a charge of rape, despite the attempts of interested parties to persuade both police and prosecutor to oppose bail. The plaintiff had instituted action for alleged dereliction of duty by the latter persons. The High Court had granted absolution from the instance on the grounds that _prima facie_ a duty of care had not been proved. This finding was upheld by the Supreme Court of Appeal.\[119\] The Constitutional Court\[120\] overturned the finding of absolution from the instance and referred the matter back to the High Court for trial. This time the plaintiff’s claim met with success.\[121\]

The court considered the plaintiff’s cause of action to be founded solely on delict arising from a breach of duty owed her by the police and/or the prosecutor, providing a causal link was proved between such breach and the injuries suffered.

\[116\] In a case involving sexual misconduct by a doctor, the court awarded $10 000 (_L v Robertson_ [2000] 3 NZLR 499) and in a case involving violent rape, the court awarded $20 000 (_A v M_ [1991] 3 NZLR 229).

\[117\] _M v L_ [1998] 3 NZLR 104.

\[118\] _Carmichele v Minister of Safety and Security and Another_ 2001 10 BCLR 995 (CC) or _2001 4 SA 938 (CC)._\[119\]

\[119\] _Carmichele v Minister of Safety and Security and Another_ 2001 1 SA 489 (SCA).

\[120\] The unanimous judgment was delivered by Ackermann and Goldstone JJ.

\[121\] _Carmichele v Minister of Safety and Security and Another_ 2003 2 SA 656 (C). See discussion below in this paragraph.
The court was unambiguous regarding the fact that there was an obligation on all courts to develop the common law and to do so in keeping with the Constitution:

(UNDER the Constitution there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this Court.\textsuperscript{122}

However, the court emphasised that this duty was not taken lightly:\textsuperscript{123}

Moreover the issue in this case can hardly be described as an insignificant one, lying at an exotic periphery of the law of delict. On the contrary, the case raises issues of considerable importance to the development of the common law consistently with the values of our Constitution.

The court proceeded to consider in terms of the common law the basis of the legal duty to act and concluded that the duty to act was based on reasonableness, namely whether it would be reasonable to expect a party to have taken positive measures to prevent the injury. However, the Constitution now took this test further:\textsuperscript{124}

(IN determining whether there was a legal duty on the police officers to act, Hefer JA in \textit{Minister of Law and Order v Kadir}\textsuperscript{125} referred to weighing and the striking of a balance between the interests of parties and the conflicting interests of the community. This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the ‘spirit, purport and objects of the Bill of Rights’ and relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values... (T)he Bill of Rights entrenches the rights to life,\textsuperscript{126} human dignity\textsuperscript{127} and freedom and security of the person...\textsuperscript{128} It follows that there is a duty imposed on the State and all its organs not to perform any act that infringes these rights. (Emphasis added)

The court went on to adopt the reference in \textit{Osman v United Kingdom}\textsuperscript{129} to “a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”

\textsuperscript{122} P 1006 [34]. This is a paraphrase of s 39(2) of the Constitution.
\textsuperscript{123} P 1015 [59].
\textsuperscript{124} 1009 [43 – 44].
\textsuperscript{125} 1995 1 SA 303 (A) 318 E – H.
\textsuperscript{126} S 11.
\textsuperscript{127} S 10.
\textsuperscript{128} S 12.
\textsuperscript{129} 29 EHHR 245 305 Par 115.
The Constitutional Court thus supported the proposition that the Constitution creates a legal duty of protection vesting in the state to protect individuals not only from the actions of the state’s representatives, but also from the actions of other individuals. The breach of such duty can lead to the state being delictually liable to the victim.

In order to allay fears that this approach could lead to the state being delictually liable in every case where a person suffers the effect of a crime, the court went on to state:130

Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirement of foreseeability and proximity…. A public interest immunity excusing respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and its values.

The court was thus extending a lifeline to the state to protect it from universal liability for the consequences of crime: The requirement of a causal link between the action or inaction on the one hand, and the injury suffered on the other hand, will be used to ensure that cases of state liability are kept in check.

The following comment concerning this judgment sums up its significance:131

(T)he judgment introduces a whole new dimension to the relationship between the state and its individual citizens, significantly strengthening the rights of ordinary people. The judgment is a demonstration both of the court’s independence and of the value to ordinary people of our constitutional democracy.

Subsequent to the decision, it has been quoted in the press as a precedent for similar actions.132

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130  1012 [49].
132  On 27 May 2002 an Eastern Cape shopkeeper, Martin Whitaker, was killed, the killer allegedly being an individual who had previously received a presidential pardon for crimes of violence, despite the fact that the Truth and Reconciliation Commission had refused to grant him amnesty. Wyndham H in “Wyndham’s Week: How responsible is president for death?” Weekend Post 27 July 2002 6 explores the possibility of a similar action being brought against the president. This possibility was also mooted by Tony Leon, head of the opposition party in Parliament. Niland A “Family ‘can sue if suspect convicted’” Weekend Post 27 July 2002 1.
The matter was then heard by the Cape Provincial Division for a decision on whether the state owed Carmichele a duty to exercise reasonable care in the prevention of crime on these particular facts and whether the requisite causal link was present. The court held that that primary significance attached to the relevant constitutional imperatives. On the application of that test, the court found that the state owed Carmichele a legal duty to protect her against the risk of sexual violence perpetrated by the offender. The negligent failure to do so was unlawful.

It then became necessary to determine whether the requirement of causality had been satisfied. The court had to decide whether:

- Causality had to be determined by asking how the particular judicial officer who granted the offender bail would have decided the matter; or
- Causality had to be determined by asking how a reasonable court would have decided the matter.

The court elected to apply the second criterion – the objective approach – deciding that a reasonable court apprised of the full facts would have denied bail. It then had to be determined whether the omissions of the servants of the state were closely enough linked to the harm suffered by Carmichele. Applying the test laid down in *International Shipping Co (Pty) Ltd v Bentley*, the court found that the link between the omissions and the harm was indeed sufficiently close and ordered the payment of damages. An appeal was dismissed by the Supreme Court of Appeal, the latter considering this to be a case where a “public law breach of duty can be transposed into a private law breach leading to an award for damages.”

*Minister of Safety and Security v van Duivenboden* was an appeal from a judgment of the Cape Provincial Division in which the Respondent had successfully sued the Appellant for damages. The matter arose from a shooting incident in which a certain Brooks shot and killed his wife and child, shooting and paralysing the Respondent in the process. Brooks had a record of abusive and threatening behaviour of which the

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133 *Carmichele v Minister of Safety and Security and Another* 2003 2 SA 656 (C).
134 1990 (1) SA 680 (A) 701 where the court applied the *causa sine qua non* test.
135 *Minister of Safety and Security and Another v Carmichele* 2004 3 SA 305 (SCA) 321 D – E.
authorities were aware. In terms of legislation the Commissioner of Police may take steps to have a person declared unfit to possess a firearm if the latter shows, *inter alia*, the intention to kill or injure anyone, or if his or her possession of a firearm is not in the interests of any person as a result of the mental condition or inclination to violence of the possessor of the firearm. For a considerable period before the respondent was shot, various police officers were in possession of information that reflected upon Brooks’ fitness to be in possession of firearms.

The court pointed out that a negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. The existence of a legal duty does not, however, automatically lead to liability. Negligence is also required; the test being whether a reasonable person in the position of the defendant would not only have foreseen the harm, but would also have acted to avert it. Negligence is not inherently unlawful. Where the negligence manifests itself in a positive act it is presumed to be unlawful. The court endorsed the test for negligence propounded in *Kruger v Coetzee* namely, whether a reasonable person in the position of the party concerned would not only have foreseen the harm, but would also have acted to avert it.

The court referred to *Minister van Polisie v Ewels* where it was held that a negligent omission will be regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only evokes moral indignation, but the legal convictions of the community require that it should be regarded as unlawful. This was found to be in keeping with the approach followed in English law. However, the court emphasised that “the question to be determined is one of legal policy, which must perforce be answered against the background of the norms and values of the particular society in which the principle is sought to be applied.” The Constitution serves as the supreme source of the norms and values of South African society. No norms conflicting with the Constitution are valid. The court labelled the Constitution “a system of objective, normative values for legal purposes.” The court also acknowledged that a duty to prevent injury will more readily be placed on

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138 The majority judgment was delivered by Nugent, JA. Howie JA, Heher AJA and Lewis AJA concurred. Marais JA gave a separate, but concurring judgment.
139 1966 2 SA 428 (A) 430 E – F.
140 1975 3 SA 590 (A) 597 A – B.
141 *Ibid* Par 16.
142 *Ibid* Par 17.
the state than on an individual as it is “the very business of a public authority or functionary to serve the interests of others.”\textsuperscript{143} The court went on to say:\textsuperscript{144}

(II) It must also be kept in mind that in the constitutional dispensation of this country the state (acting through its appointed officials) is not always free to remain passive. The state is obliged by the terms of section 7 of the 1996 Constitution not only to respect but also to “protect, promote and fulfil the rights in the Bill of Rights” and section 2 demands that the obligations imposed by the Constitution must be fulfilled.

The public accountability of the state is an important factor in determining whether a duty to prevent injury rests on the state. However, this accountability can be enforced in a variety of ways – enforcement is not limited to granting a delictual claim to the victim:\textsuperscript{145}

The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account. Where the conduct in issue relates to questions of state policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting.

Against this constitutional duty of protection, other factors must be weighed up:\textsuperscript{146}

It might be that in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed.

The court found that there were no external factors militating against the state’s liability and also no means to enforce the state’s liability other than by granting the Respondent a delictual claim.

The court then considered the issue of causation, following the criteria adhered to by the Cape Provincial Division in \textit{Carmichele’s case},\textsuperscript{147} finding a “direct and probable chain of causation between the failure of the police to initiate an enquiry into the fitness of Brooks to possess firearms … and the shooting of the respondent.”\textsuperscript{148}

\textsuperscript{143} Ibid Par 19.  
\textsuperscript{144} Ibid Par 20.  
\textsuperscript{145} Ibid Par 20.  
\textsuperscript{146} Ibid Par 22.  
\textsuperscript{147} Supra.  
\textsuperscript{148} Ibid Par 30.
Marais JA based his concurring judgment purely on the law of delict, finding it unnecessary to refer to the Constitution and the concept of Constitutional accountability: 149

For all their 150 momentous and enormous historic, symbolic, legal and emotional significance and status as the supreme law, in my view, their existence has little bearing upon this particular case...

I hesitate to accept unreservedly that the listing in the Bill of Rights of a right (whether it be a newly accorded right or a longstanding one) necessarily gives rise to the existence of a legal duty to act where none existed previously...

I doubt that the accountability of which section 41(1)(c) of the Constitution speaks ("All spheres of government and all organs of State within each sphere must... provide effective, transparent, accountable and coherent government for the Republic as a whole...") can be regarded as prima facie synonymous with liability under the lex Aquilia for damages for omissions to act.

The South African Law Reform Commission 151 has cited this judgment as authority for the recommendation that the positive duties resting on state officials to act ought to be set out in legislation. While private citizens have the right to remain passive when the constitutional rights of others are threatened, the state has a constitutional duty to act in order to protect such potential victims from harm. The Commission "recommends that positive duties be visibly imposed on public office bearers responsible for the investigation of sexual 152 offence matters by way of the multi-disciplinary protocols." 153 Such protocols can be amended as the situation changes.

The judgment is also seen to "delineate more closely the relationship between the right to freedom from violence as entrenched in section 12(1)(c) of the Constitution and concomitant duties on the state to take steps to protect this right." 154

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149 Ibid Par 2 – 4.
150 Marais JA referred also to the interim Constitution.
152 It is to be borne in mind that the Report deals specifically with sexual offences, but, bearing also in mind that the van Duivenboden case did not deal with sexual offences, it is submitted that the recommendations of the SA Law Reform Commission ought not to be limited to sexual offences, to the exclusion of other offences.
153 Ibid 30.
The Supreme Court of Appeal subsequently granted the claim of a woman raped by a known dangerous criminal and serial rapist who had escaped from police custody in *van Eeden v Minister of Safety and Security*, relying on the Constitutional Court judgment in the *Carmichele* case.

In *Hamilton v Minister of Safety and Security*, the Cape Provincial Division granted a claim to the victim of a shooting offence. The authorities had possessed information showing the perpetrator to be emotionally unsuitable to have a firearm licence. The facts of the case arose in September 1993 – before the passing of the interim Constitution. The court stated:

> To my mind in September 1993 the community’s legal convictions demanded that the police exercise reasonable care in the prevention of violent crimes...

In *Phoebus Apollo Aviation CC v Minister of Safety and Security*, the Constitutional Court found that the rules of vicarious liability apply to the state as they do to any employer. Thus, the state is not *ipso facto* liable for all wrongs committed by its servants:

> It was also contended in argument that the respondent should be held liable for the wrongful acts of the policemen whether they were acting in the course of their employment or not. No convincing argument was, however, advanced to sustain this submission, or to show why the common-law should be developed so as to impose an absolute liability on the State for the conduct of its employees committed dishonestly and in pursuit of their own selfish interest.

In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*, the Constitutional Court held the state liable for damages, emphasising its duty to provide an effective legal remedy (as required by the rule of law and the Constitution) where constitutional rights have been breached by third parties.

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155 2003 1 SA 389 (SCA).
157 741[32].
158 2003 (1) BCLR 14 (CC). In this case police officers abused their official status to steal property which had already been stolen from its owner.
159 17[6].
This case dealt with the unlawful occupation of land.
From the above it is clear that the judiciary is employing the provisions of the Constitution in extending the law of delict to grant the victim of violent crime a remedy against the state; while having its roots in constitutional law, this remedy is administered by applying the rules of delict.

3 4 3 Great Britain

*Hill v Chief Constable of West Yorkshire*\(^{161}\) arose from facts similar to those of *Carmichele*’s case.\(^{162}\) The estate of a victim of the “Yorkshire Ripper” sued the police on the basis of negligence, in that the latter had not properly investigated previous murders by the offender and thus not prevented the murder of the deceased. The claim rested on police failure to control another person to prevent harm to a third party.\(^{163}\) The House of Lords upheld the decision of the court *a quo*\(^{164}\) that the claim disclosed no cause of action. The court found that there was insufficient proximity between the parties to constitute an exception to the general rule that no duty is owed. A duty might arise between a gaoler and a person in the vicinity of a prison who suffered harm due to the escape of a prisoner.\(^{165}\) In this case, however, the deceased was a member of the general public and the risk borne by her was no greater than that borne by any other female member of the public. Policy considerations also played a role in the judgment; reference was made to the vast diversion of police resources to defending such actions and the risk of the police acting in a detrimentally defensive way in investigating crime.\(^{166}\) The facts in *Hill*’s case can be distinguished from those in *Carmichele*’s case: In the latter instance the offender had already been identified and placed in custody and his case record proved that he was a risk to the public.

The European Convention on Human Rights sets out certain rights and freedoms and English courts are authorised to grant remedies to enforce them. In terms of

\(^{161}\) In *Stenning v Home Office* [2002] EWCA Civ 793 the Court of Appeal acknowledged that the prison authorities could be liable in damages to a prisoner for injuries inflicted by a fellow prisoner.

\(^{162}\) See Par 3 4 2 (*supra*).

\(^{163}\) This case was decided before the passing of the Human Rights Act. The decision was thus based on tortious principles.

\(^{164}\) *Hill v Chief Constable of West Yorkshire* [1988] 2 WLR 1049.

\(^{165}\) In *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550, [1999] ICR 752 the Court of Appeal found that a police officer owed a tortious, common law duty of care to another police officer who was being attacked by a prisoner in the former officer’s presence. See also *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; *Palmer v Tees Health Authority and another* 45 BMLR 88.

\(^{166}\) At 63 per Lord Keith.
section 8(2) of the Human Rights Act\textsuperscript{167} an order for damages is included in the relief which may be granted. The door has thus been opened for the state to be held tortiously liable for human rights violations. English law in general – and the law of tort in particular – have entered the arena of human rights.\textsuperscript{168} Two avenues exist regarding the liability of public bodies vis-à-vis persons suffering harm due to the unlawful acts or omissions of the state:

- The common law tort of negligence can be extended; or
- The legislation quoted above can serve as legal foundation.

In \textit{Osman v United Kingdom}\textsuperscript{169} the European Court of Human Rights favoured the former interpretation, but in the later judgment of \textit{Z v United Kingdom}\textsuperscript{170} favoured applying the statute in preference to the common law, holding that the convention imposes a positive duty on the state to provide adequate protection to everyone within its jurisdiction. At the time of \textit{Osman v United Kingdom}, the only basis for holding the police accountable was an action for negligence under the common law, while section 8 of the Human Rights Act\textsuperscript{171} creates a new (legislative) framework for liability. This could stunt the growth of the common law.\textsuperscript{172} Both the \textit{Osman}\textsuperscript{173} and

\begin{itemize}
  \item 1998.
  \item Wright J \textit{Tort and Human Rights 1.}
  \item [1999] 1 FLR 193.
  \item 2001] 2 FCR 246 at [73]. This stance seems to be borne out by the European Court of Human Rights in \textit{E and others v United Kingdom} (App no 33218/96) [2003] 1 FLR 348, [2002] 3 FCR 700 at [115] where the court stated:
    - If taking action at the present time, the applicants might, at least on arguable grounds, have a claim to a duty of care under domestic law, reinforced by the ability under the Human Rights Act 1998 to rely directly on the provisions of the Convention.
  \item 1998.
  \item Wright J 3. Both these cases were quoted with approval in \textit{Carmichele v Minister of Safety and Security and Another.}
  \item In \textit{Barrett v Enfield London BC} [1999] 3 All ER 193 at 199, [2001] 2 AC 550 at 559 560 Lord Browne-Wilkinson explained the problem in applying the reasoning of the court in Osman’s case as follows:
    - In English law the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered. (3) In English law, questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company (see \textit{Caparo Industries Plc v Dickman} [1990] 1 All ER 568, [1990] 2 AC 605), that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of
the Z cases support claims such as that instituted by the victim in the *Carmichele* case, as is borne out by the following quotation from the *Osman* case:174

In the instant case, involving the protection of a child and the right to life and where the damage caused was grave, the requirements of *public policy could not dictate that the police should be immune from liability*. Furthermore, the combined effect of the strict tests of proximity and foreseeability provided limitation enough to prevent untenable cases ever reaching a hearing and to confine liability to those cases where the police have caused serious loss through truly negligent actions. (Emphasis added)

Similarly, in the Z case, it was decided that a contravention of article 13 of the European Convention on Human Rights175 entitled victims of abuses to176 "... an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment and the possibility of obtaining an enforceable award of compensation for the damages suffered thereby."

Even in instances where state liability is held to be founded on tort, there is a divergence of opinion as to whether a broader approach based on general principles ought to be followed, or whether a narrower, casuistic approach is to be followed in determining whether a duty to protect the victim rests on the state. In *Anns and Others v London Borough of Merton*,177 the broader approach was applied:

In order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise...

the damage to the plaintiff and the damage to the public in each particular case.

This case was quoted with approval in *D v East Berkshire Community Health NHS Trust; K and another v Dewsbury Healthcare NHS Trust and another; RK and another v Oldham NHS Trust and another* [2003] EWCA Civ 1151, [2003] 3 FCR 1 [14].

174 *Ibid* 314 Par 312.

175 Which provides that everyone whose rights in terms of the Convention have been breached should have an effective remedy before a national authority.

176 *Ibid* Par 111.

In *Caparo Industries Plc v Dickman and Others*\(^{178}\) the House of Lords returned to the casuistic approach by referring to “a series of decisions... (that) emphasized the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope.” It stated that “in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by law as one of ‘proximity’ or ‘neighbourhood’ and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the party for the benefit of the other.”\(^{179}\)

The court stated:\(^{180}\)

> Whilst recognising, of course, the importance of underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorization of distinct and recognisable situations as guides to the existence of, the scope and the limits of the varied duties of care which the law imposes.

England’s casuistic system of tort grants a remedy only if it fits into an exiting paradigm and thus experiences difficulty in extending the law of tort to cope with the requirements of the victim of crime, and it is not certain whether the new remedy is tortious or constitutional.

### 3.4.4 India

Like any other large organisation, the state is subject to mass tort liability.\(^{181}\)

The Constitution of India provides:\(^{182}\)

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

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\(^{178}\) [1990] 1 All ER 568; [1990] 2 AC 605 (HL) – quoted with approval in *DP and another v United Kingdom*, (App no 38719/97) [2003] 1 FLR 50, [2002] 3 FCR 385 at [95]. In *Murphy v Brentwood District Council* [1990] 2 All ER 908; [1991] 1 AC 398 it was expressly held that the *Anns* case had been wrongly decided.

\(^{179}\) 617 G – 618 C.

\(^{180}\) See previous footnote.

\(^{181}\) See Par 3 2 4 (*supra*).

\(^{182}\) Art 21 of Part III.
Thus the life and personal liberty of the individual are protected. Any law contradicting the fundamental rights will be void.183

The Supreme Court of India has created binding precedents to ensure adherence to the fundamental rights where specific legislation is lacking.184 Fundamental rights violations are invariably concomitant with criminal liability.185

There is a great deal of jurisprudence, both old and new on this issue that indicates that complicity in human rights atrocities may result in individual civil and criminal liability and may also result in collective liability of an organisation.

The liability of the state for criminal actions of its representatives in violation of fundamental rights is influenced by the doctrine of sovereign immunity186 in terms of which the state is not tortiously liable for the acts of its agents when they are performing a sovereign – as opposed to a non-sovereign – function.187 The

183 Article 13 reads:
   (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
   (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

However, the Constitution of India does not have horizontal application [Unlike its SA counterpart. See Ch 1 Par 1 1 (supra)] which would protect individuals from infringement of their fundamental rights by other individuals [See Vidya Verma (Smt) v Dr Shiv Narain 1956 Cri L J 283; A K Gopalan v State of Madras (1950) 2 Mad L J 42]. Any victim of the action of another individual would thus have to seek redress under civil law by way of tort [Chaudhari & Chaturvedi Law and Fundamental Rights 4th ed (1998) 703]. However, this rule was not adhered to in the Supreme Court case of Bodhisattwa Gautam v Subhra Chakraborty (supra). See Par 3 2 4 (supra) where it was stated that fundamental rights are enforceable even against private bodies and individuals, thus the law on this point is obscure.


186 This doctrine is a legacy of India’s history as a British colony.

187 In N Nagendra Rao and Co v State of Andhra Pradesh (1994) 6 SCC 205: AIR 1994 SC 2663, the court distinguished between sovereign and non-sovereign functions as follows:
Constitution\textsuperscript{188} perpetuates this limitation by preserving the legal dispensation as it existed before independence.\textsuperscript{189} However, since 1962 the Supreme Court of India has been developing the right of the individual to sue the state for the criminal acts of its agents, thus eroding the doctrine of sovereign immunity.\textsuperscript{190} The term \textit{constitutional tort} has been coined.\textsuperscript{191} The Constitution\textsuperscript{192} grants the necessary jurisdiction to the Supreme Court.\textsuperscript{193}

Because victims are usually not in a position to enforce their rights, public interest litigation plays a prominent role in India. The Supreme Court allows public-spirited citizens to approach it for relief on behalf of disadvantaged persons. In \textit{M C Mehta v}

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\textsuperscript{188} Art 300.

\textsuperscript{189} The passing of the Government of India Act in 1968 did nothing to eliminate this protection of the state which can trace its origins back to the Charter Act of 1833. In the time of Jawaharlal Nehru the Indian Law Commission proposed a progressive elimination of this limitation on state liability, but legislation to this effect has not been passed.

\textsuperscript{190} Baxi U "A perspective from India" (1990) E/CN.4/Sub 2/1990, 26 July 1990 (July 2002) \url{http://www.law.uu.nl/english/sim/specials/no-12/12-08.pdf}

\textsuperscript{191} Ramanathan U "Compensation and Insurance" 8.

\textsuperscript{192} Article 32 – particularly article 32(2) – of Part III:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of \textit{habeas corpus}, \textit{mandamus}, \textit{prohibition}, \textit{quo warranto} and \textit{certiorari}, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) …

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

\textsuperscript{193} Mundrathi \textit{Law on Compensation: To Victims of Crime and Abuse of Power} 150 – 151. Article 226 grants the same powers to every High Court in the territory in which it exercises jurisdiction.
Union of India the Supreme Court also stated that the poor can seek enforcement of their fundamental rights by writing a letter to a judge.

In Rudul Sah v State of Bihar a person had been kept in custody unlawfully for a number of years. The Supreme Court relied on the Constitution to grant exemplary damages, but held that this was not a substitute for existing civil and criminal remedies, which could still be enforced. On the subject of state liability, the court stated:

One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield.

In Sebastian M Hongray v Union of India the court issued a writ of habeas corpus for the release of two persons illegally kept under military custody. When they were not produced, the court used its contempt jurisdiction to order exemplary costs to be paid to the widows of the missing men. The court also issued a mandamus to the Superintendent of Police to commence a criminal investigation. This trend has been followed by the Supreme Court in various cases, treating the state’s liability for the criminal violation of fundamental rights by its agents as a constitutional matter.

194 Delhi Land Use Case (supra).
195 In Khatri (II) v State of Bihar (1981) 1 SCC 627 630 Par 4 the Supreme Court stated:

Why should the Court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty?

197 Art 32.
198 Ibid Par 13.
201 People’s Union for Democratic Rights v State of Bihar AIR 1987 SC 355, Rudal Sah v State of Bihar (1983) 4 Supreme Court Cases 141; People’s Union for Democratic Rights v Police Commissioner Delhi Police (1983) 4 Supreme Court Cases 731; Saheli v Commissioner of Police, Delhi 1990 1 Supreme Court Cases 422.
202 In State of Maharashtra v Ravikant S Patil (1991) 2 SCC 373: (1991 AIR SCW 871) the award of compensation by the High Court to an awaiting trial prisoner for a violation of the fundamental right under art 21 of the Constitution was upheld. The prisoner had been handcuffed by the police during an investigation and taken through the streets in a procession.
Compensation will be awarded under this heading only “where the infringement is gross and its magnitude is such as to shock the conscience of the court.” In *A S Mittal v State of U P* the court referred to humanitarian considerations which could move a court to a grant of monetary relief in appropriate circumstances.

In *Nilabati Behera v State of Orissa* “monetary amends” as exemplary damages were awarded to the mother of a person who died in police custody. The remedy was stated to be of a public law nature, based on strict liability for contravention of fundamental rights where sovereign immunity does not apply.

The state’s liability in this instance is in fact a form of restitution – not compensation – as the state is being held vicariously and strictly liable for a contravention of fundamental rights by its servants. The Indian Supreme Court thus recognises two distinct forms of state liability:

- **Tortious** liability in cases where sovereign immunity is not applicable; and
- **Constitutional** liability in cases where sovereign immunity would normally apply.

Whereas the cases cited thus far deal with the liability of the state on the basis of abuse of power by its agents, attention has recently been focussed on “culpable inaction” where timely action by agents of the state could have prevented criminal

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204 AIR 1989 SC 1570.


206 *Ibid* Par 9 per Verma J.

207 See also Mundrathi *Law on Compensation: To Victims of Crime and Abuse of Power* 139.

208 This applies also in the case of the “mass tort” discussed above Par 3 2 4 where the state is (usually) not the defendant.

209 Court orders often give the state the right to recoup from the wrongdoer the amount disbursed to the victim. For example in *Arvinder Singh Bagga v State of Uttar Pradesh* 1994 AIR SCW 4148 where the order of the Supreme Court read: “Having awarded such compensation, it will be open to the state to recover such amounts from the concerned Police Officers personally.”

210 “The defence of sovereign immunity being inapplicable and alien to the concept of fundamental rights, there can be no question to such a defence being available in the constitutional remedy.” Per Verma J in *Nilabati Behera v State of Orissa* AIR 1993 SC 1960 1969; 1993 Crl L J 2899 2912.

211 An example of this is the case of *R Gandhi v Union of India* AIR 1989 Mad 205 where
victimisation. In *Sri Lakshmi Agencies v Government of Andhra Pradesh*\(^{212}\) the High Court stated:

> If no action was taken by the concerned individuals in tackling the law and order problem after eruption of violence by private individuals, then the state is liable to pay compensation for their wilful inaction, but the state cannot be made liable in not anticipating the eruption of violence.

There is also a trend of *ex gratia* payments by the state in cases of “militancy.”\(^{213}\)

To summarise, there are three distinct possibilities of state liability arising from criminal acts:

- The *mass tort* where a group of individuals sues a corporation or the state on principles of tort;
- The *constitutional tort* where the state is liable for the criminal acts of its agents on constitutional grounds for (exemplary) damages. This liability is not based on tort; and
- The case of *culpable inactivity* where the state effects an *ex gratia* payment to victim of criminal action due to the neglect of its agents in taking appropriate action.

### 3 4 5 New Zealand

The Bill of Rights Act\(^{214}\) guarantees fundamental freedoms. No specific mention is made of the rights of victims of crime *per se*, the contents of the Act being arranged under the following headings: *Life and the Security of the Person; Democratic and Civil Rights; Non-Discrimination and Minority Rights; and Search, Arrest, and Detention.*

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\(^{213}\) See Ramanathan U “Compensation and Insurance” 10. This occurred in the case of victims of militancy, where the state was unable to treat the incidents as disparate occurrences. The states of Punjab, Undra Pradesh and Assam, for instance, formulated schemes for paying a certain sum to victims of militant violence. Victims of state violence in the same context were not covered by these schemes, and have had to depend on the intervention of courts and the exercise of their discretion.

\(^{214}\) 1990.
Where a fundamental freedom is breached by public servants – invariably a criminal act – a right of action to sue the state for damages arises. This is seen as being a public law remedy rather than one based on tort.\textsuperscript{215} Strict liability principles apply.\textsuperscript{216}

3.5 Comparison

A diagrammatical representation shows the following differences and similarities regarding:

- Claims based on delict/tort;
- Claims for punitive damages; and
- Claims against the state:


\textsuperscript{216} Whithair v Attorney-General [1996] 2 NZLR 45 57.
<table>
<thead>
<tr>
<th></th>
<th>South Africa</th>
<th>Great Britain</th>
<th>India</th>
<th>New Zealand</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Delict/tort</strong></td>
<td>Victim has delictual claim against offender.</td>
<td>Victim has tortious claim against offender.</td>
<td>Victim has tortious claim against offender.</td>
<td>Victim has no tortious claim against offender for personal injuries – only for material losses.</td>
</tr>
<tr>
<td></td>
<td>General principles of delict:</td>
<td>Casuistic system:</td>
<td>British system is followed.</td>
<td>Compensation paid by Accident Compensation Corporation replaces tortious claim for personal injuries.</td>
</tr>
<tr>
<td></td>
<td>Flexible system which can be adjusted to</td>
<td>Victim’s claim to fit into existing paradigms.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>meet changing needs.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Punitive damages</strong></td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>State liability</strong></td>
<td>Constitutional Court creating human rights-based precedents whereby victims can hold state delictually liable for omissions of its servants, tempered by requirement of causality.</td>
<td>Courts creating human rights-based precedents whereby victims can hold state liable for acts of its servants.</td>
<td>Courts creating human rights-based precedents whereby victims can hold state liable for acts of its servants, based on:</td>
<td>Courts creating precedents based on Bill of Rights Act 1990 whereby victims can hold state strictly liable for acts of its servants.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Whether basis is tort or constitutional law is uncertain.</td>
<td>Constitutional grounds (in cases of sovereign acts);</td>
<td>Considered public law, not tortious, remedy.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Culpable inactivity (in cases of non-sovereign acts); or</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Mass tort</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Possibility of <em>ex gratia</em> payments by state setting binding precedent.</td>
<td></td>
</tr>
</tbody>
</table>
In both developed and developing countries, the law of delict/tort does not significantly alleviate the problems of victims of crime. This is corroborated by the fact that all four countries have criminal procedure legislation formalising – with varying degrees of efficacy – the victim’s restitutionary claim.

New Zealand differs most radically from the other three countries in that its comprehensive victim compensation scheme deprives the victim of crime of a tortious claim, except in cases of damage to property. The other three countries grant victims full delictual/tortious claims against perpetrators.

South Africa is the only country where punitive damages have generally not been granted, the Constitutional Court refusing to grant this avenue of redress, though not completely excluding the possibility of its being appropriate in special circumstances. The courts in the other countries remain cautious because punitive damages are seen as the – largely unwelcome – amalgamation of civil and criminal law and grant punitive damages only in unusual circumstances.

In all four countries, constitutional law is increasingly being relied on as a basis for granting the victim of crime a claim against the state, but this development is more vigorous in the countries where an acute problem of criminal victimisation is coupled with the absence of a comprehensive victim compensation scheme, namely South Africa and India. While it is debated whether the victim’s claim against the state is a constitutional or a delictual/tortious remedy, once the claim has been granted the rules of law of delict/tort are applied.

In the next chapter, the restitutionary provisions in the legislation of the four states that form the subject matter of this study will be considered and compared, as well as any other state-driven restitutionary initiatives, in order to show the machinery created by the state to foster restitution to victims of crime and to evaluate the efficacy thereof.

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See Ch 4 Par 4 2 (infra).
Chapter 4

Restitution: Primary legislation, secondary legislation and state-initiated programmes

4 1 Introduction

In addition to its primary legislation dealing with restitution, each of the countries that form part of this study has other enactments in terms of which victims of crime can obtain restitution from offenders. Furthermore, it will be shown that all four countries have certain state-initiated programmes to foster restitution.

In this chapter, the primary and secondary legislation will be analysed and compared, followed by a consideration of state-initiated programmes to benefit victims of crime in order to determine whether sufficient statutory provision is made to grant victims a viable chance of obtaining restitution from those victimising them.

4 2 Primary legislation

4 2 1 South Africa: Criminal Procedure Act

The Criminal Procedure Act\(^1\) has three sections which deal specifically with restitution by the perpetrator. Their subject headings are:

- Section 297: Conditional or unconditional postponement or suspension of sentence, and caution or reprimand;
- Section 300: Court may award compensation where offence causes damage to or loss of property; and
- Section 301: Compensation to innocent purchaser of property unlawfully obtained.

\(^1\) 51 of 1977.
Section 297(1)(a)(i) authorises a court of law to postpone the sentencing of a convicted person for up to five years on certain conditions, regarding inter alia:

- Compensation (restitution);\(^4\)
- “The rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss,”\(^5\)
- “The performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community”\(^6\) (community service); or
- “Any other matter.”\(^7\)

The section goes on to authorise the suspension of the whole or any part of the sentence for up to five years on the same conditions. In the former case the process of sentencing is postponed as a whole, while in the latter case sentence is imposed, but the execution thereof is suspended.

This section thus expressly authorises the following forms of restitution:

- Financial;
- In kind; and
- Community service.\(^11\)

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\(^2\) This is the longest section of the Criminal Procedure Act and only the relevant parts are discussed.

\(^3\) This period can be extended by an appropriate court if the accused has been unable to comply with the condition imposed through circumstances beyond his or her control or for “any other good and sufficient reason.” S 297(7).

\(^4\) S 297(1)(a)(i)(aa). The word “compensation” in the section is used in the sense of “restitution” as the term is used in this work—see Ch 1 Par 1 3 1 (supra).

\(^5\) S 297(1)(a)(i)(bb).

\(^6\) S 297(1)(a)(i)(cc).

\(^7\) S 297(1)(a)(i)(hh).

\(^8\) This period can be extended by an appropriate court if the accused has been unable to comply with the condition imposed through circumstances beyond his or her control or for “any other good and sufficient reason.” S 297(7).

\(^9\) S 297(1)(b).

\(^10\) The other provisions of the section are not relevant to this research.

\(^11\) This can be seen as a form of restitution if one accepts the traditional view that a crime is an act prejudicial to the community (and not just the individual victim): “(C)rimes... are a breach of the public rights and duties, due to the whole community,
The means used to encourage the perpetrator to effect restitution are postponement and suspension of sentence.\textsuperscript{12}

Where the crime is of a less serious nature, the suspension of sentence subject to restitution is deemed desirable. South African courts are generally in favour of sentences of this nature where appropriate.\textsuperscript{13}

Although the section refers to conviction of the accused on any offence, in \textit{S v Stanley}\textsuperscript{14} Olivier J A stated that “there must be a rational and causal connection between the offence and the damage in respect of which the compensation order is made.” In this case an order was made regarding the loss of golf clubs in a stolen car although the accused was not charged with the theft of the golf clubs per se. The court found that the facts satisfied the requirement of a causal link even though the accused had not been convicted of the theft of the golf clubs. To require a more stringent legal requirement “would unduly restrict the use of the salutary sentencing option of a compensatory order.”\textsuperscript{15}

The following principles are relevant in the application of the provisions of section 297:\textsuperscript{16}

\begin{itemize}
\item The objective is to keep the accused out of jail. The conditions of suspension must be neither too onerous nor too lenient;
\item The secondary objective is to remind the accused of the consequences of his or her actions;
\item The third objective is to redress the harm done to the victim. It must not appear as if the perpetrator is paying a fine to the accused;
\end{itemize}

\textsuperscript{12} Suspension occurs much more frequently than postponement. Kriegler \textit{Suid Afrikaanse Strafprosesreg} 5\textsuperscript{th} ed (1993) 732.
\textsuperscript{13} \textit{S v P} 1986 2 SA (C), where the amount stolen was R40 and the accused only 18 years old, earning R30 per month; \textit{S v Masongo} 1972 4 SA 46 (T); \textit{S v Mila} 1973 3 SA 942 (O); \textit{S v Magkise} 1973 2 SA 493 (O); \textit{S v Charlie} 1976 2 SA 596 (A); \textit{S v Edward} 1978 1 SA 317 (NC); \textit{S v Rolef} 1990 1 SA 145 (C).
\textsuperscript{14} \textit{S v Stanley} 1996 2 SACR 570 (A) 574C.
\textsuperscript{15} Ibid 574C. See also du Toit, de Jager, Paizes, Skeen & van der Merwe \textit{Commentary on the Criminal Procedure Act} (1998) 28 – 45 and the review by Cowling M of \textit{S v Stanley} in 1997 (10) \textit{SA Journal of Criminal Justice} 219 where the case is discussed with approval.
\textsuperscript{16} Kriegler \textit{Suid-Afrikaanse Strafprosesreg} 735 – 736; \textit{S v Tshondeni, S v Vilakazi} 1971 4 SA 79 (T).
The trial must not become a mere dispute regarding *quantum*. The accused must be aware that the court is ascertaining the extent of the loss and must be given the opportunity to adduce evidence in this regard;\(^{17}\)

*Quantum* is determined by balancing three factors:

- The *extent* of the loss;
- The *ability* of the perpetrator to effect restitution; and
- The *culpability* of the perpetrator.\(^{18}\)

The assessment of the loss takes place after conviction. The loss suffered is not limited to financial loss, but includes non-patrimonial harm such as pain and suffering;

The award is not limited to the amount of the magistrate’s criminal (fine) jurisdiction;\(^{19}\)

The ability of the accused to pay must be borne in mind. Payment in instalments may be ordered. An award less than the actual amount of the loss may also be ordered to keep the accused from serving a prison sentence which would result in the victim receiving no restitution whatsoever;

Although the *quantum* of the amount for pain and suffering is discretionary, the court must indicate on what basis it is assessed. An agreement between the victim and the accused in this respect is perfectly acceptable; and

It is acceptable that restitution be ordered on its own without a fine or other penalty being imposed.

In Kriegler’s view the wording of section 297(1)(a)(i)(aa) allows for restitution to be made not only to the victim, but also to dependants of the victim. The writer says that the same cannot be said for paragraph (bb) where the “benefit or service” has to be rendered “to the person aggrieved.”\(^{20}\) This matter has not been decided by our courts, but it could be argued that “the person aggrieved” can be interpreted to include dependants of the direct victim, pursuant to the reasoning that they are also aggrieved. This would be in harmony with the common law which grants a delictual claim to the dependant. Especially in the light of what has just been said regarding paragraph (aa), it is difficult to see why the legislature would have wanted a different interpretation to be placed on paragraph (bb).

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\(^{17}\) This privilege is not specifically mentioned regarding the victim, but s 300(2) (see below) states that for the determination of quantum “…the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.”

\(^{18}\) Krugel W F & Terblanche S S *Praktiese Vonnisoplegging* 916.

\(^{19}\) S 300 imposes certain limitations in this regard. See Par 4 2 1 2 (*infra*).

\(^{20}\) Kriegler *Suid-Afrikaanse Strafprosesreg* 736.
Paragraph (hh), which refers to conditions regarding “any other matter”, is extremely broad. However, it must be interpreted in the spirit of the remainder of the section. Thus there must be a logical and causal link between the condition imposed and the crime.\footnote{S v Enslin 1960 1 SA 882 (N).}

The case of \textit{S v Noordien}\footnote{1990 2 SACR 172 (C).} deserves special attention. The accused who had been convicted of culpable homicide following the killing of his lover, was ordered to create a trust for the maintenance of her eight and a half year old son by her ex-husband (not the accused). Conradie J imposed a sentence of six years’ imprisonment suspended for five years with the usual conditions regarding the commission of a similar offence during the period of suspension. One of the reasons for the suspension of the sentence was the fact that imprisoning the accused would take away his ability to effect restitution.\footnote{255 (i - j).} The further conditions imposed by the court contained full instructions regarding the structuring of the trust.\footnote{As a (rare) example of the degree to which a court can cater for the needs of the victim where the court fully applies its mind to the task, the full conditions are quoted: (2)(a) …pay into the trust account of his attorney of record, Mr Norman Vivian Snitcher, an amount of R36 000 by not later than 30 September 1990; (b) forthwith instruct his attorney of record at his, the accused’s, own expense to create a trust in favour of Gareth Michael Sharp, the beneficiary, to be known as the Michael Sharp trust, the deed of establishment of which is to contain the following provisions: (i) instituting the said attorney as trustee with power of assumption; (ii) empowering the trustee in his discretion to invest and reinvest all or any of the money in the trust in a unit trust or in a registered deposit receiving institution, or in a participating mortgage bond; (iii) that the trustee shall pay to Mrs Brigitte Shürstedt-Kochems on behalf of the beneficiary, or to the custodian for the time being, so much as the said Mrs Shürstedt-Kochems or the custodian shall request for the support and comfort of the beneficiary, but subject to the trustee’s right to refuse to make what in his opinion is an excessive payment; (iv) dispensing with the need to provide security to the Master of the Supreme Court for the trustee’s administration of the trust; (v) providing for the keeping of accounts of the trust and the auditing thereof; (vi) providing for the remuneration of the trustee; (vii) providing for the termination of the trust and for the payment to the beneficiary when he reaches the age of 21 of whatever capital and income remain in the trust; (viii) providing for payment of the costs of drawing the trust deed by the accused and for the registration thereof at the accused’s expense; (ix) providing for acceptance of the benefits of the trust by the beneficiary’s guardian;}{24} This decision
represents a creative, effective and thus welcome application of the discretion extended to the courts in terms of section 297(1)(a)(i)(hh).

In the unreported case of S v Cyril Salzwebel, Darryl Ivor Lottering, Charl Justin Lottering and Barry Quintin Lottering\(^{25}\) the Supreme Court of Appeal\(^{26}\) considered the judgment of the court a quo following a violent, racially motivated, attack leading to the death of one of the victims. The offenders were sentenced to ten years imprisonment, suspended subject to certain conditions. The State appealed against the leniency of the sentence, as all the accused would be able to avoid imprisonment by complying with the conditions of suspension. One of the conditions\(^{27}\) of suspension was that each of the respondents was to pay an amount of R3 000 into the Guardian’s Fund in monthly instalments of R50 on behalf of the minor children of the deceased. The Supreme Court of Appeal, having considered the purpose of sentence, imposed a sentence of twelve years imprisonment on each of the accused. Two years of their sentences were suspended on various conditions, one of which was that the payments into the Guardian’s Fund continue\(^{28}\) (during their period of incarceration) and be completed. Thus the imposition of a period of (unsuspended) imprisonment does not necessarily preclude restitution.\(^{29}\)

Section 297 can be used effectively in cases where the perpetrator has sufficient means, as was shown in Noordien’s case.\(^{30}\) The full order in the latter case\(^{31}\) shows the degree of effort which the court was willing to put into formulating an appropriate sentence and its concern for the plight of the (indirect) victim of the crime. It also

\[(3) \text{pay the costs of drawing the trust deed and of having it registered in terms of Act 32 of 1944;}\]
\[(4) \text{instruct his said attorney to:}\]
\[(a) \text{certify to the Registrar of this Court that payment of the amount of R36 000 to the said attorney has been made;}\]
\[(b) \text{deliver to the Registrar of this Court a copy of the registered trust deed not later than 31 July 1990.}\]

\(^{25}\) Supreme Court of Appeal Case number: 273/98
\(^{26}\) Website of the Law Faculty of the University of the Witwatersrand (April 2002) http://wwwserver.law.wits.ac.za/scrtappeal/1999/salzwedel.pdf
\(^{27}\) In terms of s 297(1)(b) read with s 297(1)(a)(i)(aa) of the Criminal Procedure Act.
\(^{28}\) R1 350 of the R3 000 had already been paid by each offender.
\(^{29}\) It will be seen below that courts are reluctant to impose sentences of restitution under s 300 unless it is clear that the offender has the financial means to satisfy his or her obligations. The words of Mahomed C J imply that it is adequate if the offenders can find some means (other than current assets or future earnings) to settle their indebtedness: “It should be within their capacity to pay or cause to be paid what are relatively small instalments even while they are to be incarcerated with effect from the date of this order.” (Emphasis added).
\(^{30}\) Supra.
\(^{31}\) See footnote 24 (supra).
shows that the section can be applied constructively in the form in which it is drafted. The efficacy of the section is greatly enhanced by the fact that non-compliance with the conditions regarding restitution will be visited by the expectation of a severe sentence in cases where sentencing has been suspended\textsuperscript{32} or the execution of the suspended sentence where sentence has already been imposed.\textsuperscript{33}

The fact that section 297 allows the court to order payment of “compensation”\textsuperscript{34} and not just restitution for patrimonial losses – as is the case with section 300 – makes it a useful tool. Its application provides the offender with a powerful stimulus to raise the necessary finances to comply with the conditions of the court order.\textsuperscript{35}

Sentences in terms of this section are very scarce. The main reason for this is the lack of means of offenders.\textsuperscript{36}

\textbf{4 2 1 2 Section 300}

Section 300(1) authorises a court to order a person who has been convicted of a crime causing damage to or the loss of property (including money) belonging to another person, to effect restitution to the victim for the damage or loss suffered. Application must be made by the injured party or by the prosecutor acting on his or her instructions. In \textit{S v Msiza}\textsuperscript{37} a court made an order in terms of section 300 without application being made by the complainant. The court of appeal declared the order invalid because of this circumstance, coupled with the fact that the complainant had not given evidence regarding his damages and the offender had not been afforded the opportunity to lead evidence or make representations regarding the amount of the damages. The \textit{audi alteram partem} rule had thus not been applied.

The amount of restitution ordered in terms of this section by a regional or district magistrates’ court may not exceed the limits published by the Minister in the Government Gazette from time to time.\textsuperscript{38} In \textit{S v Brand}\textsuperscript{39} the amount of the order

\begin{itemize}
\item \textsuperscript{32} S 297(1)(a)(i).
\item \textsuperscript{33} S 297(b).
\item \textsuperscript{34} Which includes awards for non-patrimonial harm such as pain and suffering.
\item \textsuperscript{35} Van Dokkum N “Compensation for victims of sexual crimes” 286; \textit{S v Edward} 1978 1 SA 317 (NC).
\item \textsuperscript{36} Kriegler \textit{Suid-Afrikaanse Strafprosesreg} 755.
\item \textsuperscript{37} 1979 4 SA 473 (T). See also \textit{S v Sigwadi & Another} [2005] JOL 14657 (Tk).
\item \textsuperscript{38} Currently the amounts are fixed at R300 000 for regional courts and R60 000 for district courts respectively in terms of Government Notice No R1410 of 30 October 1998.
\end{itemize}
made in a regional court was R240 675.24, thus exceeding the fine jurisdiction of the court (at the time). The High Court decided that this was unacceptable without a formal waiver from the victim and quashed the award. The court referred to the fact that an order in terms of section 300 has the status of a civil judgment and, in effect, required a waiver of part of the claim to reduce it to the stipulated amount (R200 000)\(^{40}\) in accordance with the rules of abandonment in the law of civil procedure.

Section 300(2) states that the court may determine the *quantum* of the award by referring to the evidence at the trial or further evidence given orally or upon affidavit.

Such an order will have the effect of a civil judgment of the district court of the area where the trial took place,\(^{41}\) irrespective of whether made by a district court, a regional court or a high court. The means to enforce a civil district court judgment are by issuing a writ of execution in terms of which the deputy sheriff is mandated to attach the property of the execution debtor and to sell it by public auction.\(^{42}\) The alternative is to take steps against the debtor in order to obtain settlement of the debt by means of instalments.\(^{43}\) While sections 65(A) – (M) of the Magistrates’ Courts Act\(^{44}\) create the possibility of civil imprisonment for non-compliance with an order for the payment of a debt in instalments, the Constitutional Court has ruled that the imposition of civil imprisonment for non-payment of a debt in terms of the above-mentioned sections is unconstitutional.\(^{45}\) In *S v Medell*\(^{46}\) the accused had been sentenced by a magistrate’s court to thirty months’ correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act. An order in terms of section 300 was included in the sentence. The accused was poor and had no attachable assets. The effect of non-payment would have been the imprisonment of the accused. The High Court would not allow this, setting aside the section 300 order:

In the light of the Constitutional Court’s decision, the beneficiary of a compensation order would not be able to obtain an order for the civil imprisonment of a defaulting judgment debtor. It follows that the criminal

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39 1998 1 SACR 296 (C).
40 At the time of the decision the maximum amount for an order in terms of s 300 was fixed at R200 000.
41 S 300(3).
42 S 66 of the Magistrates’ Courts Act 32 of 1944.
43 S 65(A) - 65(D) of the Magistrates’ Courts Act (*supra*).
44 Supra.
45 Coetzee v Government of the Republic of SA, Matiso and Others v Officer Commanding, Port Elizabeth Prison and Others 1995 10 BCLR 1382 (CC).
46 1997 1 SACR 682 (C).
courts should not be used (or abused) as a mechanism for the enforcement of judgment debts. Incarceration for failure to pay a compensation order per se in effect amounts to civil imprisonment for debt and as such cannot be permitted.\textsuperscript{47}

This leads to the anomaly that the accused who might have been spared a prison sentence\textsuperscript{48} and received an order in terms of section 300, can no longer be imprisoned for not complying with such an order, thus escaping imprisonment altogether. Should a court however impose a suspended sentence – of the whole or even merely part of the sentence – with restitution as a condition of suspension in terms of section 297(1)(a)(i)(aa), the offender could be incarcerated in the event of non-payment.\textsuperscript{49}

Section 300 creates a quasi-delictual right\textsuperscript{50} without reference to the law of delict, but in the context of the law of criminal procedure. This fusion is entrenched by the fact that the right is enforced in the manner of a civil judgment. An alternative dispensation was to be found in the repealed section 15 of the Stock Theft Act\textsuperscript{51} which provided for the imposition of a compensatory fine. The juristic footing of this form of redress differed from section 300 insofar as it was in the nature of a fine and the perpetrator could be imprisoned in the case of non-payment, while section 300 has the effect of a civil judgment (with no chance of imprisonment). In the case of an order under the Stock Theft Act, the injured party could still institute a civil claim in addition to the order granted against the offender by the criminal court.\textsuperscript{52}

\textsuperscript{47} Ibid 687j.

\textsuperscript{48} Although an order in terms of s 300 is not a punishment and can accompany other punishment, it is conceivable that a court might be more lenient towards an accused in circumstances where an order of restitution appears to be viable.

\textsuperscript{49} See S v Cyril Salzwibel, Darryl Ivor Lottering, Charl Justin Lottering and Barry Quintin Lottering (supra).

\textsuperscript{50} Following the classification found in Justinian’s \textit{Institutiones} 3 13 2 where obligations which do not fit into the usual \textit{ex contractu} or \textit{ex delicto/maleficio} groupings are categorised as being \textit{quasi ex contractu} or \textit{quasi ex delicto}. Gaius’s \textit{Digesta} 44.7.1 pr eschews this terminology, stating: \textit{obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex varis causarum figuris.} Van der Merwe & Olivier (van der Merwe N J & Olivier P J J \textit{Die Onregmatige Daad in die Suid-Afrikaanse Reg} (1989) 4) agree with the latter classification. Boberg (Boberg P Q R \textit{The Law of Delict Volume I} (1984) 16 – 17) views the use of the term “quasi-delictual” as being “at one time fashionable.” Further research regarding this aspect of the law of delict may be found in: Pauw P C (1979) 42 \textit{THRHR} 240. Whatever the precise juridical nature of the rights obtained by the victim are, the fact remains that they are enforceable in terms of the law of civil procedure and not criminal procedure.

\textsuperscript{51} 57 of 1959. The current version of s 15 of the Act orders the court to direct the attention of the victim, if present in court, to the provisions of section 300 of the Criminal Procedure Act and limits a magistrate’s court to an award not exceeding R20 000.

\textsuperscript{52} \textit{Dhltidhla v Ndhlovu} 1949 NAC (N – E) 131; \textit{Mioti v Ziyendani} 1951 NAC (S) 307.
In terms of section 300(4) a court may order that money taken from the accused upon arrest be used to pay the award to the injured party.

The victim has a period of sixty days within which to renounce the award in writing and to effect repayment of any amount already received. Should the victim not renounce the order, he or she will not be entitled to sue the accused for any other form of restitution in a civil court. Thus an order in terms of section 300 takes the place of any other civil legal remedy that the injured party might have against the accused.53

The term injured person as used in this section is strictly interpreted. If stolen goods are sold to an innocent purchaser and vindicated in his or her hands, the victim cannot receive restitution in terms of section 300,54 but will have to rely on the normal delictual action or on an order in terms of section 301.55 Following the same rationale, where a stolen ox was exchanged for goods, the court could not order that the goods be handed back to the innocent third party in terms of section 300.56

Where a section 300 order was made against a married woman and there was no allegation that she was married out of community of property with exclusion of the marital power, the court presumed the marriage to be in community of property and ruled the section 300 order invalid due to the fact that she had no locus standi in judicio to defend herself against the making of the order without her husband’s assistance.57

As section 300 provides exclusively for “damage to or loss of property (including money) belonging to some other person”58 an amount cannot be awarded in terms of this section for bodily or non-patrimonial harm (for example defamation) or for interference with a personal right to performance which the injured party had against another person (for example, in the case of theft of a thing which has yet to be

53 Visser P J & Potgieter J M Law of Damages 138 – 139. This is probably based on the delictual rule that a plaintiff has only one chance to claim damages arising from a single cause of action and this is seen as a civil claim, which borne out by the fact that enforcement takes a civil law route. A restitution order under indigenous African law is thus also forfeited upon the acceptance of a s 300 order. Sitole v Kumalo 1938 NAC (N & T) 257; Tusini v Ngubane 1948 NAC (N & T) 17.
54 S v Zulu 1972 4 SA 464 (N); S v Mapedi 1965 2 SA 314 (G).
55 See Par 4 2 1 3 (infra).
56 R v Noko 1949 3 SA 456 (T).
57 S v Wildschut 1983 4 SA 604 (T).
58 S 300(1).
delivered to the victim). In short, the injured party has to be the owner of the property or money.\textsuperscript{59} Section 297 does not have this limitation.

Section 300 should be limited to cases where the quantification of damages is relatively straightforward. However, van Heerden\textsuperscript{60} points out that the court’s powers are not taken away merely by the presence of the victim’s negligence in the causation of damage. During cross-examination the court has objective insight into the facts and the court has the authority to hear further evidence to assess the facts. The section is inappropriate in motor vehicle accident cases because a criminal court will not be in a position to determine the contributory negligence of the injured party. For this the private law system with its extensive battery of pre-trial pleadings should be utilised to clarify the issues between the parties.\textsuperscript{61}

The fact that the injured party has been indemnified by insurance, does not preclude an order in terms of section 300, although this fact will have a bearing on the order.\textsuperscript{62}

In \textit{S v Tlame}\textsuperscript{63} it was held that an order in terms of section 300 can be made only if there is a conviction. In \textit{R v Booysen}\textsuperscript{64} it was held that the order could not be made where the accused had been discharged with a caution or reprimand as this has the effect of an acquittal. To circumvent this perceived restriction, the court imposed a nominal fine. This interpretation is open to criticism. The compensation order is made after conviction and before sentence. At this stage it is thus by no means certain what \textit{sentence} the court will impose, thus it is not known whether the court will settle for a caution or reprimand.\textsuperscript{65}

The constitutionality of depriving the victim of a (full) delictual claim in cases where he or she accepts the terms of the section 300 order is open to debate if one considers the terms of section 9(1) of the Constitution.\textsuperscript{66} Allowing the victim both

\textsuperscript{59} See \textit{S v Liberty Shipping} 1982 4 SA 281 (D) where the court refused to grant an order in favour of the Department of Customs and Excise for the fraudulent non-payment of customs duty; Kriegler \textit{Suid-Afrikaanse Strafprosesreg} 756.

\textsuperscript{60} Van Heerden “Artikel 300 van Wet 51 van 1977” 1984 (1) \textit{De Jure} 192 196.

\textsuperscript{61} \textit{R v Faburichi} 1958 3 SA 802 (R); \textit{S v du Plessis} 1969 1 SA 72 (N); \textit{S v Makaula} 1970 4 SA 580 (E); \textit{S v Dunywa} 1973 3 SA 869 (E); \textit{S v Lombaard} 1997 1 SACR 80 (T).

\textsuperscript{62} \textit{R v van Zyl} 1928 PH H61.

\textsuperscript{63} 1982 4 SA 319 (B).

\textsuperscript{64} 1920 EDL 390.

\textsuperscript{65} Van Heerden “Artikel 300 van Wet 51 van 1977” 196 – 197.

\textsuperscript{66} See the discussion of \textit{Tsotetsi v Mutual and Federal Insurance Co Ltd} 1996 11 BCLR 1439 (CC) in Ch 5 Par 5 2 15 (\textit{infra}).
claims would not necessarily grant him or her double damages: The private law claim could be a means to top up the shortfall in the section 300 order.67

4 2 1 3 Section 301

Section 301 deals with cases where an accused is convicted of theft (or other crime concerning the unlawful acquisition of property) and has sold the property to a bona fide purchaser. The bona fide purchaser can apply to court (on restitution of the property to its owner) for a refund of the purchase price (or lesser amount). This refund is paid from the money taken from the accused at arrest. In cases falling outside the strict terms of the section, the purchaser will have to rely on private law remedies against the accused – examples are: Where the accused had no money with him or her at the time of arrest, where the purchaser is in pari delicto with the accused or where the purchaser had not bought the item directly from the accused.68

While section 301 limits the amount of restitution to the amount actually paid for the stolen goods, it does not deprive the injured party of his or her civil law rights against the thief.

4 2 1 4 Other sections

Finally, section 34 (the return of stolen goods to the owner), section 28 (award of damages as a result of a wrongful search) and section 185A (protective custody for witnesses and/or their families who have been victimised or threatened) round out the provisions of the Criminal Procedure Act relevant to victims of crime.

Section 34 directs the judicial officer to make one of the following orders at the conclusion of the proceedings:

- An article is returned to the person from whom it was seized; or
- The article is returned to any other person entitled thereto; or
- The article is forfeited to the state if nobody is entitled to it, or if the person who is entitled to it cannot be traced or is unknown.

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67 See penultimate footnote.
68 Kriegler Suid-Afrikaanse Strafprosesreg 758 – 759.
69 Contra s 300 Par 4 2 1 2 (supra)
The court may hear additional evidence, whether oral or by affidavit. If the judicial officer does not make an order at the conclusion of the proceedings, any judicial officer of the court in question may make the order at a later stage. An order may be suspended pending appeal or review. In terms of section 34(5) read with section 31(2) of the Act, registered notice must be given at the last known address of the person concerned and failure to take delivery of the property within thirty days will lead to forfeiture to the state.

Section 34(6) allows the presiding officer to make an order at any stage of the proceedings if circumstances so require or where the trial cannot be disposed of. The reference to the person entitled to the goods does not entail a finding by the court on the issue of ownership. The principles of _in pari delicto potior est conditio defendentis_ and _ex turpi causa non oritur actio_ are not applicable.70 Thus the court basically weighs up whether the person to whom restitution is to be effected has a stronger claim than the accused. Should this choice be unfeasible, forfeiture of the goods to the state becomes a possibility.

Goods in respect of which an insurer has compensated the victim will be given to the insurer in terms of the usual contractual relationship between insurer and insured. Unless the court is informed of the fact of insurance, however, the order will be in favour of the complainant who will _prima facie_ be seen as being entitled to the stolen items and the matter will be a civil one between insurer and insured.71

Where money stolen has been paid into an official bank account by the clerk of the court,72 the court will order payment of an equivalent amount to the victim. The legislator did not intend that the same notes and coins be returned and the same reasoning applies in the case of stolen negotiable instruments.73 The same rules ought to apply in the case where the thief paid the money into a private bank account. The wording of the section makes it clear that the passing of an order is obligatory and application is not required. These circumstances favour the victim. Section 360 of the previous, repealed Criminal Procedure Act74 gave the court a discretion in making the order and usually it was made only if specifically applied for

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70 _S v Campbell_ 1985 2 SA 612 (SWA).
71 _Hiemstra V G Suid-Afrikaanse Strafprosesreg_ 50.
72 In terms of s 33(3)(a) which deals with the safekeeping of items required as evidence in court.
73 _Hiemstra V G Suid-AfrikaanseStrafprosesreg_ 52.
74 56 of 1955.
by the complainant. Thus the rights of the victim enjoy slightly greater protection in terms of the current Act. It is difficult to find the motivation for the fact that section 300 imposes less favourable requirements from the victim’s point of view than those imposed by section 34: As seen in the discussion of section 300, a restitution order has to be applied for specifically and the court has a discretion in its granting. The fact that the order can be made before conclusion of the trial where circumstances warrant this, can be used to the benefit of the victim who may urgently need the property. The wording of the section makes it clear that its provisions are subject to the provisions of other laws regarding the forfeiture of goods. An example of this is the Prevention of Organised Crime Act which authorises a court to make a confiscation order to deprive a convicted person of the proceeds of crime, though, as will be seen below, a confiscation order does not preclude restitution from taking place. The section does not apply to goods bought with stolen money. In this case the complainant is left with only a civil, delictual claim.

4.2.2 Great Britain: Powers of Criminal Courts (Sentencing) Act

The Power of the Criminal Courts Act gave criminal courts the power to order an offender to pay restitution to the victim. This power was later extended and the courts now have an obligation to make such an order, thus once again bringing into question the distinction between crime and tort. In the words of an English writer:

In this respect the distinction between crime and tort has become more blurred, though since tort originated in trespass, which to our eyes was in medieval times quasi-criminal, tort may only be returning to its roots.

Lately the state has taken upon itself (through the courts) the responsibility to effect restitution by the offender to the victim in the same legislation that deals with criminal procedure. However, in a criminal case the primary objective is punitive – restitution
being merely an ancillary function – while in a civil case the primary objective is restitution, this distinction is, however, not absolute in the light of restorative justice’s placing of the emphasis on the victim in the criminal justice system.

Throughout history English law has shown an awareness of the need for restitution for victims of crime and the legislative measures dealing therewith have become better structured.

This Act has various provisions dealing with *reparation*, which can be equated with restitution, but, the term does not bear exactly the same meaning throughout the Act.

### 4 2 2 1 Deferment of sentence

A court may defer the passing of sentence to enable it to consider the behaviour of the offender in the interim and any change in his or her circumstances. The period of deferment is limited to six months and the consent of the offender is required. One of the aspects that the court is allowed to consider, is the making of *reparation* by the offender.

This legislation does not allow for the possibility of including a *condition* of restitution in the deferment of sentence. The only way to do this is by passing a compensation (restitution) order in conjunction with, or instead of, sentence. Deferment takes place before sentence is passed. An offender has a legitimate expectation that a custodial sentence will *not* be passed where he or she has complied with the expectations of the deferring court; by the same token, a custodial sentence may be passed if the offender has made no significant effort to comply with the conditions of deferment: “(I)f the offender successfully completes the period of deferment (by complying with the court’s requirements regarding restitution), he or she can certainly

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83 Rogers W V H Winfield and Jolowicz on Tort 10.
84 See Ch 2 Par 2 3 (supra).
85 The Act consolidates various items of repealed legislation which together had the same effect.
86 S 1. Previously dealt with in substantially the same terms in s 1 of the Powers of Criminal Courts Act 1973 (as amended).
87 “Reparation” is not defined in this s, but s 73 deals with “reparation orders” made against young offenders under 18 years of age. In the latter section reparation specifically excludes the payment of compensation (restitution) and includes reparation made to the victim or the community at large, though in s 23(2)(a), which also deals with youthful offenders, mention is made of “financial or other reparation”. Thus it would be reasonable to assume that “reparation” could take a pecuniary or non-pecuniary form for the purposes of deferment of sentence.
88 See Par 4 2 2 5 (infra).
89 In terms of s 130(1).
expect not to be sent to prison (a conditional discharge or a probation order is a more usual result).” This can be seen as a resurrection of an idea of the 1980s where reparation was used in mitigation of sentence. Deferment of sentence allows the court to ask for an undertaking from the offender to “tap into reparation and restorative justice schemes, where they exist, at the pre-sentence stage… The activities carried out and the progress shown would act as a mitigating factor in any subsequent sentence passed.”

It is the court’s duty to make clear – preferably in writing – to the offender what purposes the court has in mind with the deferment and what is expected of him or her during the period of deferment. Failure to clarify this can lead to an appeal. Deferment must also not be used by a court simply because it is unable to decide on sentence.

In terms of the Magistrates’ Association Guidelines, voluntary restitution is a mitigating factor in determining sentence.

However, the value of reparation (as opposed to other forms of conduct or change in the circumstances of the offender) is not very highly rated when deferment of sentence is considered by the courts – probably in keeping with the principle that the offender ought not to be allowed to buy his or her way out of prison:

The purpose of deferment is therefore to enable the court to take into account the defendant’s conduct after conviction or any change in circumstances and then only if it is in the interest of justice to exercise the power. It will, one imagines, seldom be in the interests of justice to stipulate that the conduct required is reparation by the defendant. (Emphasis added)

Possibly the lack of effectiveness of deferment in England could be remedied by the adoption of provisions similar to those found in Section 297 of the South African

93 In 1992 the Magistrates’ Association, a voluntary body of which most magistrates are members, published its sentencing guidelines which consist mainly of an offence-by-offence consideration of sentencing. See Wasik M & Turner A “Sentencing Guidelines for Magistrates” 1993 Criminal Law Review 345.
94 As well as “low value” and “impulsive action.” Examples of “plus” factors are “large amount”, “planned”, “sophisticated”, “vulnerable victim” and “adult involving children”.
95 R v George (1983) 6 Cr App R (S) 211 per Lord Lane CJ.
Criminal Procedure Act\textsuperscript{97} where a court may impose various reparation options as a condition in deferring sentence for up to five years.

\textbf{4 2 2 2 Youth offender contracts\textsuperscript{98}}

These are agreements between the offender and the Youth Offender Panel\textsuperscript{99} containing stipulations for the prevention of re-offending. They may include terms dealing with financial or other reparation made by the offender, not only to the victim of the offence, but also to someone “affected by the offence.”\textsuperscript{100} However, redress does not end there: Mediation between victim and offender and unpaid work in the community are forms of redress that are also mooted, amongst other measures calculated to prevent re-offending, for example, the attendance by the offender at a school or place of work, or the staying away from specified places or persons. The victim’s consent is required for any measure which may involve him or her.\textsuperscript{101}

\textbf{4 2 2 3 Reparation orders for young offenders\textsuperscript{102}}

These orders require reparation\textsuperscript{103} in non-pecuniary form. The court has to give reasons for not making a reparation order where empowered to do so.\textsuperscript{104} While the interests of the young offender are protected by the limitations placed on the order,\textsuperscript{105} the consent of the victim\textsuperscript{106} is required before a reparation order can be made. The court is also required to consider the attitude of the victim when complying with this section.\textsuperscript{107}

The emphasis is on the rehabilitation of youthful offenders rather than on the rights of victims. A reparation order may not accompany a custodial sentence and may be made only after consideration of a written report by a probation officer, a social worker or a member of a youth offending team. The court is obliged to explain the effect of the order to the offender. Failure to comply with the terms of the reparation

\textsuperscript{97} See Par 4 2 1 1 (\textit{supra}).
\textsuperscript{98} Ss 23 – 27 deal with youth offender contracts.
\textsuperscript{99} Established in terms of s 21.
\textsuperscript{100} S 23(2)(a).
\textsuperscript{101} S 23(4).
\textsuperscript{102} Ch VI of the Act deals with reparation orders for offenders under the age of 18.
\textsuperscript{103} To a specified victim or to the community at large.
\textsuperscript{104} S 73(8).
\textsuperscript{105} S 74 prohibits, for example, interference with the offender’s attendance at an institution of learning.
\textsuperscript{106} S 74(1)(b).
\textsuperscript{107} S 73(5)(b).
order can lead to the sentencing of the offender as if the reparation order had never been made.\textsuperscript{108}

However, the introduction of restorative justice provisions has not significantly reduced re-offending by young offenders.\textsuperscript{109}

\textbf{4 2 2 4 Suspended sentences}\textsuperscript{110}

A court passing a sentence of imprisonment of not more than two years may order that the sentence shall not take effect unless, during a period specified in the order, the offender commits in Great Britain another offence punishable with imprisonment.\textsuperscript{111} The period specified may not be shorter than one year or longer than two years and the court \textit{must} consider the making of a compensation (restitution) order as well.\textsuperscript{112} The Act does not provide for conditions of suspension (other than the commission of a subsequent offence). Fines can be imposed in addition to the suspended sentence but the fine itself cannot be suspended. As a court has no authority to stipulate restitution as a condition of suspension, the punitive nature of a suspended sentence acting as a means to encourage the offender to comply with the requirements of restitution are not available. As a court may impose a suspended sentence only if it can be justified by the exceptional circumstances of the case,\textsuperscript{113} suspended sentences are rarely passed.\textsuperscript{114}

\textbf{4 2 2 5 Compensation (restitution) orders}

The power to grant these orders was given to English criminal courts in the early 1970s.\textsuperscript{115} In response to public opinion this power was extended by further legislation preceding\textsuperscript{116} the Power of Criminal Courts (Sentencing) Act.

\textsuperscript{108} Schedule 8 of the Act.
\textsuperscript{110} Ch V of the Act.
\textsuperscript{111} S 118.
\textsuperscript{112} S 118(5).
\textsuperscript{113} S 118 4(b).
\textsuperscript{114} United Kingdom Bar Council September 2003 Joint Response to the Independent Inquiry into alternatives to Custody by the Bar Council Law Reform Committee and the Criminal Bar Association (December 2003) http://www.barcouncil.org.uk/document.asp?documentid=2323&languageid=1
\textsuperscript{115} By s 35 of the Powers of Criminal Courts Act 1973. See Rogers W V H \textit{Winfield and Jolowicz on Tort} 10.
The imposition of a compensation (restitution) order is an **obligation** when sentencing an offender.\(^{117}\) A compensation (restitution) order can be the sole order on conviction,\(^{118}\) except in cases where a minimum penalty is prescribed by law.\(^{119}\) The order may be made both for the offence of which the accused is convicted as well as for any other offence taken into consideration when determining sentence.

Application is not required. The Act requires a court to give reasons if it refrains from making a compensation (restitution) order in circumstances where it is empowered to do so.\(^{120}\) The victim has the opportunity to set out the loss suffered in his or her Victim Personal Statement.\(^{121}\) In cases where the imposition of both a fine and a compensation (restitution) order is considered to be appropriate, the court is directed to give precedence to the compensation (restitution) order if the offender's means are insufficient to support both.\(^{122}\)

Regarding the nature of the loss for which restitution is payable, the Act specifically includes **personal injury** under **loss or damage**.\(^{123}\) Where stolen goods are recovered undamaged, their value should not be the subject matter of an order.\(^{124}\) The Act places limitations on the amount of the order that can be made by magistrates' courts,\(^{125}\) but the Crown Court is not subject to such limitations.

The beneficiary need not be the complainant. The requirements are satisfied as long as **someone** suffered a "personal injury, loss or damage."

\(^{116}\) Criminal Justice Act 1998, ss 104 – 105. Even before the current Act was passed, s 35 of the Powers of Criminal Courts Act 1973 (as amended) already had the same wording as the current s 130(1). Ss 130 – 134 set out the main provisions of the law concerning restitution. See also Miers D 1989 *Criminal Law Review* 32.

\(^{117}\) Ss 130(1) and 130(3).

\(^{118}\) S 130(1): “A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may… make an order…” (Emphasis added)

\(^{119}\) S 130(2) ibid.

\(^{120}\) S 130(3). In *R v Ingram* [2002] EWCA Crim 672 at [12] the court said that “…there is a presumption that an order should be made.”

\(^{121}\) See Par 4 3 2 4 (infra).

\(^{122}\) S 130(12).

\(^{123}\) S 130(1)(a).

\(^{124}\) R v Hier 62 Cr App R 233; R v Boardman 9 Cr App R (S) 74; [1975] AC 421.

\(^{125}\) Powers of Criminal Court (Sentencing) Act 2000, s 131(1).
The court must not make an order unless the liability of the offender has been clearly proved. In *R v Kneeshaw* the accused had pleaded guilty to the burglary of a house, admitting to the theft of some property, though denying the theft of certain rings. In this case the court required the victim to make application and to show as a matter of evidence that the rings were in fact the subject matter of the theft.

When determining the *quantum* of the order the court is directed to consider “any evidence and representations that are made by or on behalf of the accused or the prosecutor.” The court may not “simply pluck a figure out of the air.” When there is doubt as to the precise *quantum*, the court must make an order in respect of only that amount which has been proved, leaving the victim to claim the balance by civil action. The court considers the means of the accused when determining the amount payable and should not impose an order in excess thereof. The general rule adopted is that the offender should be able to settle the amount within a period of two years, without further offending to achieve this. Where two or more persons are convicted of an offence, the wealthier may be ordered to pay more than the poorer. The parties are liable jointly and severally and if only one of them has any resources, it is appropriate to make the order against him or her alone.

In *R v Martin* the offender had assaulted the victim and had been ordered to pay restitution of £200 in addition to serving a year in prison. On appeal the order was challenged on two grounds:

- Firstly, that it was improper to make a compensation (restitution) order which would necessitate the offender’s selling her car. This was alleged to be inappropriate, as the car had not had any connection with the assault. The

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127 Supra.
128 S 130(4).
129 *R v Swann and Webster* 6 Cr App R (S) 22 at 23. See also *R v Vivian* 68 Cr App R 53. (These decisions were made in terms of s 35 of the Powers of Criminal Courts Act 1973.)
130 Barnard D *The Criminal Court in Action* 254.
133 *R v Bagga* (1989) 11 Cr App R (S) 497.
Court of Appeal rejected this argument, the only criterion being that the value of the asset should be sufficient to satisfy the order, and

- Secondly, that it would be incorrect to combine a compensation (restitution) order with a lengthy period of imprisonment. The Court of Appeal rejected this argument as well, the only relevant criterion being the ability of the offender to effect restitution.

The victim does not lose his or her civil claim when a compensation (restitution) order is granted, but the civil claim will be reduced by any amount actually received in terms of the compensation (restitution) order.

The order is enforced as if it were a fine imposed by a magistrates' court (even if imposed by a Crown Court). A quasi-tortious right is created without reference to the law of tort, but in the context of the law of criminal procedure. The enforcement of the right also takes a public law route.

When a Crown Court makes an order, it may allow time for payment and order payment in instalments. If the offender defaults, the magistrates' court has the power to commit him or her to a period in custody.

The rights of the beneficiary are protected by sections 6(5) and 6(6) of the Proceeds of Crime Act. If the court makes both a confiscation order and a compensation order, the only criterion being that the value of the asset should be sufficient to satisfy the order.

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136 See also R v Chambers (1981) 3 Cr App R (S) 318; R v Stewart (1983) 5 Cr App R (S) 320.
137 See also R v Normanton [2003] EWCA Crim 959.
138 S 134.
139 In terms of s 76(1) of the Magistrates’ Courts Act 1980, “…where default is made in paying a sum adjudged to be paid by a conviction or order of a magistrates’ court, the court may issue a warrant of distress for the purpose of levying the sum or issue a warrant committing the defaulter to prison.”
140 See Par 4 2 1 2 and n 50 (supra).
141 S 141.
142 As determined by Schedule 4 of the Magistrates’ Courts Act 1980. Schedule 4 lays down periods of imprisonment which can be imposed by magistrates’ courts in the event of non-payment of fines or orders.
143 2002. The Act creates an Assets Recovery Agency and provides for the making of a confiscation order against an offender who has benefited from the proceeds of crime. See Attorney General v Blake (Jonathan Cape Ltd Third Party) [2001] 1 AC 268 where the House of Lords held that an injunction restraining the defendant from receiving royalties (the defendant was a spy currently living in Russia who had written a book concerning his criminal activities) was interlocutory in character. In the absence of any realistic prospect of the defendant facing criminal proceedings and a (final) confiscation order being made, the interlocutory order would not be valid as it would have the practical effect of being a final order which would be contrary to the intention of the legislature.
(restitution) order against the same person in the same proceedings, and he or she does not have sufficient means to satisfy both orders, the court must direct that the shortfall in the compensation (restitution) order be paid out of the sum recovered under the confiscation order. The court thus reduces the confiscation order to accommodate the compensation (restitution) order.

Research shows that victims are more interested in restitution (even partial) from the offender, than severe sentences: Compensation (restitution) orders form part of what was described in 1998 as a “reawakening interest in the victims of crime” and intended “…as a convenient and rapid means of avoiding the expense of resorting to civil litigation when the criminal clearly has the means which would enable compensation to be paid.”

The fact that a compensation (restitution) order can be the sole order on conviction is possibly an indication of the blurring of the line between crime and tort. Is this an example of restitution taking the place of punishment? This is a vexed question, but the generally preferred the view is that the victim’s needs are of importance and

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144 Shapland J “Victims, the Criminal Justice System and Compensation” (1984) 24 British Journal of Crime 131 144 – 145:
Victims were, again, not particularly punitive either in the sentence that they would wish their offenders to get or in their reactions to the sentence that those offenders who were convicted finally received. Their suggested sentences seemed to be very much within those of current English sentencing practice. They did however, feel that compensation for the offender should have played a much larger part than in fact it did (only 20 per cent of victims whose offenders were sentenced received compensation orders and many of these were for small amounts). These reactions on sentencing are not just confined to the victims of violent crimes, as in our study. The recent British Crime Survey… has also suggested that: “victims’ recommendations are broadly in line with present practice”, and that compensation is important. How, then, did victims view state compensation and compensation by offenders? They regarded compensation not as mainly a matter of money or of financial assistance (charitable or otherwise), but rather as making a statement about the offence, the victim and the position that the criminal justice system was prepared to give to the victim. Even the element of payment in proportion to suffering and loss was subordinated to this symbolic function. This was most obvious in victims’ enthusiasm for compensation from offenders as part of the sentence of the court. (Emphasis added)


146 Per Lord Scarman in R v Inwood (1974) 60 Cr App R 70 73.

that a compensation (restitution) order is not a penalty.\textsuperscript{148} English courts frown on the idea of the offender buying his or her way out of prison by means of restitution. Restitution is seen as a mitigating factor.\textsuperscript{149} The fact that current legislation makes provision for the passing of a compensation (restitution) order on its own without punishment, however, revives the spirit of the ancient law where restitution was seen as the primary means of dealing with the offender.

If the offender is acquitted of the offence from which the loss or injury flowed, but is convicted of some other offence related to the subject matter, a compensation (restitution) order cannot be made.\textsuperscript{150} This supplies another reason why restitution cannot take the place of punishment completely.

Factors indicative of the high regard for the rights of the victim to restitution, are:\textsuperscript{151}

- Application does not have to be made for compensation (restitution) orders;
- Courts are obliged to consider making compensation (restitution) orders;
- Compensation (restitution) orders are given precedence over fines;
- Compensation (restitution) orders are enforced as if they were fines and offenders face the ultimate possibility of custody in the event of non-compliance; and
- Compensation (restitution) orders take precedence over confiscation orders where the means of the offender are insufficient to satisfy both.

This procedure is not suitable where there are complex questions concerning quantification of loss. Due to the reduced onus of proof in civil cases and the fact that the offender might have an insurance policy indemnifying him or her against civil liability, a civil action may offer the victim certain advantages. The possibility of claiming exemplary damages could be another one of these advantages.

\textsuperscript{148} See, for example s 154(5) of the Criminal Justice Act 2003 which states that a “‘fine’ includes a pecuniary penalty but does not include a pecuniary forfeiture or pecuniary compensation.” There are, however, instances of compensation orders being made to remind the offender of his wrongdoing: Wasik “The place of compensation in the penal system” 1978 Criminal Law Review 599.

\textsuperscript{149} R v Copley (1979) 1 Cr App R (S) 55; R v Barney (1989) 11 Cr App R (S) 448.

\textsuperscript{150} R v Derby 12 Cr App R (S) 502; R v Halliwell 12 Cr App R (S) 692. See also Archbold Criminal Pleading, Evidence and Practice 5 – 415.

\textsuperscript{151} In R v McInerney; R v Keating [2002] EWCA Crim 3003 [2003] 1 All ER 1089 [2003] 1 Cr App Rep 627 [51] the Court of Appeal emphasised the importance of courts’ ordering restitution wherever appropriate.
Though a compensation (restitution) order should be made only where the offender’s responsibility is clear, civil liability is not a legal precondition. A compensation (restitution) order can be made even if there is no civil liability. Application of this legislation can thus give rise to a remedy where none previously existed under civil law.

4 2 2 6 Responsibility of parent or guardian to pay compensation

A parent or guardian can be held responsible to comply with a compensation (restitution) order made against a young offender. The criteria for the making of the order are that “the court is of the opinion that the case would best be met by the … making of such an order…” In such cases the court has no option but to order that the parent or guardian pay the amount, unless they cannot be found or it would be unreasonable. Reference to the financial means of the offender will be interpreted as relating to the means of the parent or guardian. Where a local authority has parental responsibility for the young offender, the former will bear this obligation in place of the parent or guardian.

This dispensation is reminiscent of the early Anglo-Saxon concept of the collective guilt of the offender’s kin.

4 2 2 7 Restitution orders in respect of stolen goods

Restitution orders in respect of stolen goods can be combined with deferment of sentence. The concept of (stolen) goods includes money and things severed from

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153 S 137.
154 S 137(1)(b).
155 S 137(1)(b)(i).
156 S 137(1)(b)(ii).
157 In s 130(11).
158 S 138(1)(b).
159 Ss 137(8) – 137(9).
160 See Ch 2 Par 2 2 3 (supra).
161 Ss 148 – 149. S 28 of the Theft Act 1968 granted courts the power to order restitution by means of the delivery of stolen goods or goods bought with the proceeds of the disposal thereof. This s has been repealed in Schedule 12 of the Powers of Criminal Courts (Sentencing) Act. The Powers of Criminal Courts Act (now repealed) did not make reference to restitution orders and the matter was dealt with solely by the Theft Act.
land by theft.\textsuperscript{163} The crime of theft itself does not have to be proved – an offence of which theft is the gist\textsuperscript{164} is adequate, but it has to be proved beyond dispute that the goods were stolen from the victim or that they represent the proceeds of their disposal.\textsuperscript{165} Anyone having possession of the stolen goods may be ordered to effect restitution, not just the convicted person. Where the stolen goods have been disposed of, goods obtained from their disposal may be substituted. Similarly, money taken from the offender at the time of apprehension may be paid to the victim in lieu of the goods.

The purchase price of stolen goods must be refunded to a \textit{bona fide} purchaser out of money taken from the accused on apprehension.\textsuperscript{166} The Act extends the same protection to the person who has \textit{bona fide} lent money with the stolen goods as security. The court has a discretion as the order is not obligatory. Specific application by the person entitled to restitution is not required.\textsuperscript{167} A total of 621 restitution orders were made in 1996.\textsuperscript{168}

\section*{4 2 2 8 The Powers of Criminal Courts (Sentencing) Act in practice}

The following statement underwrites the efficacy of the legislation discussed:\textsuperscript{169}

Furthermore, even in serious cases the existence of the Criminal Injuries Compensation Scheme and the power of the criminal court to make direct compensation orders against defendants nowadays do much to remove the incentive to bring a civil action. If reported cases are anything to go by, actions for trespass to the person tend to arise from allegedly improper police conduct and to serve more as a vindication of personal liberty than as a vehicle for compensatory harm.

\begin{itemize}
  \item \textsuperscript{162} S 148(2).
  \item \textsuperscript{163} Immovable property cannot be stolen, though “once severed from the reality” a thing becomes a chattel and capable of theft: Hunt P M A \textit{SA Criminal law and procedure} (1970) 564.
  \item \textsuperscript{164} For example, handling dishonestly obtained goods. In \textit{R v Webbe; R v Mitchell; R v Davis; R v Moore; R v White} [2001] EWCA Crim 1217 [32] it was stated “that a court passing sentence in handling cases should always have in mind the power to make restitution orders under ss 148 and 149 of the \textit{Powers of Criminal Courts (Sentencing) Act 2000}.”
  \item \textsuperscript{165} \textit{R v Ferguson} [1970] 2 All ER 820, 54 Cr App R 410; \textit{R v Thibault} (1983) 76 Cr App R 201.
  \item \textsuperscript{166} S 148(4).
  \item \textsuperscript{167} The only exception is s 148(2)(b) which deals with the restitution of goods acquired from the proceeds of stolen goods, where application is mentioned as a requirement. Under s 35 of the \textit{Powers of Criminal Courts Act 1973}. Select Committee on Home Affairs \textit{Third Report}: (September 2002)
  \url{http://www.publications.parliament.uk/pa/cm199798/cmselect/cmhaff/486/486ap05.htm}
  \item \textsuperscript{169} Rogers W V H \textit{Winfield and Jolowicz on tort} 53 – 54.
\end{itemize}
The following factors indicate that this legislation is highly refined:

- A victim of crime does not have to choose between a compensation (restitution) order and a civil law claim;
- In most – almost all – cases a victim does not specifically have to apply for a compensation (restitution) order;
- A compensation (restitution) order can be enforced in the same way as a fine (and does not merely have the force of a civil judgment);
- A compensation (restitution) order can cover a broad spectrum of harm, not being limited to patrimonial loss;
- The Act has a battery of legislation dealing with restitution by young offenders, including holding the guardian liable;
- Courts are instructed to favour a compensation (restitution) order above a fine where the offender has limited means; and
- The benefits of a compensation (restitution) order are not restricted to the owner of goods, but are extended to those whose personal rights have suffered.

While it is not suggested that statistics provide a conclusive answer to questions regarding the efficacy of any legal enactment, the availability of statistical records goes a certain way to indicating what impact this Act has had in practice. Statistics\(^\text{170}\) of compensation (restitution) orders passed in the *magistrates’ courts* show the following trends:

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\(^{170}\) All statistics below found in or based on information found in Criminal Statistics in England and Wales 1999 (2001 Cm 5001) Table 7.20, unless otherwise indicated.
Compensation (restitution) orders in *violent crimes* have thus dropped from 21,700 in 1989 to around 10,000 per year. This represents a percentage of 43% of all compensation (restitution) orders, the average amount of violent crime compensation (restitution) orders being £218. The percentage of offenders (not just violent crimes) ordered to pay restitution as a percentage of all offenders sentenced during the period is 14%. The average amount for *all* compensation (restitution) orders was £156.

Statistics for compensation (restitution) orders in the *Crown Court* are:
This also represents a sharp decline. The average amount of compensation (restitution) orders in violent crimes was £491. Just 7% of offenders sentenced in the relevant period (not just violent crimes) were ordered to make restitution. The average amount for all compensation (restitution) orders was £1 338.

The decline in compensation (restitution) orders is exacerbated by the fact that the total number of violent crimes recorded in England and Wales rose from 176 962 in 1989 to 376 579 in 1999. In cases where there is a vast discrepancy between the means of the offender and the severity of the loss, the courts will usually not make a compensation (restitution) order. The reason for the actual decline in compensation (restitution) orders could be the efficacy of the Criminal Injuries Compensation Scheme combined with the lack of means of offenders.

Reeves and Mulley point out that compensation (restitution) orders have the “hidden danger” of leading to further frustration and dissatisfaction of victims because the orders are often not complied with, due to factors such as offenders’ lack of means. In order to address this problem the undertaking is made in the White Paper, Criminal Justice: The Way Ahead, that the government will consider instituting a victim’s fund to ensure that victims receive immediate payment in terms of compensation (restitution) orders; the court would then pursue defaulting criminals.

172 Miers D Compensation for personal victimisation in the UK 8.
173 See Ch 5 Par 5 3 2 (infra) and Jones M A Textbook on torts 472 quoting Veitch and Miers (1975) 38 MLR 139 152 where it is shown that there is a trend of academic thought that the Criminal Injuries Compensation Scheme has superseded the law of tort.
175 CM5074 published February 2001. See Par 4 3 2 1 (infra).
A distinction is made between cases when a fine is imposed and cases when no fine is imposed:

- When a fine is imposed

A court may order the whole (or part) of a fine to be applied:

- To defray the expenses properly incurred in the prosecution;
- As restitution to any person for any loss or injury caused by the offence as would be recoverable in a civil court;
- As restitution in terms of the Fatal Accidents Act; and/or
- As restitution to any bona fide purchaser of illegally procured property which has been vindicated.

The imposition of a fine is a sine qua non for making an order. Orders are discretionary; courts are not obliged to make restitutionary orders. The victim does not have to make special application. Actual payment is suspended subject to the finalisation of an appeal. Amounts awarded are taken into account in subsequent civil suits.

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(T)he procedure should not be complicated and should, to the utmost extent possible, ensure a fair deal to the poorer sections of the community.

Although the Code represents a codification of the law, there has been significant judicial interpretation of it in the century since its forerunner was promulgated. The two Codes have much in common and, where relevant, case law dealing with the Code of 1898 will be quoted in the discussion of the current Code. The Code of Criminal Procedure was extensively amended by the Criminal Procedure Code (Amendment) Act 45 of 1978.

177 S 357 of the Code of Criminal Procedure.
178 S 357(1).
179 See Ch 5 Par 5 4 1 (infra).
180 Mundrathi Law on Compensation: To Victims of Crime and Abuse of Power 88. Subs 357(3) (infra) deals with compensation when no fine is imposed.
181 S 357(2).
182 S 357(5).
Whether the reference\textsuperscript{183} to “the expenses properly incurred in the prosecution” refers to the complainant’s expenses or the state’s expenses, is not clear.\textsuperscript{184} As the section refers specifically to the fine being applied to defray expenses it would seem to be pointless to make the order in favour of the prosecution, as the state would in any case receive the fine in the normal course of events. On the other hand, Mundrathi maintains that it does, in fact, refer to the state’s expenses and proceeds to criticise this provision resoundingly, as “substantial justice to the victim gives way to unjust gain of the oppressor.”\textsuperscript{185} Should the former interpretation be the correct one, circumstances could arise where a third party (not the complainant) could benefit from the order if the third party could prove that he or she had properly incurred valid expenses in bringing the accused to justice.\textsuperscript{186}

As an amount may be awarded for any “loss or injury caused by the offence,”\textsuperscript{187} the court’s power is not limited to patrimonial losses. The requirement that the claim must be “recoverable by such person in a civil court,”\textsuperscript{188} combines civil and criminal law.\textsuperscript{189} The section does not seek to create a new causa for the victim, but seeks to create a public law avenue to enforce an existing private law right.\textsuperscript{190} The victim does not have to choose between the remedy under the Code and the remedy under civil law.

- **When no fine is imposed**

Courts may impose free-standing restitution orders in cases where no fine is imposed.\textsuperscript{191} However,\textsuperscript{192} the award is recoverable as if it were a fine.\textsuperscript{193} A conviction

\textsuperscript{183} See above [S 357(1)(a)].
\textsuperscript{184} See s 359 discussed below where similar wording is used and specifically linked to the complainant (who may not be a victim of the crime).
\textsuperscript{185} Mundrathi \textit{Law on Compensation: To Victims of Crime and Abuse of Power} 89. No authorities are cited by the author.
\textsuperscript{186} As the wording does not refer specifically to the complainant’s being the beneficiary of the order.
\textsuperscript{187} S 357(1)(b).
\textsuperscript{188} S 357(1)(b).
\textsuperscript{189} On the one hand, the section refers to a fine; on the other hand, the claim is equated with a civil claim, presumably insofar as cause of action and the calculation of quantum are concerned. A fine is thus applied to settle a civil claim.
\textsuperscript{190} S 357(1)(c) which authorises a court to apply the fine to pay an amount to persons entitled to restitution in terms of the Fatal Accidents Act extends a remedy to enforce a claim created by a different statute.
\textsuperscript{191} S 357(3).
\textsuperscript{192} In terms of s 431 which forms part of Ch XXXII, dealing with “Execution, Suspension, Remission and Commutation of Sentences.”
is a condition precedent for the order,\textsuperscript{194} which can be made in favour only of the person who suffered loss or injury due to the commission of the offence.\textsuperscript{195} The court's jurisdiction is not limited to the amount of the fine. Thus the effect is that the court's discretion as to \textit{quantum} is limited to the amount of the fine where a fine is imposed, while it is not limited in this way where no fine is imposed. Also in the former case the categories of restitution are explicitly identified, while in the latter case the term \textit{compensation} is used without reference to the categories stipulated.\textsuperscript{196}

When a substantial sentence of imprisonment is imposed, Indian courts are not likely to impose heavy fines unless the circumstances are exceptional.\textsuperscript{197} In \textit{Guruswami v State of Tamil Nadu}\textsuperscript{198} the court tempered its reluctance to impose restitutionary fines concomitant with sentences of imprisonment, holding that in a case of murder the dependants of the deceased should receive proper restitution.\textsuperscript{199}

Subordinate legislation passed in certain states\textsuperscript{200} makes the awarding of the fine (or part thereof) in terms of this section \textit{obligatory} (as opposed to discretionary) where the victim belongs to “Scheduled Castes or Scheduled Tribes,” unless the perpetrator also belongs to “Scheduled Castes or Scheduled Tribes.”\textsuperscript{201}

\textsuperscript{193} Mundrathi \textit{Law on Compensation: To Victims of Crime and Abuse of Power} 88. Subs (3) was not in the original Code and was added because the existing legislation allowed for compensation to be ordered only where a fine was imposed. The drafters of the Code in its current form felt that this was unacceptable. Subs 357(3) was added on recommendation of the Indian Law Commission, made in its 41\textsuperscript{st} report.


\textsuperscript{196} In s 357(1)(a) – (d).The reason for this distinction is probably to be found in the fact that s 357(3) dates from a later period than s 357(1).

\textsuperscript{197} For example where justified by the magnitude of the offence, the pecuniary circumstances of the accused, the motive of the accused and the pecuniary gain that the offender obtained from the commission of the offence – Mundrathi \textit{Law on Compensation: To Victims of Crime and Abuse of Power} 144. Mohammed Sah and others \textit{v Emperor} AIR 1934 Lah 519; Palaniappa Gounder \textit{v State of Tamil Nadu} AIR 1977 SC 1323 (Pars 11 – 13); Adamji \textit{v State of Bombay} A 1952 SC 1229; Sarwan Singh \textit{v State of Punjab} 1978 4 SCC 111.

\textsuperscript{198} 1979 3 SCC 799.

\textsuperscript{199} The Supreme Court reduced a sentence of death to a sentence of life imprisonment, ordering the offender to pay a fine which would be paid over to the dependants of the deceased. When deciding the quantum of the fine, the court must bear in mind that - in terms of s 357(1) - the claimant receives restitution only if the fine is “recovered.”


\textsuperscript{201} Definitions whereof are to be found in Articles 366(24) and 366(25) of the Constitution of India.
Basu\textsuperscript{202} supports the liberal exercise of these powers in the interests of justice. Ramanathan\textsuperscript{203} is of the opinion that because the criminal trial has tended to focus on the crime and the criminal, and reparation has been treated essentially as a civil remedy, this discretion vested in the courts has been under-utilised. The link required between conviction and restitution also reduces the effectiveness of this provision for the victim.

Mundrathi states:\textsuperscript{204}

\begin{quote}
Section 357... does not provide speedy or sure relief... There is a case to provide interim or immediate compensation to the victim on the lines of Motor Accident claim cases,\textsuperscript{205} so as to meet the immediate needs caused due to the loss.
\end{quote}

Problems surrounding the application of these provisions are:\textsuperscript{206}

- Offenders usually lack the means to effect restitution;
- Courts are reluctant to use criminal law proceedings for purposes of reparation;
- Courts are reluctant to impose fines together with substantial sentences of imprisonment;
- Maximum fines laid down by legislation are no longer realistic; and
- The requirement of a conviction subjects reparation to the vagaries of criminal law.

In theory no fine should be paid over to the state while the victim remains uncompensated, provided the latter’s right to compensation meets the stated requirements, of which the foremost is that the recipient must have a valid civil claim. However, the theory is seldom put into practice.

\textsuperscript{203} Ramanathan U \textit{“Compensation and Insurance”} 5.
\textsuperscript{204} Mundrathi \textit{Law on Compensation: To Victims of Crime and Abuse of Power} 89.
\textsuperscript{205} See Ch 5 Par 5 4 1 2.
\textsuperscript{206} Mundrathi \textit{Law on Compensation: To Victims of Crime and Abuse of Power} 147 – 148.
4 2 3 2  **Order to pay costs in non-cognisable**\(^207\) **cases**

A restitution order can be made against a convicted offender in favour of the complainant for “the cost incurred by him in the prosecution.”\(^208\) This covers costs for matters incidental to the trial and not losses suffered as a result of the commission of the offence itself.\(^209\) Conviction of the offender is a prerequisite for the making of the order. Failure to pay the amount ordered can lead to imprisonment of up to thirty days.

This is another\(^210\) instance where a criminal procedural form of enforcement is afforded to effect restitution. The term *complainant* is used, thus the section could be invoked even if the complainant were not a victim of the crime.\(^211\)

4 2 3 3  **Orders recoverable as fines**

Any money payable by virtue of an order in terms of the Code is recoverable as a fine\(^212\) and the court may enforce payment by issuing a warrant of attachment.\(^213\)

While serving the full period of imprisonment usually relieves the offender of the obligation to pay a fine, this does not apply when the fine is of a restitutionary nature.\(^214\)

Mundrathi comments:\(^215\)

> Though sections 421 and 431 of the Criminal Procedure Code provide for compensation recoverability procedures, for this the victim would again have to resort to courts thus snuffing out all hopes of expedient recovery.

Thus the means provided to enforce payment of restitutionary orders are ineffective.

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\(^207\) S 2 (Definitions): A cognisable offence is one where the alleged offender may be arrested without a warrant, while a non-cognisable offence is an offence where a warrant is required.

\(^208\) S 359.

\(^209\) Which are dealt with by s 357. See Par 4 2 3 1 (*supra*).

\(^210\) See above.

\(^211\) For example, someone reporting a so-called victimless crime, such as a traffic offence.

\(^212\) Unless an alternative method of recovery is prescribed: S 431.

\(^213\) S 421.

\(^214\) S 421. The imposition of a fine in such cases does not of necessity provide for an alternative of imprisonment, but serves to effect restitution to the victim.

\(^215\) Mundrathi *Law on Compensation: To Victims of Crime and Abuse of Power* 90.
The suspension of sentences is an executive function in India, as opposed to a judicial function. Specific application has to be made to the “appropriate Government” for suspension of sentence subject to such conditions as the offender accepts. No provision is made for a court to suspend its sentence, though the opinion of the court may be sought.

Reference is made to “any conditions which the person sentenced accepts.” Restitution is not specifically mentioned, but can be implied because the condition of suspension “may be one to be fulfilled by the person in whose favour the sentence is suspended...” However, Basu does not include restitution in his list of conditions of suspension, thus suspension subject to restitution is not encountered in India.

Disposal of property

At conclusion of trial

A court may order the return of property to a person entitled thereto at the conclusion of the inquiry or trial. Property includes the following:

- Property that has been produced in court at the trial, including property placed under the control of the court while not necessarily produced physically in court;
Property in custody of the court;\textsuperscript{226} Property in respect of which an offence has been committed or any property into which it has been converted even if the property is not produced in court;\textsuperscript{227} and Property used in the commission of the offence.\textsuperscript{228}

A court is not obliged to make an order. Although the section’s wording does not expressly require notice to be given before disposing of the property, courts interpret the words “person claiming possession” and the exigencies of natural justice to require that an order can be given only after notice to the parties,\textsuperscript{229} unless the order is passed as part of the judgment in the criminal case.\textsuperscript{230}

The order cannot be made before the trial is over as this would be tantamount to prejudging the case.\textsuperscript{231}

The court relies on the evidence already before it in the main case, together with other relevant circumstances on the record. No special enquiry is required.\textsuperscript{232}

Regarding the identity of the beneficiary, Basu\textsuperscript{233} says the following:

\begin{quote}
The expression “entitled to possession”… does not refer to ownership\textsuperscript{234} but the right to present possession, determined in a summary manner, without entering into or affecting the question of title, which should be decided by a Civil Court.
\end{quote}

The burden of proof required is not the same as that in a criminal trial as the matter is \textit{quasi-civil}.\textsuperscript{235}

\begin{itemize}
\item \textsuperscript{226} Bal Kaur v State of HP (1976) Cr L J 1928 (HP).
\item \textsuperscript{227} Felicidade v D’Souza (1978) Cr L J 1189 (Goa). The term \textit{converted} is sufficiently broad to include the case of a sum of stolen money being deposited into a bank account.
\item \textsuperscript{228} The implement used for cutting wire in the case of theft of wire is an example (Nanak v State of UP (1974) Cr L J 1402 (All)), while the vehicle used to transport the offender to the scene of the crime and to transport the stolen goods was excluded from this category (Balamal v State of Gujarat A 1970 Guj 26).
\item \textsuperscript{229} Ramakrishna v Seethamma A 1939 Mad 916; Himangshu v Sobhan A 1959 Cal 782; Bombay Cycle Agency v Pandey (1975) Cr L J 820 (830) DB.
\item \textsuperscript{230} Govind v State of UP (1986) Cr L J 1478 Or (DB).
\item \textsuperscript{231} Basu D D Criminal Procedure Code, 1973 1004.
\item \textsuperscript{232} Meena v State of HP (1990) Cr L J 1445 All; Govindachari v State (1979) Cr L J 428; Prakash v Jagdish A 1958 MP 270.
\item \textsuperscript{233} Op cit 1005.
\item \textsuperscript{234} Madhavan v State of Kerala A 1979 SC 1829.
\item \textsuperscript{235} Basu D D Criminal Procedure Code, 1973 1006. In cases involving motor vehicles, there is a rebuttable presumption that the registered owner in terms of the Motor Vehicles Act 59 of 1988 is prima facie entitled to possession.
\end{itemize}
Courts may grant an order of financial compensation against the state where the goods have been lost in police custody and the state cannot prove the due diligence of its servants.\textsuperscript{236}

Courts can require security for return of the property should the beneficiary of the order prove not to be entitled to the property on appeal or revision.\textsuperscript{237} However, if such security is not given, the order can be executed only after two months or after finalisation of the appeal.\textsuperscript{238} The requirement of security highlights the fact that the court order is not to be seen as a final decision on the matter of ownership. Ownership is a matter for a civil court and the criminal court acting in terms of this section proceeds on the basis of who is \textit{prima facie} entitled to possession.

Once an order for restitution has been made, the state has a \textit{statutory} – and not merely \textit{tortious} – duty to return the property to the beneficiary. The state will be civilly liable for damages where the property is lost due to the negligence or dishonesty of its servants. The state will not have the defence of sovereign immunity in this instance.\textsuperscript{239}

\textbf{4 2 3 6 Payment to innocent purchaser from money found on accused}

A court may order a refund of the purchase price to a \textit{bona fide} purchaser of stolen property out of money taken from the accused upon arrest and the property is returned to the person entitled thereto. Application by the purchaser is required.\textsuperscript{240}

The court is not expected to decide the matter of ownership; it simply decides who is “entitled to possession.” Should the offender have had no money in his possession when arrested, the purchaser will have to fall back on his civil, tortious remedy.\textsuperscript{241}

\textsuperscript{236} \textit{Tookappa v State} (1977) Cr L J 1850 Knt.
\textsuperscript{237} Section 452(2).
\textsuperscript{238} Unless the goods are livestock or perishables: S 452(4).
\textsuperscript{239} \textit{Prithwiraj v State} (1979) Cr L J 96 (Cal); \textit{State of Gujarat v Memon} A 1967 SC 1885.
\textsuperscript{240} See Ch 3 Par 3 4 4 (supra) regarding state immunity.
\textsuperscript{241} \textit{Roshan} A 1957 Punj 297.
 Appeal against orders

A right of appeal exists against the orders discussed in the previous two paragraphs. A number of matters are noteworthy:

- The right of appeal is open to any person aggrieved, and is not limited to the offender or the victim of the offence.
- The restitutionary order itself is appealable separately from the judgment and sentence in the criminal trial.
- However, the court hearing the appeal from the criminal case also has the power to deal with the restitution order.

Natural justice requires notice to be given to the party concerned before a court sets aside or modifies an order in terms of its powers of appeal.

 Restoring possession of immovable property

When a person has been dispossessed by force or criminal intimidation, the court may, upon conviction of the offender, order that possession of immovable property be restored. No other form of unlawful dispossession is mentioned, thus this remedy would not be available against an unlawful occupier who obtained possession in some way not involving force or intimidation. The victim would have to rely on the normal civil remedy.

The order has to be made within one month of the conviction. This does not apply in the case of an appeal, confirmation or review, when the higher court can make the order without being limited in terms of time.

This remedy does not impact on the civil law rights of the parties. Thus an order does not constitute a judicial confirmation of ownership, but serves as a counter-
spoliation measure. An investigation into the civil law merits of ownership is not envisaged.

4.2.4 New Zealand: Sentencing Act

Formerly the Criminal Justice Act contained the main legislation dealing with restitution. In 1992 an investigation concerning sentences of reparation was conducted. In 2000 a referendum was held asking whether greater emphasis on the needs of victims was required with provision for restitution and compensation. A resoundingly positive response was recorded and the Sentencing Act was passed. Just prior to this, the Minister of Justice, Phil Goph, stated:

Increased funding for victim support is accompanied by changes in the Sentencing Act to introduce a strong presumption in favour of reparation. There will be an extension of reparation to allow payments for physical harm, and not just property loss or damage and emotional harm. Victims’ views will be given greater prominence by courts.

250 S 456(4).
251 Which is consistent with the other provisions of this nature in the Code of Criminal Procedure.
254 The former Act introduced the concept of the sentence of reparation. This nomenclature was perpetuated in the current Act.
257 2002. Restorative justice is provided for in the Sentencing Act. S 7 provides for holding an offender accountable for harm done to the victim and the community, and for promoting in the offender a sense of responsibility for, and acknowledgement of, that harm, and provides for the interests of the victim of the offence and for reparation for harm done. S 8(j) requires the court to take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case. S 8(i) requires the court to take into account the offender’s personal, family, whanau, community, and cultural background in cases with a partly or wholly rehabilitative purpose. S 9(2)(f) says the court must take into account as a mitigating factor any remorse shown by the offender, or anything described in s 10. See Ch 4 Par 4 2 4 & 4 3 4 (infra).
On the promulgation of the Sentencing Act, the New Zealand Minister for Courts referred to it as the first key item of sentencing legislation in the world to empower courts to utilise restorative justice principles, benefiting victims by placing them at the centre of the sentencing process. Suspended sentences were abolished because they were considered ineffective.259

4241 Definitions

The term *reparation* is applied to refer to restitution effected by the offender to the victim of crime. One of the purposes of the Act is “to provide for the interests of victims of crime.”260

A victim is:261

- A person against whom an offence is committed;
- Every person who, due to an offence committed by another person, suffers physical injury or loss of or damage to property;
- A parent or guardian of a child who falls within the categories above;262 and
- Every member of the immediate family of a person who dies or is rendered incapable as a result of an offence committed by another person.263

A person charged with the same offence cannot also be a victim.264 The concept of victim is defined broadly in order to include all persons harmed by the crime, including surviving family members of victims. Harm is not limited to personal injury and includes proprietary losses.

4242 Significance assigned to reparation

Preparatory to dealing with sentences of reparation *per se*, the Act contains various provisions indicating the significance attached to restitution and the role thereof in the sentencing milieu.

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260 S 3(d).
261 S 4(1).
262 Unless the parent or guardian is charged with the offence.
263 Unless that family member is charged with the offence.
264 For example, an accessory after the fact. S 4.
Two of the stated purposes of sentencing are:\(^{265}\)

- Providing for the interests of the victim of the offence; and
- Providing reparation for harm done by the offence.

The court when sentencing the offender must take account of:\(^{266}\)

- Any offer of amends, whether financial or by means of the performance of any service, made by or on behalf of the offender to the victim;
- Any agreement between the offender and the victim as to how the offender may remedy the wrong or ensure that the offence will not recur;
- Any measures taken by the offender or the family of the offender to:
  - Make restitution to the victim or family of the victim; or
  - Apologise to the victim or family of the victim; or
  - Otherwise make good the harm that has occurred.
  - Effect any remedial action.

In \textit{R v Clotworthy},\(^{267}\) the Court of Appeal pronounced the following words of caution:

An element of apparent inconsistency can arise if the public perception is that those with an ability to pay reparation can in effect buy themselves out of a full time custodial sentence. Against that must, of course, be balanced the clear legislative policy... which provides that a sentencing Court must consider imposing a sentence of reparation in every case and... must impose such a sentence unless it is satisfied that it would be clearly inappropriate to do so.

In this case the Court of Appeal overturned a suspended sentence of imprisonment imposed by the court \textit{a quo},\(^{268}\) substituting a longer, unsuspended sentence and reducing the reparation order on the grounds that the offender would not be able to comply with it. A reparation order – which the offender had already settled – was imposed. The court’s stance apropos reparation was expressed as follows:\(^{269}\)

\(^{265}\) S 7(1)(c) & (d).
\(^{266}\) S 10(1).
\(^{267}\) (CA 114/98 29 June 1998) 21.
\(^{269}\) See also \textit{R v Drinkrow} (CA 229/96 22 August 1996).
We would not wish this judgment to be seen as expressing any general opposition to the concept of restorative justice... Those policies must, however, be balanced against other sentencing policies... Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case... (T)he restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose.

On the other hand, in *R v Andrew*\(^{270}\) the Court of Appeal approved the following approach:

The District Court saw as its first priority doing whatever it could to ensure that the young man who had been duped by the appellant was repaid as quickly as possible. It expressly reached the decision to impose non-custodial penalties because ‘although the brazen nature of the offending really calls for a prison term,’ that would have delayed the prospect of reparation being effected.

The *Clotworthy* and *Andrew* cases\(^ {271}\) can be distinguished on the basis that the former involved crimes of serious violence, while the latter involved crimes of dishonesty. In each case a court will have to harmonise the interests of the community with the interests of the individual. The dividing line is fine. The judgment in *R v Morgan*\(^ {272}\) shows that courts are reluctant – even in non-violent cases – to allow a tenuous prospect of token reparation to serve as a pretext for sparing the offender from a custodial sentence. In this case of burglary the loss amounted to $16,000. Reparation of $40 – $100 per week was offered depending on the

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\(^{270}\) (CA 419/95 10 November 1995) 5.

\(^{271}\) Supra. The latter favours restitution, while the former expresses caution.

\(^{272}\) (CA 311/97 25 September 1997)
offender’s finding seasonal employment. An amount of $250 had already been paid to the insurer. In the light of the offender’s “lengthy history of offending persisting over a period of some 17 years,” the Court of Appeal endorsed the sentence of two years’ imprisonment imposed by the court a quo, thus effectively stifling any prospect of restitution.

In deciding an appropriate sentence, the court must take into account whether the redress was genuine and capable of fulfilment, and whether it has been accepted by the victim as expiating or mitigating the wrong. If a court determines that it is nevertheless appropriate to impose a sentence, it must take the redress offered into account when determining the appropriate sentence. The following approach has been approved by the Court of Appeal:

(T)he Judge took three years as his starting point. He deducted 6 months for the reparation and arrived at the sentence of two and a half years plus $6 000 reparation… (A)lthough many other factors must be taken into account, the three most important variables have tended to be the total sum involved, the extent of the reparation, and the plea.

In R v Hawkins the Court of Appeal held:

The substantial reparation order was also a factor to be taken into account in assessing the final sentence of imprisonment but any attempt to lay down any amount of tariff for reparation if it fetters a discretion of a sentencing Judge is to be avoided.

Courts are also given the authority to adjourn proceedings pending the making of reparation.

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273 Ranging from twenty previous convictions of burglary to charges of assault, indecent assault and possession of cannabis. Op cit Par 7.
274 See also R v Whitelaw (CA 392/01 21 February 2002) (November 2002)
275 S 10(2). See also R v Constable (CA 551/99 24 May 2000) 5 – 6. (November 2002)
276 S 10(3).
277 R v Harvey (CA 237/01 19 September 2001) 9; 13. (November 2002)
278 (CA 51/02 22 May 2002) 9. (November 2002)
279 per Gendall J.
280 S 10(4).
These provisions emphasise the value of restitution. New Zealand courts remain aware of the importance of formulating a sentence which balances the restitutionary interests of the victim with the interests of the community in penalising criminal behaviour. The most common reason for not granting a sentence of reparation appears to be the inability of the offender to comply therewith within a realistic period.\(^{281}\)

4 2 4 3 Sentences of reparation

A reparation order may be imposed in respect of:\(^{282}\)

- Loss of or damage to property;
- Emotional harm;\(^{283}\)
- Loss or damage consequential\(^{284}\) on any emotional or physical harm or loss of or damage to property.

*Property* is not restricted to tangibles and has been interpreted to include the right to recover a debt.\(^{285}\) The cost of medical care arising from a physical injury is


\(^{282}\) S 32 in Part 2 of the Act deals with reparation. S 320 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 gives the right to be heard to the Accident Compensation Corporation when a determination is being made in terms of the Injury Prevention, Rehabilitation, and Compensation Act. As will be seen, the Accident Compensation Scheme pays entitlements to victims of crime who have suffered personal injuries. See Ch 5 Par 5 5 2 (*infra*).

\(^{283}\) S 32(2) provides: "Despite subs (1), a court must not impose a sentence of reparation in respect of emotional harm, or loss or damage consequential on emotional harm, unless the person who suffered the emotional harm is a person described in par (a) of the definition of "victim" in s 4.

\(^{284}\) Under previous legislation (s 22(1) of the Criminal Justice Act 1985) only damage to property, and emotional harm, were covered, thus leading to the following interpretation (Doyle & Hodge *Criminal Procedure in New Zealand* 177):

The courts will not allow the reparation provisions to be used by victims to recover tangential financial loss resulting indirectly from an offence. In *Cooper v Ward* (1988) 3 CRNZ 366 Speight J refused a Crown appeal whereby it was sought to use the provisions of s 22(1) of the Criminal Justice Act 1985 to recover $11 500 spent in an undercover operation to purchase cannabis.

S 32(1)(c) of the new Act has been added to allow for the claiming of such “tangential financial loss.”

included, as is payment effected by an insurer. In *R v Black* electricity stolen from two power supply authorities was treated as property. In *R v Harvey* reparation was ordered for the emotional distress caused by the dishonesty of an accountant with respect to his clients. In *R v Shaw* the offender had transferred her assets to a trust in anticipation of a sentence of reparation. The Court of Appeal held that it was acceptable to make a reparation order based on the value thereof to discourage fraud and evasion.

A court may pass a sentence of reparation even if the offender has to rely on relatives to comply with it. However, there will have to be evidence that this assistance is likely to be forthcoming. In *R v Lepupa* Gault J stated that family collective responsibility for a reparation order could be appropriate, particularly in light of well recognised responses by certain cultural groups to offending by family members.

Courts are directed to consider any alternative avenue of financial aid at the disposal of the victim, whether utilised or not. Reparation orders must not be made in respect of consequential loss for which the victim will receive entitlements from the Accident Compensation Scheme.

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287 *R v O’Rourke* [1990] 1 NZLR 155.


289 S 218 of the Crimes Act 1961 reads: “Electricity is hereby declared to be a thing capable of being stolen; and every one commits theft who fraudulently abstracts, consumes, or uses any electricity.”

290 Supra.


293 S 32(3).

294 S 32(4).

295 S 32(5).

296 Operated in terms of the Injury Prevention, Rehabilitation, and Compensation Act 2001. As will be seen, the Accident Compensation Scheme pays entitlements to victims of crime who have suffered personal injuries. See Ch 5 Par 5 5 2 (*infra*).
A court may not place an obligation on the offender to perform any service to the victim in a sentence of reparation.  

In circumstances where a sentence of reparation may be imposed, a court must impose it "unless it is satisfied that the sentence would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate." The fact that no application for a sentence of reparation is made on behalf of the victim does not absolve a court from this duty. However, the lack of such application can be considered in deciding the appropriateness of granting a sentence of reparation. With regard to whether a reparation sentence is appropriate, the Court of Appeal held as follows in *R v Batt*:  

"There is some difficulty in formulating the terms of a satisfactory reparation order in the circumstances of this case. The house is in the nature of a bach, run-down and in need of repair, and located in an area which may not attract a ready sale. Clearly, an order that Mrs Batt make reparation of a fixed sum by a certain date would be unsatisfactory. The house might not sell by that date or for a price which would cover the amount specified in the order. Mrs Batt would then be in the position of not being able to comply with the order. We consider that such an order would be unrealistic."

In *Ruka v Department of Social Welfare* the Court of Appeal voiced the following *obiter dictum*:

"Where there is no realistic prospect of payment being made within a very few years an order should not be made, at least for the full amount sought."

A court failing to impose a sentence of reparation under *prime facie* appropriate circumstances is compelled to give reasons for failing to do so. A sentence of

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297  S 32(7).
298  S 12(1).
299  *R v Batt* (CA 27/01 31 May 2002) 8 16.  
(November 2002)  
300  Before the passing of the current Act, the matter was dealt with in S 24 of the Criminal Justice Act 1985 which used the phraseology: "The court shall consider imposing a sentence of reparation in every case, and, subject to s 22 of this Act, shall impose such a sentence unless it is satisfied that it would be clearly inappropriate to do so." (Emphasis added)
301  Supra 17.
302  (CA 43/96 1 October 1996) 2.
303  In this case the reparation order was for the amount of $44 759.93 payable at a rate of $10,00 per week. In *Belmont v Police* (unreported Wellington Registry M 258/86 13 October 1986) it was held that 13 years was too long a period. See Doyle & Hodge *Criminal Procedure in New Zealand* 177.
reparation may be combined with other sentences. Where a court deems it appropriate to impose a fine as well as a sentence of reparation, but the means of the offender are insufficient to discharge both, the court has to favour the sentence of reparation over the fine.

While there is no restriction on the imposition of cumulative custodial and reparation sentences, it is inappropriate to direct that reparation be made following a sentence of imprisonment if an offender lacks the means to effect payment. In *R v Cunard* the Court of Appeal held that “to make a reparation order in the absence of any ability on the part of the appellant to meet it, when its terms would require payments over a period in excess of 10 years, offends against the principles applicable to such cases.” In *R v Lynn* the Court of Appeal held that an order based on the ability of the offender to find employment after an effective period of three years’ imprisonment was inappropriate, there being no realistic likelihood of his being able to comply with the order. In *R v Munro* the Court of Appeal had to consider a sentence of reparation passed by the court a quo which provided for payment of $2,500 at a rate of $30 per week, the first payment being due six weeks after the offender’s release from prison. However, the court a quo also directed that because the reparation sentence might be impracticable it should be the subject of review, both as to the quantum of the sentence and the rate of payment, following the offender’s release. While the Court of Appeal accepted the possibility of a reparation order being subject to review on the offender’s release, it declined to confirm the imposition of a reparation order following on “such a significant sentence of

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304 S 12(3).
305 S 12(2).
306 S 14(2).
309 (CA331/01 3 December 2001).
310 per Doogue J.
311 Supra 29.
312 (CA 90/01 13 June 2001).
313 (CA 132/02 24 July 2002)
314 “…presumably by the Registrar in terms of the provisions of Part III of the Summary Proceedings Act 1957…” Supra 17.
imprisonment”315 – three and a half years – combined with the unlikelihood of the offender’s being gainfully employed on his release. However, a sentence of imprisonment is not always seen as a bar to a sentence of reparation: In R v Bowden316 a reparation order was made for payment of $1 000 in instalments of $10 per week, the first payment to be made seven days after the offender’s release from prison, the total sentence of imprisonment amounting to twenty seven months, the offender being twenty seven years of age. It appears from the judgment that the offender was in a position where he was likely to find employment and the defence did not challenge the order of restitution.317

Regarding quantum, a court may instruct a probation officer to prepare a reparation report canvassing the following matters:318

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315 Supra 18.
316 (CA 102/01 26 June 2001)
(September 2002)
317 Except to have it reduced as it reflected an incorrect amount of loss suffered.
318 S 33 assists the court in determining the quantum of the sentence of reparation.
In the case of **emotional harm**:
The nature of that harm and any consequential loss or damage.

- The maximum amount that the offender is likely to be able to pay under a sentence of reparation;
- The frequency and magnitude of any payments that should be required under a sentence of reparation, if provision for payment by instalments is thought desirable;
- The financial capacity of the offender.

In the case of any loss or damage consequential on **physical harm**:
The nature of the loss or damage;

- The extent to which the victim is likely to be covered by entitlements under the Injury Prevention, Rehabilitation, and Compensation Act.\(^{319}\)

In the case of loss of or damage to **property**:
The value of that loss or damage and any consequential loss or damage.

- The maximum amount that the offender is likely to be able to pay under a sentence of reparation;
- The frequency and magnitude of any payments that should be required under a sentence of reparation, if provision for payment by instalments is thought desirable;
- The financial capacity of the offender.

This broad spectrum of information covers both the amount of the loss and the ability of the offender to effect reparation. A court is not, however, obliged to seek a report if it is in a position to make the reparation order without the reparation report.\(^{320}\) A court can also order an offender to make a declaration regarding financial capacity.\(^{321}\)

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\(^{319}\) 2001. See Ch 5 Par 5 5 2 (infra).

\(^{320}\) S 33(2).

\(^{321}\) Ss 33(3) and 42. Providing false information is a criminal offence: S 43.
When making the reparation report, the probation officer has to attempt to mediate between victim and offender in order to achieve consensus. If an agreement is reached, the probation officer must report the terms thereof to the court. Should agreement regarding the amount not be achieved, the probation officer must record the respective positions of the parties and make an assessment of the loss. The victim:

- Does not have to face the offender or participate in the preparation of the report;
- Is entitled to receive a copy of the report; and
- Is entitled to receive a copy of the conditions of reparation ordered by the court.

The court may order a lesser amount than the actual loss if the offender has insufficient means to settle the full loss and/or may order payment in instalments. The interests of the victim are protected because the reparation order is settled before any fine which the offender is ordered to pay.

In cases of more than one offender, a sentence of reparation can be passed against the offender who has the ability of effecting reparation, irrespective of the relative fault of the co-offenders in the commission of the offence. Apportionment based on degrees of fault takes place only when it is not done at the expense of the victim, but in the interests of justice between the perpetrators as "(t)he basis of reparation is not intended to be punitive but restorative." In cases of more than one offender, a sentence of reparation can be passed against the offender who has the ability of effecting reparation, irrespective of the relative fault of the co-offenders in the commission of the offence. Apportionment based on degrees of fault takes place only when it is not done at the expense of the victim, but in the interests of justice between the perpetrators as "(t)he basis of reparation is not intended to be punitive but restorative."

The following matters have to be canvassed in a sentence of reparation:

- Total amount to be paid;
- Whether the amount is to be paid in one lump sum or in instalments;

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322 S 34.
323 S 37.
324 S 35.
326 S 36.
If a lump sum, whether it is to be paid immediately or at some specified date;\textsuperscript{327} and
\begin{itemize}
\item If instalments, the times and the amount of the instalments.
\end{itemize}
All these aspects have to be canvassed for the sentence of reparation to be valid.\textsuperscript{328}

The victim does not lose the right to claim the balance by tortious means in instances where the sentence of reparation does not extinguish the loss completely.\textsuperscript{329} Where the conviction is overturned on appeal, the sentence of reparation also falls away, leaving the victim with a tortious claim.\textsuperscript{330}

A sentence of reparation can be enforced in the same way as a fine.\textsuperscript{331} The remission of the whole or any part of the amount required to be paid under a sentence of reparation does not affect the right of the victim to bring civil proceedings, or make claims under the Injury Prevention, Rehabilitation, and Compensation Act\textsuperscript{332} to recover the amount remitted.\textsuperscript{333}

\begin{itemize}
\item \textsuperscript{327} A court can specify a period for payment, failing which payment will be enforced by means of imprisonment. \textit{R v T, J A and C E Barclay (supra)}.
\item \textsuperscript{328} \textit{R v Batt (supra)} 11.
\item \textsuperscript{331} S 145(2).
\item \textsuperscript{332} Supra.
\item \textsuperscript{333} S 145(3).
\end{itemize}
### The Sentencing Act in practice

As evidenced by numerous reported decisions, the matter of restitution is regularly aired in court. However, a table of statistics\(^\text{334}\) shows that sentences of reparation were granted in only 6.8% of all criminal cases during 1996:

<table>
<thead>
<tr>
<th>Offence Type</th>
<th>Resulted in Reparation</th>
<th>Did Not Result in Reparation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage</td>
</tr>
<tr>
<td>Violent</td>
<td>531</td>
<td>3.2%(^{335})</td>
</tr>
<tr>
<td>Other against persons</td>
<td>48</td>
<td>1.3%</td>
</tr>
<tr>
<td>Property</td>
<td>11400</td>
<td>20.0%(^{336})</td>
</tr>
<tr>
<td>Drug</td>
<td>21</td>
<td>0.2%</td>
</tr>
<tr>
<td>Against justice</td>
<td>25</td>
<td>0.2%</td>
</tr>
<tr>
<td>Good order</td>
<td>132</td>
<td>1.4%</td>
</tr>
<tr>
<td>Traffic</td>
<td>678</td>
<td>1.1%</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>299</td>
<td>1.7%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>13134</td>
<td>6.8%(^\text{337})</td>
</tr>
</tbody>
</table>

Property offences are most likely to result in sentences of reparation, followed by violent offences. The statistics have remained reasonably stable and within close


\(^{336}\) This was 21.5% in 2001. See reference in previous footnote.

\(^{337}\) This was 7.1% in 2001. See reference in previous two footnotes.
parameters. The report shows the number and proportion of convictions for each of the main property offences that resulted in a sentence of reparation for each of the years 1991 to 1996:

<table>
<thead>
<tr>
<th>Offence Type</th>
<th>Number Resulting in Reparation</th>
<th>Percentage Resulting in Reparation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burglary</td>
<td>1515</td>
<td>1542</td>
</tr>
<tr>
<td>Theft</td>
<td>2029</td>
<td>2178</td>
</tr>
<tr>
<td>Receiving stolen property</td>
<td>269</td>
<td>286</td>
</tr>
<tr>
<td>Motor Vehicle Conversion</td>
<td>337</td>
<td>333</td>
</tr>
<tr>
<td>Fraud</td>
<td>3917</td>
<td>4415</td>
</tr>
<tr>
<td>Arson</td>
<td>27</td>
<td>27</td>
</tr>
<tr>
<td>Wilful damage</td>
<td>2095</td>
<td>2070</td>
</tr>
<tr>
<td>Other property</td>
<td>420</td>
<td>357</td>
</tr>
<tr>
<td>TOTAL</td>
<td>10609</td>
<td>11208</td>
</tr>
</tbody>
</table>

The average for sentences of reparation imposed in respect of property offences, was thus around 20% for the period reflected. A later report reflects a slightly higher figure of 21.5% for 2001.

The quantum of sentences of reparation during 2001 varied from 50 cents to $562 301. Of the total amount of reparation imposed in 2001, 78% was in respect of property offences.

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339 See previous footnote.


341 $10.2 million of a total of $13.2 million.

342 Ministry of Justice Conviction and Sentencing of Offenders in New Zealand: 1992 –
A sentence of reparation is seldom imposed on its own without some penalty. In 2001 only 20% of reparation sentences were imposed without other sentences. Half of the reparation sentences in 2001 also had community-based sentences imposed, with reparation being most commonly imposed in conjunction with periodic detention. In 2001, 10% of reparation sentences were imposed together with custodial sentences, compared with 3% in 1992. Thus the perceived reluctance of the courts to impose sentences of imprisonment together with restitution orders is diminishing.

Empirical research was undertaken to determine the reasons for the non-granting of reparation. The report summarises the reasons for the non-granting of sentences of reparation as follows:

None of the judges who participated in the study indicated that a lack of information was the reason why they had not imposed reparation. The major reason for non-imposition was because the loss had been made good or the property was recovered. No or insignificant victim loss arising from the offence, reparation not being sought by the police, the offender being given a custodial sentence, and the offender having insufficient means were other reasons which the judges gave for not imposing reparation. The insufficient means of the offender was mentioned most frequently during the interviews with the judges. (Emphasis added)

The major problem thus appears to be the non-ability of the offender to effect reparation.

4.3 Other legislation, bills and state-initiated programmes

The issue of restitution is not limited to the “main” legislation discussed in the preceding paragraphs; in each of the four countries there are other Acts in terms of which victims of crime can also receive restitution from offenders. These enactments will be considered below in order to give a complete picture of the restitutionary rights of victims of crime in the respective jurisdictions. While some of these enactments

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The Non-Use of Reparation for Property Offences
might not often be implemented, they form an inalienable part of the whole. In addition to legislation, there are also certain state-initiated programmes reflecting policy regarding victims of crime. The fact that these initiatives have the potential to grow into sources of legally enforceable rights, is illustrated by England’s Code of Practice for Victims of Crime (which evolved from that country’s Victim’s Charter). While the Victim’s Charter enumerated expectations of victims vis-à-vis the criminal justice system, the Code of Practice for Victims of Crime contains enforceable rights.

4.3.1 South Africa

4.3.1.1 International Co-operation in Criminal Matters Act\(^\text{346}\)

The Act provides for mutual recognition between South Africa and foreign states of sentences and restitutionary orders.\(^\text{347}\) South African authorities may request the assistance of a foreign state in recovering a fine or restitutionary order made by a South African criminal court where the offender does not have sufficient local property to satisfy it.\(^\text{348}\) A foreign sentence or restitutionary order may be registered\(^\text{349}\) providing it complies with the following requirements:\(^\text{350}\)

- It must be final and not subject to review or appeal;
- The court which made the order must have had jurisdiction;
- The person against whom the order was made, must have had the opportunity of defending himself or herself;
- The order must not be capable of complete fulfilment in the country in which it was imposed; and
- The person concerned must hold property in South Africa.

Once registered, a foreign order will have the effect of a civil judgment of the South African court where it has been registered.\(^\text{351}\)

As countries such as Great Britain\(^\text{352}\) and New Zealand\(^\text{353}\) have more comprehensive restitutionary legislation than South Africa, it is anomalous that foreign victims can

\(^{345}\) See Par 4.3.2.3 (infra).

\(^{346}\) 75 of 1996.

\(^{347}\) Ch 3: Ss 13 – 18.

\(^{348}\) S 13.

\(^{349}\) S 17.

\(^{350}\) S 15(1).

\(^{351}\) S 17.
obtain better restitution from offenders with property in South Africa than South African victims.

4 3 1 2 Correctional Services Act

Chapter VI of this Act deals with community corrections. In terms of section 1, the term refers to “all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community” controlled by the Department of Correctional Services. The principle objective of community corrections is to enable persons “to lead a socially responsible and crime-free life during the period of their sentence and in future,” while ensuring the safety of the community.

Section 52 of the Act deals with conditions which may be ordered in conjunction with community corrections. The court, the Correctional Supervision and Parole Board or the Commissioner of Correctional Services may stipulate that the offender, inter alia:

- Pays damages to victims;
- Participates in mediation between victim and offender or in family group conferencing; and/or
- Contributes financially towards the cost of the community corrections to which he or she has been subjected.

Though various conditions may be imposed concurrently, section 52(2) sets out certain restrictions on the concurrent imposition of conditions. Parole – including day

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352 See generally Par 4 2 2 (supra).
353 See generally Par 4 2 4 (supra).
355 In terms of s 51 of the Act, community corrections applies to:
  - Persons who are under correctional supervision in terms of the Criminal Procedure Act;
  - Prisoners granted temporary leave;
  - Prisoners on day parole;
  - Prisoners on parole; and
  - Persons who are placed under the supervision of a correctional official in terms of the Criminal Procedure Act.
356 S 50(1).
357 S 52(1)(e). Compensation has the meaning of restitution as the latter term is used in this research. See Ch 1 Par 1 3 1 (supra).
358 S 52(1)(g).
359 S 52(1)(h).
360 S 52(1)(a) – 52(1)(q) enumerates the various possible conditions. This discussion limits itself to conditions relevant to restitution.
parole – may not be conditional on compensation (restitution), unless compensation (restitution) was part of the original sentence.\textsuperscript{361} Compensation (restitution) cannot be imposed as a condition in cases of supervision by a correctional officer where such supervision is ordered in conjunction with or in lieu of bail – this applies equally to the other two conditions bulleted in the previous paragraph.\textsuperscript{362} Compensation (restitution) cannot be a condition where temporary leave is granted – this applies equally to the second, but not the third condition bulleted in the previous paragraph.\textsuperscript{363}

A person ordered to pay compensation (restitution) and/or to make a contribution to the costs of the community corrections must provide the Commissioner with a statement of personal income and expenditure. The Commissioner will determine the contribution which the person is to pay to the costs of the community corrections and can adjust the amount. A person ordered to pay compensation (restitution) by a court must submit proof of payment of such compensation (restitution) to the Commissioner.\textsuperscript{364}

If the Commissioner is satisfied that a person has failed to comply with the conditions attached to his or her community corrections, the Commissioner may:\textsuperscript{365}

- Reprimand the person:
- Instruct the person to appear before the court, the Correctional Supervision and Parole Board or other body which ordered the community corrections;
- Issue a warrant for the arrest of the person. Within forty-eight hours of arrest the person will have to be brought before a court which will make an order as to his or her further detention.\textsuperscript{366}

The Commissioner may also apply to the court, the Correctional Supervision and Parole Board or other body which ordered the community corrections for a change in the conditions imposed, where circumstances dictate this.\textsuperscript{367}

When a court has ordered the payment of victim compensation (restitution) and it is not paid directly into court, the correctional official will order payment as a condition

\textsuperscript{361} S 52(2)(a) and 52(2)(c).
\textsuperscript{362} S 52(2)(b).
\textsuperscript{363} S 52(2)(d).
\textsuperscript{364} S 63.
\textsuperscript{365} S 70(1).
\textsuperscript{366} S 70(2)(b).
\textsuperscript{367} S 71.
of correctional supervision. Agreement is to be reached between the official and the person liable as to whether the amount will be paid in a lump sum or in instalments, taking into account all relevant factors. In the case of instalments, the period may not exceed three years. The Department of Correctional Services is responsible for notifying the victim of the arrangements. Payment is effected by the offender directly to the victim, but can also be effected at the Community Corrections Office. Non-payment amounts to a contravention of the conditions of supervision. When the full amount has been paid, the court ordering the payment has to be informed in writing. Should the period of correctional supervision elapse before full payment has taken place, the victim has to be informed and requested to deal with the matter personally in future. The court must also be informed in writing.368

The question arises: To what extent are the provisions of the Act favouring the victim of crime applied in practice? In an interview369 with the Head: Community Corrections in Port Elizabeth,370 Mr W Coutts, it was ascertained that his department is currently administering only two cases of compensation (restitution) in terms of the Act. He estimated that at any given time his department deals with no more than four or five instances of compensation (restitution) out of a total of 800 cases of community corrections. The provisions of the Act regarding conditions relating to victim/offender mediation and the making of financial contributions by the offender towards the cost of community corrections are not applied because the structures to provide for their implementation do not exist at present.

Regarding compensation (restitution), Mr Coutts said that in his experience the courts always make the order and it is not left to the Department of Correctional Services. This leads to difficulties where offenders lose their employment and thus the means to comply with the orders. This problem is compounded by the fact that the matter of restitution has to be finalised within a three year period. Much red tape is generated because matters have to be referred back to the courts for amendment of the original order (in bona fide cases) because the officials of the Department of Correctional Services cannot interfere with the terms of a court order. It seems that this problem would be resolved if the courts were more inclined to leave the matter in

368 Correctional Services Regulation 152(c) (26 June 2000) 6 – 7 sets out the procedures summarised in this paragraph. This document is available on the intranet of the Department of Correctional Services: (July 2003) http://intranet.dcs.gov.za/border/engels/CSOB%207%20map-11.htm
369 Held in his office in Port Elizabeth on 24 July 2003.
370 The powers of the Commissioner of Correctional Services are delegated to various regional heads.
the hands of the Department, which has the means to assess the ability of the offender to effect restitution. This applies particularly regarding the structuring of instalments. In all local cases money is paid directly to the courts or the victim, and not the Department of Correctional Services.

4313 Domestic Violence Act

Section 2 of this Act obliges any member of the South African Police Service to render assistance to the complainant at the scene of domestic violence or as soon as possible thereafter and to explain (in writing and verbally) the remedies at the disposal of the complainant in terms of the Act.

Section 4 provides for application for a protection order. The clerk of the court is obliged to explain his or her rights to the complainant. Not only the complainant, but also any person “who has a material interest in the wellbeing of the complainant” may bring the application.

Section 7(1) provides that the protection order may prohibit certain actions, such as committing any acts of domestic violence or entering a residence shared by complainant and respondent; provisions regarding the following restitutionary matters may be included in the protection order:

- The payment of rent or mortgage instalments.
- The payment of emergency monetary relief. This has the effect of a civil judgment.

The court must make a decision even if there is other legal relief available to the complainant.

Section 8 obliges the court making the protection order to make a suspended order authorising the issue of a warrant of arrest in the case of non-compliance – which constitutes a criminal offence.

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372 For example, a counsellor, health service provider, member of the SAPS, social worker or teacher.
373 S 7(3).
374 S 7(4).
375 S 7(7).
The fact that a protection order applies in perpetuity, and the possibility of the arrest of the accused before having the chance to put his or her case to a magistrate has raised questions regarding the constitutionality of a protection order.377

4 3 1 4 Prevention of Organised Crime Act378

The Act379 allows a court to deprive a convicted person of the proceeds of crime by means of a confiscation order380 and for a restraint order to be made in anticipation of the granting of the confiscation order.381 The purpose of a restraint order is to preserve property so that it might in due course be realised in satisfaction of a confiscation order. Section 26(1) authorises the National Director of Public Prosecutions to apply to a High Court, ex parte, for an order “prohibiting any person … from dealing in any manner with any property to which the order relates.” The remaining provisions of Part 3 confer wide powers upon the court regarding the terms of a restraint order. In particular, it may appoint a curator bonis to take charge of the property that has been placed under restraint, order any person to surrender the property to the curator, authorise the South African Police Service to seize the property, and place restrictions upon encumbering or transferring immovable property. It may also make a provisional restraint order having immediate effect and simultaneously grant a rule nisi calling upon the defendant to show cause why the order should not be made final.

The Act creates the Criminal Assets Recovery Committee. The plight of victims of crime was not forgotten by the legislature when the Act was drafted: In terms of Section 68(c) the Committee has inter alia the duty to:

(A)dvice Cabinet in connection with the rendering of financial assistance to any other institution, organisation or fund established with the object to render assistance in any manner to victims of crime.382 (Emphasis added)

Confiscated and forfeited funds are paid into the Criminal Assets Recovery Account383 and disbursed to, inter alia, institutions that render assistance to victims of

376 S 17.
378 121 of 1998.
379 Ch 5 which encompasses ss 12 to 36.
380 S 18(1).
381 Ss 25 and 26 which fall within Part 3 of Ch 5.
382 Ss 65 and 68(c).
crime.\textsuperscript{384} The interests of the victim are also acknowledged in section 30 which provides that the court may allow a person to make representations in connection with the realisation of property if:

- The person is likely to be directly affected by the confiscation order; or
- The person has suffered damages or injury as a result of an offence or related criminal activity committed by the defendant.

If such person has instituted civil proceedings (or intends to do so within a reasonable time) or has obtained a judgment, the court may order the \textit{curator bonis} to suspend the realisation of the property for an appropriate period in order to satisfy the claim plus costs. The court may also make such ancillary orders as it deems expedient. This refers specifically to the instance where the victim has instituted a civil claim, but remains silent regarding the effect that a confiscation or restraint order has on the restitutionary rights of the victim in terms of section 300 of the Criminal Procedure Act.\textsuperscript{385}

The relationship between confiscation and restitution came up for consideration in the Supreme Court of Appeal case of \textit{National Director of Public Prosecutions v Rebuzzi}.\textsuperscript{386} At the request of the company from which the respondent had stolen money, the appellant had applied successfully to the High Court, \textit{ex parte}, for a provisional restraint order. The order prohibited all persons from dealing with the respondent’s property and bank accounts. A \textit{curator bonis} was appointed to take charge of them. On the extended return day the matter came before Goldstein J who set aside the provisional order.\textsuperscript{387} The judge was of the view that the legislature could not have intended a confiscation order to be made where there was an identifiable victim who had a claim for recovery of the proceeds of the crime. Otherwise the realisation of the defendant’s assets in satisfaction of the confiscation order would deprive the victim of the means of satisfying his or her claim.\textsuperscript{388}

\textsuperscript{383} See s 63.
\textsuperscript{384} S 69A(1)(b) read with s 68(c).
\textsuperscript{385} See Par 4 2 1 2 (supra).
\textsuperscript{387} National Director of Public Prosecutions v Rebuzzi 2000 2 SA 869 (W).
\textsuperscript{388} Ibid 875 C – D.
(T)he proceeds of confiscation orders are intended by the Act to accrue to the State. It follows that if a court were to convict the respondent and were to make a confiscation order in terms of Section 18 and were to give effect to such intention, it would deprive the complainant of the benefit of obtaining payment of its loss …

After noting that section 18(1) confers a discretion on the court concerned, the judge continued:389

(I)t seems to me inconceivable that a confiscation order could be made in the present circumstances where PG Bison Ltd, a known complainant, is entitled to compensation or repayment of money stolen which far exceeds the total assets under restraint. It would be absurd to provide for the granting of a confiscation order which would deprive the complainant of compensation for the wrong perpetrated upon it.

The judge concluded that the court was not competent to make a restraint order. The Supreme Court of Appeal did not agree with this view, Nugent A J A stating:390

In my view Sections 30(5) and 31(1) make it clear that the legislature did not intend a confiscation order to be withheld merely because an identifiable victim has an equivalent claim for recovery of his loss. Not only do those sections recognise that a confiscation order might co-exist with a claim by the victim (which would hardly have been provided for if the legislature intended that to be avoided) but they provide the means to avoid the claims competing for the defendant’s property. Where the defendant’s property has not yet been realised section 30(5) expressly authorises the High Court to suspend the realisation until the victim’s claim or judgment has been met, and where the property has been realised. Section 31(1) enables the High Court to direct the manner in which the proceeds are to be distributed. There is no reason to think that a court that called upon to give such directions will not recognize the claim of a victim and order that it be paid before any moneys accrue to the State bearing in mind that section 31(1) expressly provides that it does not have a preferential claim. Thus the making of a confiscation order need not deprive the victim of the means of recovering his loss, nor is there reason to think that it will ordinarily do so.

Both the intention of the legislature and the way in which the Act has been interpreted by the Supreme Court of Appeal are sympathetic to the restitutionary interests of the victim.391 In fact, restraint and confiscation orders serve to protect the restitutionary interests of the victim as disposal of property is prevented pending finalisation of the victim’s claims. The provisions of the Act can be used to prevent disposal of the property in fraudem creditoris, the creditor and the victim being one and the same person in this instance.

389  Ibid 875 E – F.
390  Ibid [17].
391  In NDPP v Cook Properties 2004 8 BCLR 844 (SCA) [18] it was held that the objectives of the Act “transcend the merely penal.”
4315 Child Justice Bill\textsuperscript{392}

One of the goals enumerated in the preamble to the Child Justice Bill is “to entrench the notion of restorative justice in respect of children.” Section 2(b)(iii) states as an object of the Bill “supporting reconciliation by means of a restorative justice response,” while section 1 defines \textit{restorative justice} as “the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child’s parent, the child’s family members, victims and communities.”

Chapter 6 of the Bill has the heading \textit{Diversion}, which is the “diversion of a child away from the formal court procedures to the informal procedures established by Chapter 5.”\textsuperscript{393} Chapter 5 deals with preliminary inquiries. A preliminary inquiry must be held in respect of every child before plea in order to decide whether the matter is to be conducted in the courts or by way of diversion.\textsuperscript{394} A court trying a charge can also refer the matter for diversion.\textsuperscript{395} Diversion is seen as a tool to effect restorative justice. While restitution is included in the definition of restorative justice in section 1, it is not specifically mentioned in subsections 44(a) – 44(f) as one of the purposes of diversion, but subsection 44(e) does refer to “the delivery of some object as compensation for the harm” which amounts to restitution under a different guise. Section 45(3)(b) requires that diversion must “include a restorative justice element which aims at healing relationships, including the relationship with the victim.”

Section 46(1)(a) places the burden on the Cabinet member responsible for the administration of the Act to “develop suitable diversion options.” However, section 47 already provides for, \textit{inter alia}, the following diversion options:

- Symbolic restitution to a specified person, persons, group or institution.
- Restitution of a specified object to a specified victim or victims of the offence.


On 11 August 2005 the bill was still listed as being before the Portfolio Committee on Justice and Constitutional Development of the National Assembly Website of Parliamentary Monitoring Group (August 2005) http://www.pmg.org.za/overview/update.htm


\textsuperscript{394} S 25(1).

\textsuperscript{395} S 59.
- Performance under supervision and without remuneration of some service for the benefit of the community.
- Provision of some service or benefit to a specified victim or victims in an amount which the child or the family can afford.
- Payment of compensation (restitution) to a maximum of R500 to a specified person, persons, group or institution where the child or his or her family is able to afford this.396
- Where there is no identifiable person or persons to whom restitution or compensation could be made, provision of some service or benefit or payment of compensation to a community organisation, charity or welfare organisation.
- Referral to appear at a family group conference or victim-offender mediation at a specified place and time.

A child justice court397 convicting a child of an offence may refer the matter to a family group conference or for victim-offender mediation.398 These are known as restorative justice sentences.

Passing of sentence can be postponed, or a sentence can be suspended for up to three years subject to conditions dealing with, inter alia, compensation (restitution), symbolic restitution or an apology.399

Section 71 provides for the following forms of restitution in lieu of punishment:

- Symbolic restitution to a specified person, group of persons or institution.

396 Regarding who bears the responsibility to compensate the victim and a possible overlap with s 300 of the Criminal Procedure Act, NICRO raised the possibility of the victim fraudulently using both avenues to obtain double restitution. NICRO submitted that as a general rule restitution in monetary terms should be excluded as children do not have the means to pay victims and parents should not be held financially accountable for their children’s offending. Community service rendered to the victim as a form of symbolic compensation was preferred. Submission On The Child Justice Bill (Bill 49/2002) NICRO (National Institute for Crime Prevention and the reintegration of offenders) (March 2005) http://www.childjustice.org.za/submissions/NICRO.htm

397 Any court (other than a Children’s Court in terms of the Child Care Act 74 of 1983) dealing with a matter that has not been diverted. S 50(1)(a).


399 S 70.
Payment not exceeding R500 to a specified person, group of persons or institution where the child or his or her family is able to afford this.

An obligation on the child to provide some service or benefit or to pay compensation to a community charity or welfare organisation identified by the child concerned or by the child justice court if there is no identifiable person to whom restitution could be made.

Regarding responsibility for harm caused by a child while performing community service, section 83 provides for recovery of damages from the state by the person suffering the loss.

The benefit of diversion is that it promotes the aims of restorative justice by:

- Allowing the victim to express his or her views on the harm caused; and
- Promoting reconciliation between the offender and the victim(s) and community. 400

Concerns have been expressed regarding the constitutionality of diversion programmes in cases of serious offences. It is contended that diversion could defeat the expectations of the victim in these cases, the exclusion of a full criminal trial derogating from the gravity of the offence. The possibility exists that diversion will be excluded in the case of certain (more serious) offences when the Act is passed. 401

This supports the conclusion that while restitution is important to victims of crime, the latter also have the desire to see the offender punished.

On the other hand, the concern has been expressed that, by diverting children away from the criminal justice system, “we also remove them from a system with finely-tuned procedural safeguards.” 402 This echoes one of the major criticisms of restorative justice. 403 It is thus important that careful consideration be given to the

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403 See Ch 2 Par 2 3 2 (supra).
structuring of the diversion system in order to ensure its credibility and efficacy. The inference is that the balance between victim and offender rights will have to be carefully maintained if the policies of restorative justice are to be successfully integrated into the criminal justice system.

4 3 1 6 Victims’ Charter

The government initiated the Victim Empowerment Programme – as part of the National Crime Prevention Strategy – in response to the problem of victimisation. In May 1996 a document was drawn up by an Interdepartmental Strategy Team, emphasising the plight of the victim, adhering to a broadly restorative justice strategy.

By August 2001, the Draft Victims’ Charter had been developed in consultation with various parties. Subsequently the Service Charter for Victims of Crime (Victims’ Charter) was finalised, receiving Cabinet approval on 1 December 2004. It is accompanied by a subsidiary document, the Minimum Standards on Services for Victims of Crime, with the following headings:

- Part I – Your rights as a victim of crime;
- Part II – The processes and responsibilities of the relevant departmental role-players within the criminal justice system;
- Part III – Minimum standards on services for victims of crime; and
- Part IV – Complaint mechanisms.

406 Including the SA Police Service, the Department of Social Development, the Department of Health, the Department of Correctional Services, the SA Law Commission and the academic sector.
In the Foreword to the Victims’ Charter, the Minister for Justice and Constitutional Development states that the document “is compliant with the spirit of the South African Constitution… and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”\(^{410}\) and adheres to the tenets of restorative justice.\(^{411}\)

The Preamble affirms the South African government’s commitment to “promote the rights of victims in compliance with international obligations under human rights instruments…”\(^{412}\) Thus Government acknowledges its \textit{obligations} in this respect, as opposed to the view that international instruments create mere expectations.

The Victims’ Charter acknowledges that the victim has:

- The right to be treated with fairness and with respect for dignity and privacy;
- The right to offer information;
- The right to receive information;
- The right to protection;
- The right to assistance;
- The right to compensation; and
- The right to restitution.\(^{413}\)

\textit{Compensation} is defined as “an amount of money that a criminal court awards the victim who has suffered loss or damage to property, including money, as a result of a criminal act or omission by the person convicted…”\(^{414}\) Thus the government refuses to address the issue of victim compensation as the term is understood internationally.\(^{415}\) In Part III of the Minimum Standards on Services for Victims of Crime\(^{416}\) a simple explanation is given of the meaning and effect of sections 297, 300

\(^{410}\) SA Government Website (December 2004)
\(^{411}\) See Ch 2 Par 2 3 (supra).
\(^{412}\) See previous footnote.
\(^{413}\) The Criminal Law (Sexual Offences) Amendment Bill [B50 -2003] in its guiding principles also refers to the importance of restitution by offenders “which may include material, medical or therapeutic assistance to victims and their families and dependants” [l (iii)].
\(^{414}\) Service Charter for Victims of Crime Par 6.
\(^{415}\) See Ch 1 Par 1 3 1 (supra).
\(^{416}\) SA Government Website (December 2004)
and 301 of the Criminal Procedure Act.\textsuperscript{417} A duty is placed jointly on the prosecutor, the police, the clerk of the court and the presiding officer to inform the victim of his or her rights in terms of these sections. This therefore opens the door to the possibility of state liability for the omissions of the police, prosecutors or courts should the victim not be informed of his or her rights;\textsuperscript{418} this coincides with the approach of English law regarding the Code of Practice for Victims of Crime which is seen as creating \textit{enforceable rights} (as opposed to mere expectations) and also prescribes the machinery for enforcing these rights.\textsuperscript{419} Whether the South African government foresaw the prospect of being held liable at law for the undertakings set out in the Victims’ Charter, is debatable, especially in the light of the state of the local criminal justice system.\textsuperscript{420}

The meaning attached to \textit{restitution} “refers to cases where the court, after conviction, orders the accused to “give back… the property or goods that have been taken… unlawfully, or to repair the property or goods that have been unlawfully damaged…”\textsuperscript{421} in order to restore the status quo. Part III of the Minimum Standards\textsuperscript{422} brings the family and dependants of the victim within the scope of restitution and places the obligation on the prosecutor to inform the victim that his or her request can be enforced by the court.

Thus the difference between compensation and restitution appears to be that while restitution refers to the actual return (and/or repair) of property, compensation refers to the payment of pecuniary damages. This somewhat forced distinction could signify a governmental attempt to avoid the internationally accepted understanding\textsuperscript{423} of compensation as being state-funded damages, while restitution refers to damages claimed from the criminal.

While the Victims’ Charter has the laudable object of informing the victim of his or her rights in straightforward terms, it does not create any new rights, but rather focuses the victim’s attention on pre-existing rights. At the same time the Charter is worded in

\textsuperscript{417} See Par 4 2 1 (\textit{infra}).
\textsuperscript{418} Similar to the situation in \textit{Carmichele v Minister of Safety and Security and Another} 2001 (10) BCLR 995 CC as discussed in Ch 3 Par 3 4 2 (\textit{supra}).
\textsuperscript{419} See Par 4 3 2 3 (\textit{infra}).
\textsuperscript{420} See Ch 1 Par 1 1 (\textit{supra}).
\textsuperscript{423} See Ch 1 Par 1 3 1 (\textit{supra}).
such a way that the implementation of a victim compensation scheme would slot in very comfortably in the environment which it seeks to create. Whether this will be the case, awaits the decision of the government.

4 3 1 7  Recommendations of the South African Law Reform Commission regarding reparation

The South African Law Reform Commission’s Report on sentencing in criminal cases includes a section on reparation to victims of crime. The following approach is followed in the Report:

An ideal system should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the state to enforce in the long term. (Emphasis added)

The Report comments favourably on English legislation which compels a court to pass a direct sentence of reparation (restitution), as opposed to an order that merely has the force of a civil court judgment, as is the case under South African law.

Before making its recommendations regarding a draft bill, the Report makes the following a priori comments:

Accordingly, (the SALRC) now proposes a sentence of reparation that must be considered as part of the substantive penalty in every case. Such a sentence is a radical departure, as inevitably it combines elements of what could otherwise be recovered as civil damages with a criminal penalty. The commission recognises that, although reparation must be considered in all cases, it will not always be feasible to impose it. It will also require that courts show a degree of flexibility. Courts will be required to balance consideration of the means of the offender with the amount that would be regarded as truly reparative. In order to ensure this flexibility and to allow for jurisprudence on the subject to develop, the provisions relating to reparation are stated in general terms and the possibility is left open for a victim also to proceed civilly to recover any further amount that may be due.

Website of the University of the Witwatersrand (April 2003) http://wwwserver.law.wits.ac.za/salc/report/project82.pdf
This Report is separate from the SA Law Reform Commission proposals for a victim compensation scheme which will be discussed fully in Ch 5 Par 5 2 2 (infra).
425 Ibid xix.
426 Ibid 74. See Par 4 2 1 2 (supra).
427 Ibid 74.
Sections 37 – 40 of the draft bill deal with reparation. A sentence of reparation may be imposed for any offence and must be considered in every case. Restitution may be ordered not only for loss or destruction of property, but also for physical, psychological or other injury, and loss of income or support. Quantum in awards made by lower courts are restricted to the latter’s fine jurisdiction. In assessing the reparation that a person convicted may be ordered to pay, courts must consider the means of the offender as well as the appropriate reparation. A sentence of reparation enjoys precedence over a fine where the means of the perpetrator are limited. Reparation may be imposed on its own or combined with any other sentence, but the overall sentence must reflect the principle of proportionality. In cases where the amount of the loss exceeds the award made, an additional civil action may be instituted. Courts must also determine the time for and the method of making reparation. If the victim is not present when sentence is considered, the court may direct that the victim be notified that he or she may attend the proceedings.

The court may enforce the making of reparation by allowing the accused to make reparation on conditions and in instalments. The court can order amounts to be deducted from the wages of the offender and paid over to the clerk of the court (or registrar) who may, subject to the approval of a magistrate or judge in chambers, vary conditions and instalments. Any court of equal or superior jurisdiction may reconsider a decision and replace it with a new order.

The court passing sentence may issue a warrant authorising the attachment and sale of any movable property of the offender which is mutatis mutandis the same procedure as that prescribed by section 288 of the Criminal Procedure Act for the enforcement of payment of a fine; however, there is one important difference: Provision is not made for the sale in execution of the immovable property of the offender. The reason for this distinction is not obvious and is not given in the Report. The court is not given the authority to impose an alternative sentence of imprisonment at the time of sentencing. However, in terms of section 40 of the draft bill, the defaulting offender can be brought before a court and sentenced to any other sentence which the original court might have been authorised to impose, bearing in mind any partial reparation which has already been made.

428 What follows is drawn from these sections, unless otherwise indicated.

429 Supra.
Reparation includes both restitution and compensation. Despite the international trend to limit use of the term restitution to offender reparation and compensation to state sourced reparation, the draft bill uses the terminology as follows: “Restitution” refers to the restoration of property to its owner, while “compensation” refers to the making good by the offender of damage resulting from the crime.

The use of the terminology “any victim” in section 37(2) indicates that the concept of victim is not restricted to the owner of property or the person directly injured, but is broad enough to cover a dependant of the injured or deceased party, as well as the victim whose personal rights – as opposed to real rights - have been negatively affected.

Section 46 of the draft bill creates procedures to reveal the financial position of the offender to enable the court to assess his or her ability to effect restitution. Sections 47 and 48 deal directly with the interests of victims. Section 47 places the duty on the prosecution to bring the interests of the victim to the attention of the court by furnishing the court with particulars regarding:

- Damage to or the loss or destruction of property, including money;
- Physical, psychological or other injury; or
- Loss of income or support.

The restorative justice derived victim impact statement is thus mooted in South African legal practice. If made, the prosecutor has the duty to bring it to the notice of the court.

Section 48 provides that if a person has been convicted of an offence involving violence and is sentenced to an unsuspended term of imprisonment of two years or more, the court must explain to a victim of the crime, including the next of kin of a deceased victim, that they may inform the Commissioner that they wish to be notified of any hearing of a Correctional Supervision and Parole Board where the conditional release of such offender is being considered, so that they may make representations on the risks that such release may hold.

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430 S 37(2).
431 See Ch 1 Par 1 3 1 (supra) and s 37(2).
432 See also wording of s 37(2)(c) where “loss of … support” is mentioned.
Neser\textsuperscript{433} refers to the draft bill as heralding “a new era in sentencing in South Africa.”

It radically extends the purview of existing legislation:

- The concept of \textit{victim} is extended to cover all persons suffering from the consequences of the commission of the crime;
- The quantum of damages is extended to cover all damage (in accordance with the criteria of civil delictual law);
- The machinery for enforcement of payment is extended beyond the force of a civil judgment;
- The rights of the absentee victim are protected;
- Courts are \textit{compelled} to consider restitution;
- Courts are empowered to order restitution \textit{suo motu} without having to await a request from the victim (as is the case with section 300 of the Criminal Procedure Act);\textsuperscript{434}
- The victim is given a role and relevance in the sentencing process by the introduction of the victim impact statement;
- The victim impact statement serves as a vehicle to bring the degree of the loss suffered by the victim to the attention of the court;
- The prosecution\textsuperscript{435} is also given the responsibility to bring the victim’s loss to the attention of the court by means of the victim impact statement; and
- Legal machinery is created to protect the interests of the victim even after the release of the offender.

However, the following questions arise regarding the draft bill:

- Why does it not follow the precedent set by the General Law Further Amendment Act\textsuperscript{436} in authorising a court initially to impose a period of imprisonment to be served if payment is not effected?\textsuperscript{437}


\textsuperscript{434} See Par 4 2 1(supra).

\textsuperscript{435} See also Neser J “Reformation of Sentencing in SA” (2001) 14 \textit{SA Journal of Criminal Justice} 84 88.

\textsuperscript{436} See Par 4 3 1(supra).

\textsuperscript{437} Possibly the answer to this question is to be found in the stance of the Constitutional Court regarding imprisonment for civil debts. See Coetsee \textit{v} Government of the Republic of SA, Matiso and Others \textit{v} Officer Commanding, Port Elizabeth Prison and Others \textit{(supra)}. However, it is questionable whether this is, in fact, a case of a civil debt as s 40(2) allows a court to impose a sentence that may have been imposed after conviction, in cases where the debtor is in default of payment.
Why is the immovable property of the offender protected from a sale in execution?

432 Great Britain

4321 Policy

Because the English government has generated a wealth of policy documents regarding the role of victims of crime, this paragraph deals with underlying policy considerations. Newburn identifies three periods:

- 1960 – 1975: The development of the concept of victim compensation;
- 1975 – 1980: The development of specific schemes to support victims; and
- 1980 onwards: The institutionalisation of victim support and the greater involvement of victims in the criminal justice process.

A certain tension has developed due to the perception that victim support can be unfair to the accused, for example, in cases where victim support crosses the boundaries and becomes the coaching of witnesses, and integrity has to be shown to both interests.

Criminal justice policy has been the recipient of considerable governmental consideration in England; various policy documents have resulted in the current situation as set out herein. While the criminal justice issues considered and the changes proposed have been wide ranging and not restricted to the sentencing of criminals and the position of victims of crime, the latter did receive their fair share of attention. It is these aspects that will be considered.

The White Paper, *Criminal Justice: The Way Ahead*, appeared in 2001. It states that the criminal justice system must deliver justice for all and that one of the means of achieving this is to be responsive to the needs of victims. Regarding sentencing philosophy, the statement is made that “current sentencing policy is not transparent to the victim and society about the reasons for different sentences or their actual

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441 Introduction Par 4.
content…Nor does the existing framework do enough to encourage reparation to the person victim or the community.” 442 One of the means to prevent re-offending is seen to be the community sentence 443 which should contain four elements, namely a punitive component, a reparation component, an offending behaviour component (addressing the underlying cause of the offending) and a proceeds of crime component (offenders should be deprived of the benefits accruing from their crimes). The reparation component could involve reparation to the victim or the wider community in cash or kind. Victims and the community ought to have an input in determining the form of reparation. The modernisation of the criminal justice system includes granting victims of crime a “better deal”. 444 Bringing criminals to justice cannot be effected unless victims have confidence in the system. Revision of the Victim’s Charter 445 would ensure that victims receive monetary restitution. 446 Though courts already have the duty to consider compensation in all appropriate cases, 447 the problem remains that offenders fail to comply with these orders. The undertaking is made in the White Paper that the government will consider instituting a victim’s fund to ensure that victims receive immediate payment in terms of compensation (restitution) orders. It would then become the court’s duty to pursue defaulting criminals. It is pointed out that the Criminal Injuries Compensation Scheme 448 is extremely generous, having paid out more that all other European schemes together in the previous year. 449

Easton and Piper see the approach reflected in the abovementioned literature as evidence of the rise of “actuarial justice.” 450 It is accepted that crime cannot be eliminated, but the risk must be managed optimally.

442 Part 2: Par 2 65.
444 Part 3: Par 3 95 et seq.
445 See Par 4 3 2 3 (infra).
446 Other rights proposed for victims are to be treated with dignity and respect, to receive support, to receive protection, to give and receive information and to be granted transparent criminal justice process (Par 3 104).
447 See previous footnote.
448 See Ch 5 Par 5 3 2 (infra).
449 Par 3 96 and 3 119.
In September, 2001 the Auld Review evaluated the criminal court system with a view to improving the delivery of justice. Emphasis was placed on the interests of victims and the concomitant promotion of public confidence in the rule of law. The report dealt substantially with the structuring of the judicial system and recommended the codification of the criminal law with Codes of offences, procedure, evidence and sentencing. Chapter 9 of the review is headed Decriminalisation and Alternatives to Conventional Trial. The Review points out that restorative justice has a place at various stages in the criminal justice process (not just at the sentencing stage). Restorative justice requires the offender's acceptance of guilt, his or her informed consent to the process, his or her recognition of the harm perpetrated and a desire to make reparation for it, the prospect of his or her rehabilitation, some involvement of the community and – where an individual victim in identifiable – the victim's willing involvement in the process. Regarding restorative justice the Review concludes: “I recommend the development and implementation of a national strategy to ensure consistent, appropriate and effective use of restorative justice techniques across England and Wales.”

In July 2002 the government released another White Paper, Justice for All, in response to the Halliday Report and Auld Review, emphasising the importance of rebalancing the system in favour of victims, witnesses and communities. It proposed bolstering support for victims by instituting a new Code of Practice and a Commissioner for Victims and Witnesses. The rebalance of the criminal justice system in favour of victims proposed in Justice for All is criticised by Jackson as being a cover for the imposition of increasingly punitive penalties, risking injustice to the accused while granting little tangible benefit to victims. As an example, he quotes the proposed tariff of sentence discount for those pleading guilty which he says “can lead to victim anguish when victims feel that the full gravity of an offence has not been brought home to defendants.”

In January 2004 the Home Office published Compensation and Support for Victims of Crime, a consultation paper aiming to improve services offered to victims of crime. It

452 Ibid Par 63.
453 Ibid Par 69.
454 Cm 5563.
456 Ibid 314.
proposed the creation of a national Victims Fund which, working in conjunction with the Criminal Injuries Compensation Scheme, would ensure that victims could access a variety of appropriate support services. The consultation paper set out how resources could best be used to meet the needs of victims of crime and sought views on various proposals. The possibility was mooted of making offenders pay more towards the compensation and support of victims by placing a surcharge on criminal convictions. The possibility of allowing the Criminal Injuries Compensation Authority to recover money from offenders was also raised. The issue of how to compensate those criminally injured in the course of duty led to the suggestion that this responsibility should be transferred to certain employers. This, once again, raises one of the questions central to this thesis, namely: Is there any sound reason for perpetuating the maintenance of separate state-funded schemes for compensation of victims of crime as opposed to victims of traffic and industrial misfortunes?

4322 Criminal Justice Act

This is a major Act consisting of 339 sections and 38 schedules, further developing the government’s commitment to restorative justice as set out in the White Papers Criminal Justice: The Way Ahead and Justice for All discussed above. The Act aims to re-balance the criminal justice system by granting greater rights to victims, even at the expense of those accused of offending. The restriction of the rights of the accused has proved to be controversial; an example is the admission of proof of the accused’s previous convictions. The Act also shows a shift in the attitude evidenced in the Criminal Justice Act of 1991 where the prevailing viewpoint was that criminals should “get their just deserts,” retribution and culpability underlying the sentencing framework. Under the current Act, rehabilitation and reparation have assumed more significant roles. The purposes of sentencing are set out in statute for the first time; they are: Punishment, crime reduction, reform and rehabilitation,

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public protection and reparation.\textsuperscript{461} Thus it seems that, on the one hand, proving the accused’s guilt has become simpler, while, on the other hand, once a conviction has been secured, more concern is shown for the rehabilitation of the offender than before.

Part 3\textsuperscript{462} of the Act introduces the sentencing concept of \textit{conditional caution}. A conditional caution provides for an offender receiving suitable treatment \textit{without} prosecution. Reparative conditions can be attached thereto. Non-compliance can lead to prosecution for the original offence. The deciding factor in determining whether a conditional caution should be imposed – rather than prosecution or a simple caution – is whether the imposition of specified conditions would constitute appropriate and effective means of addressing an offender’s behaviour or making reparation for the effects of the offence on the victim/community. In terms of the Code of Practice\textsuperscript{463} dealing with the interpretation of these provisions, conditional cautions are associated with the aims of restorative justice. A case study conducted in the area of jurisdiction of the Thames Valley Police suggests that conditional cautioning delivers benefits to both offenders and victims. Most cautions led to apologies that were usually seen as genuine expressions of remorse accompanied by formal reparation agreements in about a third of cases; most of these reparation agreements were fulfilled. The majority of participants believed that restorative cautions helped offenders understand the effects of the offence and experience shame.\textsuperscript{464}

Section 201(2) creates further possibilities for imposing reparative orders, stating that an “activity requirement” accompanying certain orders – for example community orders and suspended sentences\textsuperscript{465} – can “include activities whose purpose is that of reparation, such as activities involving contact between offenders and persons affected by their offences.” The aggregate number of days of such activity may not exceed sixty.

\textsuperscript{461} Part 12 of the Act deals with sentencing. Section 142 states that “the making of reparation by offenders to persons affected by their offences” is one of the matters to be taken into account in sentencing. Section 177(a) provides for community orders that can contain an “an unpaid work requirement.”

\textsuperscript{462} Sections 22 – 27.

\textsuperscript{463} Brought into force by statutory instrument (S12004 – 1683) October 2004. Par 2 5.

\textsuperscript{464} Office for Criminal Justice Reform website (June 2006) http://www.crimereduction.gov.uk/criminaljusticesystem12.htm

\textsuperscript{465} S 196.
The Act calls into existence the office of Commissioner for Victims and Witnesses as suggested in the White Paper, *Justice for All*. It is the incumbent's duty to promote the interests of victims and witnesses, and to take appropriate action to encourage good practice in their treatment. The Act also provides for the Secretary of State to issue a Code of Practice outlining the services to be provided to victims by persons having victim-related functions. The Code can also cover any other aspect of the criminal justice system. The Code of Practice for Victims of Crime is to be kept under review by the Commissioner. The Code lists individuals and organisations deemed to be service providers with whom victims may come into contact, and enumerates the obligations of such service providers. The Code sets out the services that victims are entitled to receive from criminal justice agencies; for the first time, the latter have legislated obligations in this regard. The Code provides for keeping victims informed about the progress of cases. Victims are granted, *inter alia*, the following rights by law: To receive information about the crime within specified time scales (including the right to be notified of arrests and court cases and clear information from the Criminal Injuries Compensation Authority on eligibility for compensation), to be told about Victim Support and to be referred to it, to an enhanced service for vulnerable or intimidated victims and the flexibility for victims to opt in or out of services. The agencies bound by the Code of Practice are: All police forces for police areas in England and Wales, the British Transport Police and the Ministry of Defence Police, the Crown Prosecution Service, the Court Service, the

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466 2004.
467 See Par 4 3 2 1 (supra).
470 According to empirical evidence the low number of eligible claimants actually being successful in their claims, is due to lack of communication of basic information regarding compensation schemes: Groenhuijsen M “International Protocols on Victims’ Rights and some Reflections on significant recent Developments in Victimology” in Davis L & Snyman R *Victimology in South Africa* (2005) 335 337.
471 Victim Support is national charity which helps over 1 million victims and witnesses per year. Staff and volunteers based in 386 schemes throughout England, Wales and Northern Ireland offer information, practical assistance and emotional support to victims. For an analysis of its work see Reeves H & Mulley K “The new Status of Victims in the UK: Opportunities and Threats” in Crawford A & Goodey J (eds) *Integrating a Victim Perspective in Criminal Justice* (2000) 125.
joint police/Crown Prosecution Service Witness Care Units, the Parole Board, the
Prison Service, Local Probation Boards, Youth Offending Teams, the Criminal
Injuries Compensation Authority, the Criminal Injuries Compensation Appeals Panel
and the Criminal Cases Review Commission. Provision is made for making
complaints directly to the agency involved and thereafter to the Parliamentary
Ombudsman. In the context of this thesis it is notable that the Code\textsuperscript{472} does not
require services to be provided in circumstances where the crime is subject to
investigation in terms of the legislation applicable to work related incidences – this
underlines the distinction drawn between victims of industrial crimes and other crimes
in the English system.

One of the multiplicity of obligations placed on the police is to respond to requests for
information from the Criminal Injuries Compensation Authority to enable a victim’s
claim for compensation to be assessed with the most accurate information available
at the time.\textsuperscript{473}

\textbf{4 3 2 4 Victim Personal Statement Scheme}\textsuperscript{474}

The Victim Personal Statement Scheme\textsuperscript{475} is an example of the current restorative
justice trend to grant victims of crime an input in the sentencing process.\textsuperscript{476} It extends
an opportunity to victims to enunciate concerns and needs. The Home Office website
describes the benefits Victim Personal Statement as follows:\textsuperscript{477}

\begin{quote}
A victim personal statement adds to the information you have already given
to the police in your statement about the crime. The victim personal
statement gives you the chance to tell us about any support you might need,
and how the crime has affected you… physically, emotionally or financially...
\end{quote}

In the Victim Personal Statement the victim is afforded the opportunity of, \textit{inter alia},
informing the court of his or her restitutionary needs.\textsuperscript{478} The following information is
conveyed to the victim:

\textsuperscript{472} At 3.9.
\textsuperscript{473} At 5.28. Concerning the Criminal Injuries Compensation Authority, see Ch 5 Par 5 3 2
\textit{(infra)}.
\textsuperscript{474} Home Office UK website:
\textit{(June 2003) http://www.homeoffice.gov.uk/docs/victimstate.pdf}
\textsuperscript{475} Launched on 1 October 2001 by the Home Office’s Justice and Victim Unit.
\textsuperscript{476} See Par 4 3 2 1 \textit{(supra)}.
\textsuperscript{477} See penultimate footnote.
\textsuperscript{478} You should use the victim personal statement to give the police any information
If you want to claim compensation from the offender, you may need to provide supporting details or proof... The police officer will be able to give you advice about this. You would also need to provide proof if you claimed that a medical or social problem had been made worse by the crime.

According to Miers,\textsuperscript{479} the Victim Personal Statement has superseded the role of the prosecutor in informing the court of the restitutionary needs of the victim. The idea of victims (and/or their families) having a say in the sentence imposed on offenders is criticised on the grounds that it undermines accepted norms of justice. The inclusion of victim input in the sentence imposed is the most controversial aspect of the pro-victim movement and practice has shown it to have had little impact on the criminal justice system and victim satisfaction.\textsuperscript{480} Some writers state that a firm theoretical basis has not been formulated for victim participation in the adversarial criminal justice system.\textsuperscript{481} It is argued in some quarters that there is no clear reason for victims being given a role in the sentencing process as the therapeutic value to the victim, and the benefits to sentencing outcomes, have not been proved.\textsuperscript{482} Victim impact statements are criticised for allowing the subjective views of the victim to upset the dispassionate impartiality of the court and for creating false expectations you did not include in the witness statement. You can say whatever you like in your personal statement. For example, you may want to tell us:

- if you want to be told about the progress of your case;
- if you would like extra support (particularly if you are appearing as a witness at a trial);
- if you feel vulnerable or intimidated;
- if you are worried about the offender being given bail (for example, if the offender knows who you are);
- how the crime has affected you if you feel racial hostility was part of the crime;
- how the crime has affected you if you feel that you were victimised because of your faith, cultural background or disability;
- if you think you will try to claim compensation from the offender for any injury, loss or damage you have suffered;
- if the crime has caused, or made worse, any medical or social problems (such as marital problems); or
- anything you think might be helpful or relevant.


which are shattered if the victim is not believed.\textsuperscript{483} However, the Home Office maintains that the Victim Impact Statement “is not primarily a sentencing tool”\textsuperscript{484} and that it is only one of many factors taken into account when sentences are decided. Erez expresses a balanced view:\textsuperscript{485}

The research suggests, however, that there is every reason to include, and no reason to fear, integrating a victim voice through victim impact statements. The VIS practice has demonstrated potential benefits to the justice system as well as to victims... With proper safeguards, the practice can also increase victims' sense of control over the process... Accurate information on victim harm can enhance justice in adversarial legal systems, particularly in terms of sentence proportionality.

4325 National Association of Victims Support Schemes

The National Association of Victims Support Schemes was founded as a result of the Council of Europe’s adoption of guidelines regarding victims of crime.\textsuperscript{486} The National Association of Victims Support Schemes states its \textit{raison d'être} as follows:\textsuperscript{487}


The prime objective of the victim movement in England is to assist the victim rather than to concentrate on the rights of the victim. This indicates that English law already provides ample protection for the rights of the victim.\textsuperscript{488}

\begin{footnotes}
\item[484] \textit{Victim Personal Statements Circular} 35/2001 Justice and Victims Unit, Home Office, London.
\item[487] National Association of Victims Support Schemes website (June 2003) http://natiasso03.uuhost.uk.uu.net/navss.htm
\end{footnotes}
433 India

433.1 Police Act\(^{489}\)

In terms of this Act, an area may be proclaimed as being in a “disturbed or dangerous state or that, from the conduct of the inhabitants of such area... it is expedient to increase the number of police.”\(^{490}\) Provision is made for the cost of the additional police force to be borne by the inhabitants of the area.\(^{491}\)

Magistrates\(^{492}\) receive applications, hold enquiries and make orders identifying persons who have suffered losses\(^{493}\) as a result of riot or unlawful assembly and quantify the amounts to which they are entitled. Such orders also stipulate the payments to be made by the inhabitants of the area, but the State Government may exempt any persons or section of inhabitants from liability.\(^{494}\) The period for applications is limited to one month; the applicant must be blameless and is deprived of any further civil claim.

Mundrathi\(^{495}\) refers to this as a punitive tax which is frequently the only effective remedy where offences are committed by large numbers of (usually indigent) offenders who are often not identifiable and not convicted. The concept of punitive taxation bridges the distinction between restitution and compensation: On the one hand, offenders – albeit \(\text{en masse}\) – effect restitution to victims; on the other hand, the term “taxation” refers to funds paid to the state, forming part of the \textit{fiscus}.\(^{496}\) This form of collective responsibility for restitution is not found in the other legal systems canvassed in this research. The constitutionality of singling out a particular sector of the community for the imposition of a punitive tax is debatable.

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\(^{489}\) 1861.

\(^{490}\) S 15(1).

\(^{491}\) S 15(3).

\(^{492}\) S 15A.

\(^{493}\) Physical as well as proprietary.

\(^{494}\) S 15(5).

\(^{495}\) Mundrathi \textit{Law on Compensation: To Victims of Crime and Abuse of Power} 148 – 149. In the same context, Mundrathi refers to the Bombay Police Act (1951 (Bombay Act 22 of 1951)) which provides for the levying of contributions on a community where riots occur, or where participants in an unlawful assembly commit certain offences. Amounts levied are then paid out to the victims of the offences.

\(^{496}\) The fact that offenders contribute the amount paid to victims is a characteristic of restitution; the fact that some non-offending persons also contribute, is a characteristic of compensation.
4332 Probation of Offenders Act

The objective of this Act is “to provide for the release of offenders on probation or after due admonition and for matters connected therewith.” Courts releasing offenders on probation may order them to pay reasonable restitution for loss or injury, and costs. The reference to restitution being paid to “any person” means that dependants of the victim – or the latter’s estate – may receive restitution, and not just the victim personally. Payment can be recovered in the same way as a fine. A civil court subsequently trying a suit for damages has to take the amount paid in terms of this section into consideration when determining quantum.

Mundrathi criticises these provisions as being “inadequate from the victim’s point of view,” chiefly because the making of the award is solely within the discretion of the court as to what is reasonable under the circumstances.

434 New Zealand

Victim’s Rights Act

The Victims of Offences Act improved the rights of victims of crime, dealing with:

- Treatment of victims;
- Victims’ access to services;
- Early information for victims of certain information;
- Information about proceedings for victims;
- Restitution of victims’ property;
- Victim impact statements;

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497 1958.
498 Preamble. In Ratanlal v State of Punjab AIR 1965 SC 444: (1964) 7 SCR 676 the court stated that the Act, “is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of Criminal Law is more to reform the individual offender that to punish him.”
499 S 5.
500 S 5(1).
501 Mundrathi Law on Compensation: To Victims of Crime and Abuse of Power 95.
502 The wording of the s is not peremptory. In 1997 the Government of Punjab considered amending the Act, but recommended to the central government that no amendments were necessary. Website of the Government of Punjab (March 2004) http://www.doitpunjab.gov.in/gprlaw.asp
503 2002.
504 1987.
Non-disclosure of victims’ residential addresses;
Obtaining victims’ views on bail in certain cases; and
Notifying victims of the release or escape of offenders in certain cases.

The Act created the Victims’ Task Force with, inter alia, the following functions:

To develop guidelines to promote the principles set out in the Act;
To assess the adequacy of existing services available to victims;
To promote the distribution of information about services available to victims;
To consider further measures to assist victims;
To receive requests for financial assistance from community organisations working to assist victims;
To consider whether provision should be made, in cases where an offender is sentenced to make reparation, for the Crown to make an immediate advance to the victim; and
To make recommendations to the Minister of Justice on matters relating to victims.

The Victims Task Force was legislated to expire on 31 March 1993. It acted as a watchdog over the criminal justice system and as an advocate for victims’ rights. At the time of its termination much remained to be done to address victims’ rights. Tighter legislation was recommended.

The Victims’ Rights Act replaced the Victims of Offences Act. The changes brought about were:

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505  S 12.
506  S 13.
507  Though this was never legislated further, it provides an example of the blurring of the division between restitution and compensation.
508  S 16.
509  “National Conference to provide stocktake on provisions for victims of crime” Media release of Health Studies Faculty Auckland University of Technology 2 December 2002. (January 2003) http://www.aut.ac.nz/corp/newsrelease/?140
It expanded the range of persons defined as victims by including parents and guardians of child victims and close family members;\(^{512}\)

It gave persons not strictly victims under the Act input into proceedings;\(^{513}\)

It mandated the provision of assistance and information to victims;\(^{514}\)

It encouraged the holding of meetings between victims and offenders, in accordance with principles of restorative justice;\(^{515}\)

It prohibited the disclosure of the victim's address;\(^{516}\)

It required a victim impact statement in all cases;\(^{517}\)

It required that victims' views on orders prohibiting publication of the offender's name be sought;\(^{518}\)

It provided comprehensive rights of notification to victims of the occurrence of specified events relating to the offender;\(^{519}\) and

\(^{512}\) S 4. \textit{R v Peachey} (CA 92/01 17 July 2001) 16 [November 2002]  

The Court of Appeal, acting under the Victims of Offences Act, accepted a victim impact statement made by the mother of a victim as evidence of the impact of the offence on the victim (not the mother).

\(^{513}\) S 14 provides that certain information can be given to a victim's support person instead of to the victim personally if the latter cannot receive it or understand it. S 20 allows the taking of a victim impact statement from a person who was disadvantaged by an offence (but who is not a victim) and from whom information on the effects of the offence could be ascertained. S 40 allows a victim to appoint a representative for certain purposes.

\(^{514}\) Ss 7 & 8.

\(^{515}\) S 9(1) states: "If a suitable person is available to arrange and facilitate a meeting between a victim and an offender to resolve issues relating to the offence, a judicial officer, lawyer for an offender, member of court staff, probation officer, or prosecutor should, if he or she is satisfied of the matters stated in subs (2), encourage the holding of a meeting of that kind."

\(^{516}\) S 16 prevents the disclosure of a victim's address in a court of law except by leave of the judicial officer which will be given only if the disclosure is directly relevant to the case and its evidentiary value outweighs any prejudice to the victim's rights.

\(^{517}\) S 17 requires the prosecutor to make all reasonable efforts to obtain a statement from the victim regarding physical and emotional harm, damage to property and other effects suffered by the victim.

\(^{518}\) S 28. There is a strong presumption in favour of open justice and the offender's identity will be protected only in exceptional cases: \textit{R v Liddell} [1995] 1 NZLR 538, at 547; \textit{Lewis v Wilson & Horton} [2000] 3 NZLR 546, at 558; \textit{R v Kealey} (CA 63/01 31 May 2001); (November 2002)  


\(^{519}\) Ss 34 – 39 are relevant:

34. Notice of release on bail of accused or offender.
35. Notice of temporary release from, or escape or absconding from, or death in, prison detention or home detention, of accused or offender.
36. Notice of convictions for breaching release or detention conditions and of decisions on recall orders.
37. Notice of discharge, leave of absence, or escape or death of accused or offender.
According to the New Zealand Ministry of Justice the Victims’ Rights Act turned “…a number of directives for the treatment of victims into enforceable rights.” Officials are expected to treat victims of crime with courtesy and compassion and to respect their dignity and privacy. A victim or member of a victim's family who has welfare, health, counselling, medical, or legal needs arising from an offence should have access to appropriate services. Restorative justice meetings are encouraged. These principles are guidelines and do not confer rights that are enforceable in a court of law though there is a complaints procedure. Depending on their nature, complaints can be addressed to:

- The person required to accord the right to the victim;
- An Ombudsman;
- The Police Complaints Authority; or
- The Privacy Commissioner.

A victim may exercise his or her rights under the Act, irrespective of whether anyone is arrested, charged or convicted of the offence in question.
agencies holding property for evidentiary purposes must, to the extent that it is possible to do so, return it as soon as practicable.532

4.4 Comparison

Firstly, a tabular comparison of the law dealing with restitution in the four countries targeted in this research will be given revealing differences and similarities regarding:

- Principal legislation dealing with restitution;
- Other legislation dealing with restitution;
- Bills/proposals for legislation to promote restitution;
- Other state-initiated measures to promote restitution; and
- Reasons for the low number of restitution orders.

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532 S 51.
<table>
<thead>
<tr>
<th>South Africa</th>
<th>Great Britain</th>
<th>India</th>
<th>New Zealand</th>
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</thead>
<tbody>
<tr>
<td><strong>Principal legislation dealing with restitution</strong></td>
<td><strong>Powers of Criminal Courts (Sentencing) Act 2000:</strong></td>
<td><strong>Code of Criminal Procedure 1973:</strong></td>
<td><strong>Sentencing Act 2002:</strong></td>
</tr>
<tr>
<td><em>Criminal Procedure Act 1977:</em></td>
<td>S1: Deferment of sentence pending reparation.</td>
<td>S357: Court order to effect restitution out of fine providing civil claim exists.</td>
<td>S10: Court has to consider restitution offered when considering sentence.</td>
</tr>
<tr>
<td>S34: Restitution of stolen property – no application required.</td>
<td>S23: Youth offender contracts providing for financial or other reparation with consent of victim.</td>
<td>S359: Order to pay costs (not losses) of complainant in non-cognisable cases.</td>
<td>S32: Sentences of reparation compulsory (no application is required and reasons must be given if sentence not passed) and are enforceable as fines without victim losing civil claim (subject to provisions of <em>Injury Prevention, Rehabilitation, and Compensation Act 2001</em>): Financial and non-financial losses. Assistance from offender’s family group can be taken into consideration. Sentences of reparation precedence over fines. Courts consider alternative sources of financial aid at disposal of victim.</td>
</tr>
<tr>
<td>S297: Postponement or suspension of sentence conditional on restitution for patrimonial or non-patrimonial loss - not necessarily in financial form.</td>
<td>S73-74: Reparation orders for young offenders providing for non-financial reparation with consent of victim in non-custodial cases.</td>
<td>S431: Money ordered to be paid under <em>Code</em> recoverable as fine.</td>
<td>S33: Reparation report drafted by probation officer to assist court in establishing quantum.</td>
</tr>
<tr>
<td>S300: Restitution order (patrimonial losses only) effective as civil judgment releasing offender from further liability if not renounced by victim - application required.</td>
<td>S118: Courts imposing suspended sentences directed to consider separate restitution order - no provision for restitution as condition of suspension.</td>
<td>S452: Court can make order for disposal of property at conclusion of trial – state can be liable if goods lost in police custody.</td>
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<tr>
<td>S301: Refund of purchase price to <em>bona fide</em> purchaser of stolen property out of money taken from offender.</td>
<td>S130-134: Restitution orders compulsory (no application is required and reasons must be given if not made) and enforceable as fines without victim losing civil claim: Financial and non-financial losses. Precedence over fines.</td>
<td>S453: Order for restitution to innocent purchaser of stolen property out of money found on accused.</td>
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<td>S137: Parent/guardian of young offender can be ordered to settle restitution order.</td>
<td>S456: Order to restore possession of immovable property forcibly dispossessed.</td>
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<td></td>
<td>S148: Court can order: Restitution of stolen property (or of property obtained from proceeds thereof); Payment of its value out of money found on offender; Payment of damages to <em>bona fide</em> purchaser of stolen property (or person lending money on security thereof) out of money found on offender.</td>
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<tr>
<th>South Africa</th>
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<tbody>
<tr>
<td><strong>Other legislation dealing with restitution</strong></td>
<td><strong>International Co-Operation In Criminal Matters Act 1996:</strong></td>
<td><strong>Criminal Justice Act 2003:</strong></td>
<td><strong>Police Act 1861:</strong></td>
</tr>
<tr>
<td>Provides for mutual international recognition of sentences and restitutionary orders between South Africa and foreign states. Foreign orders registered and have effect of civil judgment of the court where registered.</td>
<td>Aims to re-balance criminal justice system by granting greater rights to victims, even at the expense of those accused of offending. Purposes of sentencing set out in statute for the first time: Punishment, crime reduction, reform and rehabilitation, public protection and reparation. Introduces conditional caution sentence: Provides for offender receiving suitable treatment without prosecution. Reparative conditions can be attached. Creates further possibilities for reparative orders: Activity requirement (which can be restitutionary) can accompany certain orders, e.g. community orders and suspended sentences.</td>
<td>Contributions are levied on community and paid out to victims of offences of riot and unlawful assembly - punitive tax.</td>
<td>Law enforcement agencies and courts to return property held for evidentiary purposes as promptly as possible. Sentencing Judge must be informed of any physical or emotional harm, or any loss of or damage to property, suffered by victim and any or effects of offence on victim. Victims’ Task Force created to promote victims’ interests.</td>
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<tr>
<td><strong>Correctional Services Act 1998:</strong></td>
<td>Court, Correctional Supervision and Parole Board or Commissioner of Correctional Services may order restitution as condition of community corrections: Non-compliance can lead to enforcement of original sentence of imprisonment.</td>
<td><strong>Domestic Violence Act 1998:</strong></td>
<td><strong>Probation of Offenders Act 1958:</strong></td>
</tr>
<tr>
<td>Court, Correctional Supervision and Parole Board or Commissioner of Correctional Services may order restitution as condition of community corrections: Non-compliance can lead to enforcement of original sentence of imprisonment.</td>
<td>Miscellaneous orders protecting victims of domestic violence, including payment of emergency monetary relief. Court making protection order must make suspended order authorising issue of warrant of arrest in case of non-compliance which is criminal offence.</td>
<td>Court releasing offender on probation can order payment of reasonable restitution for loss or injury, and costs, to victim.</td>
<td>Court releasing offender on probation can order payment of reasonable restitution for loss or injury, and costs, to victim.</td>
</tr>
<tr>
<td><strong>Domestic Violence Act 1998:</strong></td>
<td><strong>Prevention of Organised Crime Act 1998:</strong></td>
<td><strong>Domestic Violence, Crime and Victims Act 2004:</strong></td>
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<tr>
<td>Miscellaneous orders protecting victims of domestic violence, including payment of emergency monetary relief. Court making protection order must make suspended order authorising issue of warrant of arrest in case of non-compliance which is criminal offence.</td>
<td>Recognition of restitutionary rights of victim when property is confiscated in favour of Criminal Assets Recovery Committee.</td>
<td>Creates Commissioner for Victims and Witnesses to promote interests of victims and witnesses, and to take appropriate action to encourage good practice in their treatment. Code of Practice for Victims of Crime: Lists individuals and organisations service providers with whom victims may come into contact, enumerates obligations of service providers; Sets out services victims entitled to receive from criminal justice agencies that have legislated obligations in this regard for the first time.</td>
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<tr>
<td>Bills/ proposals for legislation to promote restitution</td>
<td>South Africa</td>
<td>Great Britain</td>
<td>India</td>
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<tr>
<td>Child Justice Bill 2002:</td>
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<tr>
<td>Various provisions for patrimonial and non-patrimonial restitution.</td>
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<tr>
<td>South African Law Reform Commission</td>
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<tr>
<td>Sentencing (New Sentencing Framework):</td>
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<td>Court must consider making an order of reparation, but has final discretion.</td>
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<tr>
<td>Order not restricted to patrimonial loss. Victim does not lose civil cause of action where damages exceed amount of order. Restitution is favoured above fine. Court may issue warrant of attachment and sale of offender's movable property. Victim impact statement introduced.</td>
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<table>
<thead>
<tr>
<th>Other measures to promote restitution</th>
<th>Victims' Charter:</th>
<th>Code of Practice for Victims of Crime:</th>
<th>Criminal Justice Assistance Reimbursement Scheme:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Promotes principles of restorative justice, but does not create new rights for victims.</td>
<td>Creates enforceable rights for victims in place of mere expectations.</td>
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<td></td>
<td></td>
<td>Victim Personal Statement Scheme:</td>
<td>Assessor considers applications for compensation for material loss caused by victimisation as a result of assisting in the administration of justice.</td>
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<td>Provides victim with means to inform court of restitutionary needs.</td>
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<td>National Association of Victims Support Schemes:</td>
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<td>Develops policies for treatment of victims.</td>
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<p>|                                             | Offender not identified.   | Difficulty of proving required elements of tort. | Offender not identified. | Loss made good or property recovered. |
|                                             |                             | High cost and uncertainty of litigation. | Court fees are calculated as percentage of amount claimed. | No victim loss arising from offence. |
| Criminal Procedure Act 1977 (S300):          |                             |                                      |                        |                         |</p>
<table>
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<tbody>
<tr>
<td>Magistrates’ courts are limited in amount of restitution; and Restitution orders are limited to certain classes of loss, leaving victim with no claim for balance. Secondary victimisation and traumatisation of victim. Civil court cannot accept record and conviction of criminal court as proof of facts. Problems in legal aid system. High cost and uncertainty of litigation.</td>
<td><strong>Offences Against the Person Act 1861:</strong> Person who has been convicted on charge of common assault and has complied with sentence, cannot be sued in civil court.</td>
<td>Problems in legal aid system. High cost and uncertainty of litigation.</td>
<td>Reparation not sought by police. Offender given custodial sentence.</td>
</tr>
</tbody>
</table>
4 4 1  Restitution: Similarities

Taking action against offenders was originally left solely to victims who enforced offender restitution. The concept of the state – as opposed to the victim – taking legal action against the offender on behalf of the community was a subsequent historical development. Criminal law became a system protecting primarily the community’s interests, relegating the victim’s interests to second place. The latter approach marginalised the victim. However, the victim’s entitlement to the state’s granting him or her efficacious legal means to enforce restitution in respect of harm suffered was never denied.

The main right of recourse at the disposal of the victim was\textsuperscript{980} the private law of delict/tort which does not constitute an adequate vehicle to ensure restitution. All four countries examined have criminal procedure legislation formalising the victim’s restitutionary rights, passed in an attempt to bolster the shortcomings of private law in addressing the issue of restitution. However, the promise of a cheaper, speedier solution to that offered by the private law of delict/tort has not brought about an appreciable improvement on rates of restitution.

Courts are extending state liability\textsuperscript{981} vis-à-vis the victim in cases where criminally inflicted harm can be attributed to conduct\textsuperscript{982} of agents of the state. This evolution follows in the wake of growing interest in the individual’s human rights and restorative justice.

In most cases restitution (in terms of common law and in terms of criminal justice legislation) does not effectively redress the harm done to victims of crime. Reasons for this are:

- The lack of means of offenders.
- Various practical difficulties in the justice system pertaining to obtaining/enforcing orders of restitution.
- Strict adherence by the judiciary to the distinction between private law and public law.\textsuperscript{983}

\textsuperscript{980} And still is in SA and India.

\textsuperscript{981} Regarding punitive damages, see Ch 2 par 2 2 (supra).

\textsuperscript{982} The concept “conduct” includes acts as well as omissions. See Snyman C R Criminal Law 51.

\textsuperscript{983} The need for the strict distinction between private law and public law is being
International law urges countries to have legislation effectively providing for restitution.

Restorative justice – which is widely adhered to – aims generally at the involvement of victims of crime in the sentencing process and has restitution as one of its foundations.

4.4.2 Restitution: Differences

The legal systems of South Africa, India and New Zealand developed in a colonial milieu, adopting westernised legal systems. However, all three countries acknowledge the validity of indigenous law. South Africa would therefore be following an established international trend, were it to consult customary law, with its heritage of ubuntu, in order to supplement its victims of crime regime.

While England and New Zealand have absorbed the principles of restorative justice in their legal dispensations, this cannot be said of South African and India. South Africa professes to espouse the principles of restorative justice in principle. Restitution is legislatively better provided for in Great Britain and New Zealand than in India and South Africa.

South Africa is the only country where:

- The victim has to apply for an order of restitution;
- An order of restitution is limited to patrimonial loss;
- An order of restitution is enforceable merely as a civil judgment and not as a fine;
- The victim loses the right to institute a civil claim for the shortfall left by an order of restitution;
- A court can impose a suspended sentence on condition that the offender effect restitution; and
- South Africa’s Criminal Procedure Act\textsuperscript{984} is pertinently criticised as providing inadequate means to enforce restitution for the reasons stated in the previous paragraph.

\textsuperscript{984} challenged by courts in all four countries. Par 4 2 1 2 (\textit{supra}). S 300.
Some of the most striking differences include:

- India is the only country where a punitive tax can be imposed on a section of the community in order to address the losses suffered by victims of unlawful assemblies and riots;
- In New Zealand the victim’s tortious claim against the offender is restricted to a claim for material losses as compensation for personal injuries is effected by the Accident Compensation Corporation; and
- Punitive damages have virtually been excluded from the realm of victim’s rights in South Africa.

Great Britain and New Zealand fulfil international expectations with regard to restitution, while India and South Africa fall short of these standards. However, no matter how well-drafted a country’s criminal justice legislation is, as a vehicle to effect restitution it has universally been proved to be ineffective in granting any real relief to the victim of crime.

In the next chapter, state-funded compensation will be considered in order to compare the dispensations in each of the four countries for providing state-funded compensation to victims of injury – which is sometimes, but not always, criminally caused – and to consider compensation schemes for victims of crime, where they exist.
Chapter 5

State-funded compensation for victims of crime

5.1 Introduction

While this work focuses on the position of victims of crime, an analysis of the dispensation made for state-funded compensation of victims of industrial and traffic related injury is necessary despite the fact that such victims are not per definition victims of crime. This is borne out by the fact that New Zealand’s – highly successful – Accident Compensation Commission offers protection to all victims of injury without distinguishing in principle whether they are victims of crime or victims of other types of injury. As will be seen in this chapter, New Zealand’s system evolved from its industrial and traffic related dispensations. Thus it is deemed essential to consider the way in which states deal with all victims of misfortune if conclusions are to be drawn regarding the possible advantages and disadvantages of instituting in South Africa a system similar to that of New Zealand.

Great Britain and New Zealand led the world in instituting comprehensive state-funded compensation schemes for victims of crime.¹ The Indian state of Tamil Nadu has a Victims Assistance Fund in terms of which the Tamil Nadu government provides limited compensation to victims of crime.² South Africa has no victim compensation scheme, but the South African Law Reform Commission has compiled a report on the viability of establishing a victim compensation scheme.

Various theoretical bases seek to explain why the state should accept liability for consequences suffered by victims of crime, including:

- The legal liability theory: In terms of this theory, the liability of the state to compensate the victim of crime is based on the fact that the state has a duty to protect the individual against the commission of crimes and, by allowing the crime to be perpetrated, has neglected this duty;
- The social contract theory: The state has a moral duty to protect the individual. The state thus accepts the responsibility to compensate the

¹ See Ch 2 Par 2 2 1 (supra).
² See Par 5 4 2 (infra).
individual victim for losses suffered on humanitarian grounds, but it cannot be said that the state has a legal liability arising from the commission of crimes;

- The accountability theory: The state and the individual stand in a partnership vis-à-vis each other. The individual pays taxes and the state pays compensation to the individual should the latter fall victim to criminal action. The state acts responsibly by limiting the commission of crime to a minimum, while the individual acts responsibly in order to keep taxes to a minimum; and

- The utilitarian theory: The victim who knows that the state will back him or her up when a crime is committed, will cooperate with the criminal justice system and even become involved in the combating of crime.\(^3\)

Internationally the social contract theory currently enjoys the widest support\(^4\) though in the light of recent trends reflected in the Constitutional Court judgment of *Carmichele v Minister of Safety and Security and Another*\(^5\) the question can be raised whether the legal liability theory is not more in keeping with current South African thinking. *Carmichele*’s case substantiates the view that the legal liability of the state is being extended for the acts of criminals vis-à-vis individuals. The Court’s declared reliance on the Bill of Rights to extend the common law to defend the individual’s right against the state for protection from criminal actions can be used as an argument in support of extending existing legal methods of redress or reparation when criminal acts have been perpetrated to include, *inter alia*, a victim compensation scheme.\(^6\)

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\(^4\) See previous footnote.

\(^5\) 2001 10 BCLR 995 (CC). See further Ch 3 Par 3 4 2 (*supra*).

\(^6\) See Ch 3 Par 3 4 2 (*supra*). Although it will be seen that the Constitutional Court viewed the liability of the state as resting on a delictual basis (subject to the normal delictual limitation of a causal link being proved between the acts or omissions of the servants of the state and the harm suffered) reference to the English law in Ch 3 Par 3 4 3 (*supra*) shows that English courts are not certain whether claims of this nature should be based on tort (delict) or constitutional law. If the latter view is accepted, the requirements of tort (delict) are not *per se* applicable and the approach could be adopted that the state is liable for allowing and thus compensating *all* criminal harm.
52 South Africa

521 Legislation

5211 Probation Services Act

In terms of its preamble, the purpose of this Act is:

(T)o provide for the establishment and implementation of programmes aimed
at the combating of crime; for the rendering of assistance to and treatment of
certain persons involved in crime...

The Minister of National Health and Welfare may establish programmes dealing
with, inter alia:

- The assessment, care, treatment, support, referral for and provision of
  mediation in respect of victims of crime.
- The compensating of victims of crime.
- Restorative justice as part of appropriate sentencing and diversion options.

Restorative justice is defined as “the promotion of reconciliation, restitution and
responsibility through the involvement of a child, and the child’s parents, family
members, victims and the communities concerned.”

The minister has not yet used the powers granted to establish programmes for the
benefit of victims of crime. Thus the Act confers the capacity to create structures to
promote the cause of victims of crime, but these structures have yet to be put into
place. As the minister is given the authority to establish programmes dealing with the
compensation of victims of crime, the Act confers the authority on the minister to

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8 S 3, Government Gazette No 15658, Notice No 81, Regulation Gazette No
   5308 of 29 April 1994 assigns the administration of the Act to this minister.
9 S 3(d).
10 S 3(h).
11 S 3(l).
12 S 1.
13 The Regulations (Notice No 1364, Regulation Gazette No 5372 of 5 August 1994,
   Government Gazette No 15895) passed by the minister in terms of S 16 of the Act,
   are procedural in nature and do not relate directly to the portions of S 3 referred to
   above dealing with victims of crime. The only other Regulations passed in terms of
   the Act (Notice No 82, Regulation Gazette No 5308 of 29 April 1994, Government
   Gazette No15658) deal with the date of commencement (29 April 1994) of the Act.
establish a victim compensation scheme. However, the concept of compensation is
not defined in the Act and it is therefore not clear whether the term refers to state-
funded compensation or restitution by the offender.

5 2 1 2 Compensation for Occupational Injuries and Diseases Act

During May 2000 the Committee of Inquiry into a Comprehensive Social Security
System for South Africa – which became known as the Taylor Committee – was
established to investigate a comprehensive, affordable system of social protection for
South Africa. The Committee considered existing forms of protection provided by
Government in the areas of health, labour and transport. The Report of the
Committee was submitted in March 2002 under the title Transforming the Present -
Protecting the Future.15

The Compensation for Occupational Injuries and Diseases Act establishes the
Compensation Fund, administered by a Compensation Commissioner.16 Employers
contribute to the Fund on an annual basis. The main purpose of the Act is to provide
for compensation in cases of disablement or death caused by occupational injuries or
diseases endured by employees in the course of their employment.17 The Act18
provides compensation to the injured employee who might have difficulty in proving
the delictual liability of the employer or a third party, or generally in enforcing the
claim, perhaps because the employee’s own negligence contributed to the injury.19
The Act creates the possibility of compensation for victims of crime in cases of
criminally inflicted injury.20

14 130 of 1993.
15 Website of the Department of Social Development
16 S 15.
17 See the objectives of the Act.
18 And its predecessor, the Workmen’s Compensation Act 30 of 1941.
19 Van Jaarsveld & van Eck Principles of Labour Law (1998) 389. The employee is
entitled to compensation even if the injury is due to his or her own fault, but not where
the accident is attributable to the serious and wilful misconduct of the employee,
unless the accident results in serious disablement or the employee dies in
consequence of the accident and leaves behind a dependant, wholly financially
dependant on the deceased: S 22(3); van Jaarsveld & van Eck: 391.
20 An example would be where the employer criminally causes injury to the employee by
acting contrary to a prohibition imposed by an inspector in terms of s 30 of the
Occupational Health and Safety Act 85 of 1994. In terms of s 30 an inspector may
prohibit an employer in writing from continuing or commencing with the performance
of a specified act and to prohibit in writing the user of plant or machinery from
continuing or commencing with the use of such plant or machinery. Failure to comply
with such an order constitutes a criminal offence.
The Act modifies the common law by providing that an employee or any dependant of an employee claiming damages in respect of any occupational injury or disease resulting in the disablement or death of an employee is limited to a claim under the provisions of the Act. 21 The employer is indemnified from delictual liability in these cases, though third parties causing the injury or disease are not. This indemnification applies to claims based on an employer's vicarious liability for acts of employees and claims arising from the employer's own negligence and includes claims for pain, suffering and loss of amenities of life. 22 As the Act provides for limited compensation based on the earnings of the employee, the amount to which the claimant is entitled is limited. 23 No compensation is provided for non-patrimonial harm. 24 In cases where

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21 S 35(1).
22 However, an employee is not prohibited from claiming full common law damages where the injuries arise from the deliberate wrongdoing of the employer. See Kau v Fourie 1971 3 SA 623 (T) 620 - 630; Mphosi v Central Board for Co-operative Insurance Ltd 1974 2 SA 19 (W) 22 A.

Temporary total disablement
Compensation is payable in the form of periodical payments at the rate of 75% of his or her monthly earnings subject to a maximum of R8 784,75 per month.

Permanent Disablement
Compensation where the degree of disablement is 30% takes the form of a lump sum made up of 15 times the employee's monthly earnings subject to maxima and minima of R98 430,00 and R18 885,00 respectively, proportionally reduced if the disablement is less than 30%. If the degree of permanent disablement is 31% or more, compensation takes the form of a monthly pension. The pension for total permanent disablement (100%) is calculated in the same manner as for periodical payments in respect of temporary total disablement. If an employee's permanent disablement is less than 100%, the pension is reduced proportionately.

Compensation Where an Employee Dies
The widow or widower is entitled to the payment of:
- a lump sum the equivalent of twice the monthly pension to which the employee would have been entitled if a 100% disablement occurred;
- a pension equivalent to 40% of the pension to which the employee would have been entitled, if 100% disabled.
Reasonable funeral costs to a maximum of R6 490,00.
Each child under 18 years of age is entitled to a monthly pension equal to 20% of the pension which would have been payable to the employee for 100% disablement, provided that the total pension payable to the widow or widower and children does not exceed the amount that would have been payable to the employee if 100% disabled.

the employer was negligent, the Act provides for such increase in the normal amount of compensation as the Director-General of the Department of Labour “may deem equitable,” but this may not exceed the economic loss that the commissioner expects the worker to suffer. Though this still falls short of normal common law delictual entitlement, the element of fault is partially retained.

Does the indemnification of the employer against delictual claims of the employee violate the employee’s constitutional rights? In Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening) the Constitutional Court decided that the indemnification was valid, holding that the provisions of the Act must be viewed as a whole, putting employees in a better position than they would have been in terms of the common law. The Act effects a particular balance as employees can claim from the Compensation Fund regardless of negligence, and employers are protected against employees’ claims, in return for contributing to the Fund.

The Taylor Committee identified the following major problems in the system:

- Large numbers of workers, namely domestic workers, the unemployed and workers in non-standard forms of work are excluded;
- The (re)integration of the worker into the labour market is not prioritised;

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25 S 56.
26 S 56(4)(a).
27 S 56(4)(b). In the Committee Report compiled prior to the drafting of Transforming the Present – Protecting the Future, it is stated that very few claims are instituted for increased compensation: Report of Committee of Inquiry into a Comprehensive Social Security System for SA (Taylor Committee) Committee Report No 11: Par 11.9; Thompson & Benjamin SA Labour Law: A Commentary on the Compensation for Occupational Injuries and Diseases Act (1998) HI - 37.
28 In terms of S 35(1) of the Compensation for Occupational Injuries and Diseases Act.
29 The rights to equality before the law, equal protection of the law, access to the courts, fair labour practices and not to be unfairly discriminated against: Bill of Rights, Ch 2 of the Constitution.
30 1999 (2) BCLR 139 (CC). Although the case was decided in terms of the interim Constitution, there is no material difference between the relevant terms thereof and those of the (current) Constitution.
31 Supra Par 16.
33 Benefits to workers who develop certain occupational lung diseases are dealt with in terms of the Occupational Diseases in Mines and Works Act 78 of 1973. For example the self-employed and independent contractors.
Duplication of payments – “double dipping” – takes place due to a lack of linkage with other social insurance and social assistance schemes; and

The relevant statutory framework is fragmented and the benefit structures and entitlements are not uniform.  

In addition, the administration of the system has been subjected to severe criticism:

- The Public Protector has been approached to conduct a formal inquiry into the office of the Compensation Commissioner.
- Inadequate or no grounds for refusal of claims are given by the Commissioner.
- Medical practitioners’ claims are paid out more readily than those of the actual recipients.
- Employers are reluctant to report injuries as this influences their risk ratings that in turn influence the amount of their contributions to the Fund.
- The system favours higher income earners because the quantum of a payout is determined by income.
- There is a substantial backlog in the finalisation of claims.
- On 1 February 2005 the Compensation Commissioner was suspended pending an investigation into allegations of management irregularities and bringing the Department into disrepute.

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34 Department of Social Development Transforming the Present Protecting the Future: Ch 12 Par 12.2 Page 113.
35 The word “notorious” is used to refer to the (poor) administration of the Fund. Department of Social Development Report of Committee of Inquiry into a Comprehensive Social Security System for SA (Taylor Committee) Committee Report No 11: Par 11.12.
37 A review of records at the Workers’ Occupational Health Clinic in Woodstock, Cape Town, showed that of 22% of claims rejected at first submission, 15% were successful on appeal, a painstaking and expensive procedure for claimants who are usually poor, if not destitute. 17% of successful claimants, most of them dying of cancer, died before compensation was paid out. See source quoted in previous footnote.
38 See also Jeebhay M F et al Submission to the Committee of Enquiry into Comprehensive Social Security – 2001 Department of Public Health and Primary Care, University of Cape Town 23.
Promotion of National Unity and Reconciliation Act

The Act establishes the Truth and Reconciliation Commission to investigate gross human rights violations in order to make reparation to victims. Reparation includes “any form of compensation, ex gratia payment, restitution, rehabilitation or recognition.”

Amnesty may be granted to a perpetrator. Thereafter the latter can no longer be held criminally liable for the act in question; nor can he or she be held civilly liable for any losses suffered by the victim. If the relevant deed was perpetrated during the course and within the scope of the perpetrator’s employment by the state, the state is also discharged from civil liability. Other organisations or persons are also exempt from vicarious liability. The constitutionality of this provision was confirmed by the Constitutional Court in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others. Thus the victim is entitled

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40 34 of 1995.
41 The Preamble to the Act provides for:

(I)nvestigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution… the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights (and) the establishment of a Truth and Reconciliation Commission…

Victims are defined as those who suffered “physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights” due to a gross violation of human rights or as a result of a politically motivated act for which amnesty has been granted and includes those who suffered similarly in order to assist such persons. Dependants and relatives are included in the definition. See s 1.

42 In this instance the legislature has used the word “compensation” to refer to a state funded payment as s 42 (see the following Par in the main text) refers to the creation of a President’s Fund.
43 Definition section.
44 S 20.
45 In terms of S 20(9) the granting of amnesty will not invalidate a civil judgment which has already been granted, but, in terms of S 20(9), a criminal prosecution or conviction will immediately become void.
46 1996 8 BCLR 1015 (CC). Dugard (Dugard J “International Law and the South African Constitution” (1997) Vol 8 No 1 12 European Journal of International Law 77) considers this judgment disappointing from the perspective of international law. Robinson (Op cit 481) explores whether and when the International Criminal Court – and thus international law in general – might defer to national reconciliation programmes that involve amnesties. The author proposes a stratified system. In situations of transition from mass violence, involving large numbers of perpetrators, the International Criminal Court could accept a national programme whereby only those most responsible are prosecuted and low-level offenders are dealt with by a truth commission. National programmes whereby amnesties may be sought even by those persons most responsible for international crimes are least likely to be acceptable. While it could be in the interests of justice to accept a programme
only to the reparation offered in terms of the Act. The court’s *ratio decidendi* was that the process of reconciliation could not function in the absence of full amnesty, as perpetrators would not be willing to effect full disclosure while the threat of legal action prevailed. Regarding the indemnification of the state for the acts of its agents, the court held:  

> They could have chosen to saddle the State with liability for claims made by insurance companies which had compensated institutions for delictual acts performed by the servants of the State and to that extent again divert funds otherwise desperately needed to provide food for the hungry... They were entitled to permit the claims of... the poor... to be preferred.

Didcott J relied on the fact that, while victims are not granted any legally enforceable rights, they are given a *quid pro quo* for their loss. The Act\(^\text{48}\) establishes the Committee on Reparation and Rehabilitation to consider applications for reparation. A President’s Fund is established for the payment of reparation to individuals.\(^\text{49}\)

The Act provides for two stages in the reparation process:\(^\text{50}\)

- Interim Reparation; and
- Final Reparation Measures.

The Committee on Reparation and Rehabilitation has proposed to the President and to Parliament a Reparation and Rehabilitation Policy that has five parts:\(^\text{51}\)

1. Interim Reparation;
2. Individual Reparation Grants;\(^\text{52}\)
3. Symbolic Reparation;
4. Community Rehabilitation Programmes; and

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\(^\text{48}\) Ch 5: Ss 23 – 27.

\(^\text{49}\) S 42. The Fund will receive money appropriated to it by Parliament and contributions from other sources.

\(^\text{50}\) S 4(f).


\(^\text{52}\) The recommendation is that individuals who qualify receive an amount of between R17 000 and R23 000 per year for 6 years. No means test is applied.
A broad spectrum of reparation and rehabilitation is envisaged, going far beyond the payment of financial benefits.53

While the provisions of the Act are not directed primarily at the compensation of victims of crime per se, in most cases the victims of human rights violations will ipso facto be victims of crime54 even if many of the deeds complained of occurred before the existence of the Bill of Rights. A single action can amount to a common law crime as well as being a human rights violation.55

The dispensation comes at a very high financial and political cost to the state, and it appears that the government of South Africa has become reluctant to commit itself to the implementation of the recommendations of the Committee on Reparation and Rehabilitation. In addition to this, the working of the Truth and Reconciliation Commission has become the subject of political issues.56

On 21 March 2003 the final report of the Truth and Reconciliation Commission was released.57 In the foreword the chairperson, Archbishop Desmond Tutu, expresses himself as follows on the subject of reparation:58

53 See the website cited in the penultimate footnote for details. Benefits are divided into three categories, namely Individual Benefits, Community Benefits and National Benefits. Individual benefits are arranged under the headings: Issuing of death certificates; Exhumations, reburials and ceremonies; Headstones and tombstones; Declarations of death; Clearing of criminal records and Resolving outstanding legal matters related to violations. Community benefits are headed: Renaming of streets and facilities; Memorials/monuments and Culturally appropriate ceremonies. National benefits are: Renaming of public facilities, Monuments and memorials and a Day of remembrance and reconciliation.

54 The SA Victim Empowerment Programme defines a victim as “a person who, individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their rights, through acts or omissions that are violations of national criminal laws or of internationally recognised norms relating to human rights.” (Emphasis added).

55 For example a politically motivated murder: Derby-Lewis and Another v Chairman of the Committee on Amnesty of the Truth and Reconciliation Commission and Others 2001 (3) BCLR 215 C.

56 SA Law Reform Commission Sentencing Restorative Justice (Compensation for victims of crime and victim empowerment): Ch 3 39 - 40. According to the source quoted, the state could end up paying out R2 864 400 000 over a six year period (R480m per year) to about 22 000 claimants. There has also been friction between the government and the Truth and Reconciliation Commission – see “Betrayal of the victims” Mail & Guardian 7 June 2002 and sources quoted in Ch 2 footnote 62..

I regret that at the time of writing we owe so much by way of reparation to those who have been declared victims.

This criticism of governmental tardiness is repeated in the Report of the Rehabilitation and Reparation Committee. The Report states that the victim has a legitimate expectation of reparation which is enshrined in the Constitution. A country has an obligation in terms of international law to provide for reparation for victims of human rights violations. Amnesty from prosecution and civil liability for perpetrators can be reconciled with a country’s obligations in terms of international law “only where the state has simultaneously furnished some mechanism of investigation and some form of reparation for victims.” Archbishop Tutu sees the Truth and Reconciliation Commission as an example of the operation of restorative justice.

5214 Road Accident Fund Act

The Road Accident Fund pays compensation for loss or damages suffered for physical injury or death wrongfully caused by the driving of motor vehicles. Patrimonial and non-patrimonial losses are covered, but not patrimonial damage to property. Payment for future losses can be made by way of instalments instead of a

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64 Plus taxed party and party costs – s 17(2).
65 Unlike the Compensation for Occupational Injuries and Diseases Act. See above. In terms of s 17(1)(b) the loss or damage must have been “suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person…”
66 Patrimonial loss includes matters such as medical and hospital expenses, costs of medical aids, past loss of earnings and past loss of maintenance. Non-patrimonial loss includes matters such as pain and suffering, disfigurement, diminished earning capacity and loss of amenities of life. Prospective patrimonial loss is treated in the
lump sum. The Fund is financed from a levy on fuel sold and from loans. While the Act does not require a criminal act before the liability to compensate will arise, it is usually the case that the act which gives rise to the claim will be criminal in nature.

No compensation is payable unless the driver or owner of the motor vehicle would have been liable. Thus the principles of delictual liability, including the requirement of fault, are retained. Once the Fund has provided compensation the driver and owner are indemnified from liability. An action against the Road Accident Fund therefore replaces the common law action based on delict against the owner or driver.

Generally there is no limit on the quantum of the Fund’s liability, except for a R25 000 limit where the person was being conveyed for reward, in the course of the lawful business of the owner, in the case of an employee of the driver or owner in

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67 S 17(4). In such cases the Road Accident Fund can provide an undertaking in terms of which it guarantees to pay a future claim or part thereof.

68 S 5(1). According to the Committee Report submitted to the Taylor Committee, this kind of financing is “unique in its kind world wide,” but the report does not recommend the replacement of this financing system per se.

69 S 17(1)(b) refers to the “negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee’s duties as employee.”

70 For example negligent driving, or the driving of a motor vehicle while under the influence of alcohol.

71 But for the provisions of the Act – s 19(a).

72 S 21. S 25 does extend to the Fund a limited right to recover the amount paid out to the injured party or his or her dependants from the owner (or driver when the vehicle was being driven without the owner’s consent) or from any person whose negligence or other wrongful act caused the loss or damage when:

- the owner or driver was under the influence of intoxicating liquor or of a drug which was the sole cause of the accident and the owner allowed the driver to drive the motor vehicle knowing that the driver was under such influence;
- a person without a licence drove the vehicle and the owner knowingly allowed this;
- the owner drove the vehicle under the influence which was the sole cause of the accident;
- the owner provided the Fund with false information relating to the accident and the Fund was materially prejudiced.

73 Da Silva v Coutinho 1971 (3) SA 123 A 139 E – F. This echoes the provisions of s 35(1) of the Compensation for Occupational Injuries and Diseases Act which indemnifies employers from claims by employees injured in the course of their employment.

74 Unlike the situation under the Compensation for Occupational Injuries and Diseases Act. See above.

75 S 18(1).
respect of whom subsection 18(2)\(^76\) does not apply, in the course of his or her employment or for the purposes of a lift club. The passenger may proceed against the driver personally (in terms of the common law) for the amount in excess of R25 000.\(^77\)

In *Tsotetsi v Mutual and Federal Insurance Co Ltd.*\(^78\) the Constitutional Court considered the constitutionality of similar measures limiting the amount of the Fund’s liability in terms of the previous Act. The validity of these limitations was considered in the light of the right to equality before the law under the interim Constitution.\(^79\) The accident having occurred before the commencement date of the interim Constitution, the court declined to give an answer to the question of constitutionality, simply basing its decision on the rule of interpretation that it is presumed that new legislation does not affect existing rights unless this is expressly indicated. Regarding accidents occurring after the commencement of the Constitution, the court stated *obiter.*\(^80\)

> But the effect of declaring the impugned provisions invalid would have such an inordinate effect on the financial structure of the Fund that it may be that those interests of justice would be outweighed. That may well have been the case even if the accident had occurred after the Constitution came into operation.

The *ratio decidendi* of the Constitutional Court in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)*\(^81\) indicates that this limitation would not be found unconstitutional.

The Fund’s liability is excluded completely with regard to\(^82\) a person conveyed for reward on a motor cycle and a passenger who is a member of the driver’s household (or responsible for the latter’s maintenance).

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\(^76\) This refers to overlapping coverage provided by the Compensation for Occupational Injuries and Diseases Act. Subs 18(2) limits the amount payable by the Road Accident Fund to the difference between R25 000 and the amount payable in terms of the Compensation for Occupational Injuries and Diseases Act.

\(^77\) For criticism of this provision see: Department of Transport Second Draft *White Paper on the Road Accident Fund* (1997) Par 22


\(^79\) *Supra.* S 8(1) of the interim Constitution.

\(^80\) 1443 [10] per O'Regan J, delivering the unanimous judgment.

\(^81\) *Supra.*

\(^82\) S 19(b). S 19(e) deprives claimants of the right to compensation if they refuse to give the Fund their cooperation in the investigation of the claim.
Where the claimant is also entitled to a claim in terms of the Compensation for Occupational Injuries and Diseases Act, this amount has to be deducted from the claim against the Road Accident Fund, unless the latter claim relates to sentimental damages and thus not compensated under the Compensation for Occupational Injuries and Diseases Act.  

A presidential commission of inquiry was convened to deal with certain problems surrounding the Fund. The Minister of Transport identified these problems as follows:  

- It currently has an accumulated deficit of R7.2 billion despite three increases in income from the petrol levy over the past 18 months as there is a financial mismatch between premium income and benefits.  
- Six other major problems identified in the Fund have been:  
  - High settlement costs taking up 20.2% of available expenditure (of which 75% was in legal costs alone) compared to 18.3% on medical expenses and 19.3% for loss of earnings;  
  - Settlement delays of between 34 months and 46 months on average;  
  - A cap of R25 000 for a passenger in a crash;  
  - General damages for sentimental (i.e. non-financial) losses that account for 28% of claims expenditure;  
  - Benefits to dependents that were not apportioned even when the deceased breadwinner was almost wholly to blame for the accident which resulted in the breadwinner's own death; and  
  - Our high road crash rate (almost 10 000 people are killed and 50 000 seriously injured in approximately 500 000 accidents every year).  

The Road Accident Fund Amendment Act 19 of 2005 (which will come into operation by Proclamation) legislates the following amendments:  

- General damages for pain and suffering and loss of amenities of life will be restricted to those victims who have suffered serious injury;  

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84 The commission of inquiry was chaired by Judge Kathleen Satchwell.  
All claims for loss of income as a result of the victim being unable to work as a result of injuries will be payable in instalments and capped at R160 000 per annum;

- All medical care will be restricted to state health care facilities or at state healthcare rates;

- The right to compensation from the Road Accident Fund by any victim who is not a South African citizen or lawful permanent resident is excluded; and

- The Act specifically excludes the right to claim from the person whose negligence caused the accident, the damages suffered or the shortfall between the actual amount of damages and that which may now be recovered from the Road Accident Fund.

During the consultation stage of the Act parliament’s portfolio committee on transport labelled the bill as a temporary measure, stating that a total overhaul of the South African social security system was required. The constitutionality of the capping provision is the subject of large scale controversy.

As in the case of the Compensation for Occupational Injuries and Diseases Act, the Road Accident Act was considered by the Taylor Committee, which described the Road Accident Fund as “a public compensation/insurance system based on fault.” The Compensation for Occupational Diseases and Injuries Act is not based on fault. While the Apportionment of Damages Act operates against someone claiming from the Road Accident Fund in respect of his or her own negligence, a passenger or the widow or other dependant of a fatally injured victim need only prove one percent negligence against the other party in order to succeed. The Committee Report compiled prior to the drafting of Transforming the Present – Protecting the Future,

89 See above. The authors of the Committee Report compiled prior to the drafting of Transforming the Present - Protecting the Future, relied on consultations with Judge Satchwell, but concentrated chiefly on social security issues: Department of Social Development Report of Committee of Inquiry into a Comprehensive Social Security System for SA (Taylor Committee) Committee Report No 11: Par 11.19.
90 Department of Social Development Transforming the Present - Protecting the Future: Ch 11 Par 11.1 109.
91 34 of 1956.
refers to this as being “in reality nothing else than faultless liability.” The same applies in respect of children under the age of 7 years, who are doli incapax. Consideration is given to the principles of delictual compensation and the conclusion is made that the delictual method of calculation of damages which seeks to place the victim in the position he or she would have occupied had the accident not occurred, is an “incomplete method of calculation (which) opens the door for speculation and disputes, unnecessarily costing the Fund money.”

When dealing with a Fund which cannot choose its risk and which is experiencing financial difficulties, it can be asked whether collateral benefits cannot be approached from a purely practical and functional viewpoint. If it is the purpose to place the accident victim in the same position (and not a better position) than before the risk occurred, one should perhaps merely require that an accident victim must disclose all State-provided benefits received from other sources than the Fund and that the amount paid by way of income-replacement compensation should be reduced by all such payments. This is a drastic deviation from the common law. (Emphasis in original)

The recommendation is made that non-patrimonial damages should not be claimable from the Fund, in keeping with the model created by the Compensation for Occupational Injuries and Diseases Act.

The use of an undertaking to compensate a victim for future claims is seen as being preferable to the common law “once and for all” method of compensation as it prevents over-compensation and protects the victim from the inroads of inflation on a lump sum.

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92 Department of Social Development Report of Committee of Inquiry into a Comprehensive Social Security System for SA (Taylor Committee) Committee Report No 11: Par 11.19.3.3.
93 Department of Social Development Report of Committee of Inquiry into a Comprehensive Social Security System for SA (Taylor Committee) Committee Report No 11: Par 11.20.4.
94 In the case of the Compensation for Occupational Injuries and Diseases Act, no amount is claimable for non-patrimonial loss or solatium.
95 Or general damages.
96 See penultimate footnote.
97 For example, where the victim dies before using the money.
522 Recommendations of the South African Law Reform Commission

5221 Structure of the report

Discussion Paper 97 consists of nine chapters, its structure being summarised as follows:

- **Chapter One**: A broad introduction to the report and the issue of compensation for victims of crime.
- **Chapter Two**: An overview of the violent crime situation in South Africa, which is considered essential to help provide the data for costing and assessing any compensation model.
- **Chapter Three**: An overview of the debates concerning compensation.
- **Chapter Four**: An outline of the parameters usually applied in victim compensation schemes, which will need to be considered if a victim compensation scheme were to be established in South Africa.
- **Chapter Five**: The results of two case studies of selected police docket.
- **Chapter Six**: Postulates various models and costings associated with establishing a compensation scheme in South Africa.
- **Chapter Seven**: Outlines the type of administrative structures that could be used to run and manage a victim compensation scheme.
- **Chapter Eight**: Provides various options for funding a compensation scheme and the financing systems that may be involved if a compensation scheme were to be established.
- **Chapter Nine**: Provides a list of recommendations emanating from the research.

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98 The SA Law Reform Commission was established by the SA Law Reform Commission Act 19 of 1973. The objects of the Commission are to do research with reference to all branches of the law of SA and to study and to investigate the law in order to make recommendations for its development, improvement, modernisation or reform. The Commission is an advisory body whose aim is the renewal and improvement of the law of SA on a continuous basis.

99 5 – 6.

100 This chapter analyses the motivations for and against establishing a compensation scheme for victims of crime, drawing heavily on international comparisons and experience.

101 This chapter highlights the eligibility and ineligibility criteria that would need to be considered for any compensation scheme. These are based on various international approaches and best practice.

102 The purpose of these docket analyses was to provide detailed information about certain types of violent crimes, and to assess the usefulness of police information in adjudicating possible claims for victim compensation.

103 A number of models ranging from full compensation, through to more minimal or targeted schemes are discussed and costed.
5.2.2.2 Motivation for a victim compensation scheme

The following arguments favour the implementation of a victim compensation scheme:104

- Victim empowerment on compassionate grounds builds confidence in the criminal justice system;105
- State responsibility because the state has neglected its duty in allowing the commission of a crime;106
- Restorative justice emphasises victim empowerment in the criminal justice process;
- International law calls for greater responsiveness by states to the needs of victims;107
- Difficulties in enforcing offender accountability is evidenced by the minute percentage of reported crimes that lead to convictions108 and the general lack of means of offenders;
- The criminal justice system benefits as victim compensation schemes require that the crime be reported promptly and that victims cooperate with the police;109
- The impact of crime on the state is reduced because possible financial reliance of victims on the state is prevented by helping them back to a productive status;
- Victims’ psychological trauma is eased by the assurance that society takes their plight seriously;
- The cycle of violence against women is broken by addressing their financial dependence, allowing them to leave abusive environments; and
- The cycle of retributive violence and vigilantism is disrupted.

The following arguments against victim compensation are submitted:110

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104 Discussion Paper 97: Ch 3 Par 3.3.2.47 et seq.
105 The social contract theory. See Ch 2 Par 2 2 1 (supra).
106 The legal liability theory. See Ch 2 Par 2 2 1 (supra). States are generally hesitant to accept this responsibility, relying rather on the social contract theory.
107 See Ch 2 Par 2 2 1 (supra).
108 5.4%, according to Issue Paper 97: Par 3.3.2.6 57.
The cost to the state is high;
Various priorities compete for funding;\textsuperscript{111} and
Compensation schemes do not \textit{per se} improve reporting of crime.

The following views are expressed:\textsuperscript{112}

The persistence of victims’ negative perceptions and experiences of the criminal justice system, as well as the fact that their needs are not met, will undermine the legitimacy of the system and, in so doing, erode strides made in other areas of reform. Paying compensation will not bring back the loved ones of murder victims, but equally, catching and apprehending the criminals will not offset the costs associated with the loss of a breadwinner – without either, trust in the criminal justice system remains undermined. In this context, the idea of compensating victims of crime can easily hold its own next to a range of other needs in the criminal justice arena. At the very least, compensation has to be seen as a complementary component of victim support that is vital to the ensuring of the efficacy of the whole criminal justice system.

5 2 2 3 \hspace{1em} \textbf{Administrative procedure}

The following administrative procedure for dealing with compensation applications is proposed:\textsuperscript{113}

- Applications would be submitted to a central office on specially developed forms.
- A cut-off date should be provided to prevent claims being lodged so late as to hinder consideration and investigation.
- Provision should be made for the condoning of late filing.\textsuperscript{114}
- If exclusionary criteria exist,\textsuperscript{115} information attesting to the applicant’s status in this regard would have to be provided.
- The application would have to include relevant medical information and evidence, with a medical practitioner or district surgeon’s report attached.

\textsuperscript{110} \textit{Discussion Paper 97}: Ch 3 Par 3.3.3 63 \textit{et seq}.
\textsuperscript{111} For example, the payment of witness fees and the granting of additional financial support to trauma units. \textit{Discussion Paper 97}: Ch 3 Par 3.3.3.3 64 – 66.
\textsuperscript{112} \textit{Discussion Paper 97}: Ch 3 Par 3.4 68.
\textsuperscript{113} \textit{Discussion Paper 97}: Ch 7 Par 7.2 176 - 177. The procedure is based on the British Criminal Injuries Compensation Scheme. See Par 5 3 2 (\textit{infra}).
\textsuperscript{114} Reasons for the delay should be given. It is envisaged, for example, that the late filing of applications by victims who are minors, have been hospitalised for extensive periods or even imprisoned would be condoned.
\textsuperscript{115} Such as contributory behaviour or a previous criminal record.
An affidavit from the investigating officer detailing the factual basis and status of the case, together with an assessment as to whether the injuries arose from a criminal attack, would be attached.

The application would have to be processed by administrative staff who would assess whether all the relevant documentation was in place, acknowledge receipt of the application and request the applicant to provide whatever additional information or supporting documentation might be absent or required.

Some portion of the applications would be analysed at this point to assess the presence of fraudulent applications.

The administrative officer would then assess complete applications and make recommendation to a senior assessment officer.

If the original application were incomplete and the applicant failed to provide the further particulars requested\(^{116}\) the administrative officer would recommend to the senior administrative officer that the case be closed, the applicant being informed of that decision in writing.

The senior administrative officer would review all completed applications and either request further information/evidence, or forward the application to the board for a decision.

Uncontroversial applications below a certain amount would be decided by a single board member, with decisions subsequently ratified by the board as a whole.

More controversial or larger applications would be motivated to the board by the administrative officer handling the matter.

After the board had made its decision, the applicant would be informed in writing as to the outcome.

The administrative team would complete the necessary requisitions, and instruct the financial office to make payments.\(^{117}\)

In the case of rejected applications, the applicant would have the right to appeal to the board, and an appeal board would review the case.\(^{118}\)

Decisions of the appeal board would not be appealable or reviewable.

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\(^{116}\) Within 12 months, provided that reasonable efforts had been made to contact the applicant.

\(^{117}\) The payments system would require the signatures of at least three officials, and be fully auditable.

\(^{118}\) The applicant would be entitled to make verbal submissions to the appeal board. If the appeal is founded on new information, or on the basis that the original information used was incorrect, then it will be treated as a new application.
5224 Funding

Funding is a major issue. The following three sources of funding are proposed:

<table>
<thead>
<tr>
<th>Donors</th>
<th>Taxpayers</th>
<th>Criminals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grants from national and domestic individuals and institutions</td>
<td>Appropriations from Parliament</td>
<td>Fines paid</td>
</tr>
<tr>
<td></td>
<td>Dedicated taxes on goods and services (e.g. the consumption of alcohol or the purchase of firearms or ammunition)</td>
<td>Bail forfeited</td>
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<tr>
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<td>Proceeds of crime</td>
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<td></td>
<td>Pursuing restitution orders on criminal conviction</td>
</tr>
</tbody>
</table>

5225 Recommendations

The recommendations are to be “read holistically and considered as interdependent.”

- A comprehensive victim compensation scheme is not financially viable in the short term;
- A number of areas are targeted for the introduction of compensation schemes over a period of three years, namely:
  - Persons disabled by violent crime;

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119 Discussion Paper 97: Ch 8 Par 8.1 183:
Nonetheless, for obvious reasons, the sheer scale of the financial implications of establishing a VCS will create difficulties for those who motivate for the necessity of such a scheme. In seeking to make the case for the establishment of such a VCS, it is, therefore, necessary that possible sources of funding be explored.

120 Discussion Paper 97: Ch 8 Par 8.2.2 186.

121 In its Report on sentencing in criminal cases, the SA Law Reform Commission favours reparation above fines where the means of the offender are limited. See Ch 4 Par 4 3 1 (supra). If fines are to be applied to fund a victim compensation scheme, some reconciliation will have to be effected between the restitutary interests of the individual victim and the claim of the victim compensation fund on money raised in this way, possibly by legislating that fines are firstly applied to effect restitution, and secondly to fund the victim compensation scheme.

122 See previous footnote.

123 Discussion Paper 97: Ch 9 (Recommendation) 201 et seq.

124 Discussion Paper 97: Ch 9 201.
- Rape survivors;\textsuperscript{126} and
- Dependants of indigent murder victims.\textsuperscript{127}

- The pilot schemes will serve a secondary purpose of laying a foundation for a full victim compensation scheme.\textsuperscript{128}
- Legal parameters should be set by the South African Law Reform Commission to establish eligibility criteria for compensation.\textsuperscript{129}
- A Crime Victims’ Fund is to be established to finance the targeted pilot compensation schemes.\textsuperscript{130}

\textit{Discussion Paper 97: Ch 9 Par 9.2.1 203:} We recommend that by 2002, or sooner if possible, that (sic) limited compensation for rape survivors be implemented to assist them medically and to ensure they receive the appropriate social and psychological support. As was stated in the financing ss of this report the initial sum of R2 000 is proposed. This could be used by the survivor at her own discretion for the purchase of services and support not currently available through the State (or their private medical aid), i.e. counselling, medication, and/or to pay for lost time from work, as well as travel costs to see District Surgeons, police, courts officials, etc. We estimate the cost of this to be in the order of R141 million per year. The appropriate structure needs to be established to set this process up. Funding and administration needs to be a focus of this structure, which should work from the initial financing process and administration costs outlined in this report. The structure should ensure this recommendation is realised and that the legal parameters are established (see 9.3). In addition, they could also, if the programme is successful, consider increasing the amount of compensation to be in line with international standards.

\textit{Discussion Paper 97: Ch 9 Par 9.2.2 203:} We recommend that by 2003 a grant be given to victims who have in some way been disabled as a result of violent crime. Such assistance should be dedicated to helping them purchase mechanical devices (e.g. artificial limbs, wheelchairs, hearing aids, etc) or making changes to their home, which may assist them to cope with such resultant disabilities. Small grants should be made available (in the range of R5 000) and the allocation of such compensation awards should be based on criteria of financial need. The appropriate structure needs to be established to set this process up. As with the recommendation above, attention will need to be paid to the financial, administrative and legal implications of the scheme. The scheme should only target those without private medical insurance.

\textit{Discussion Paper 97: Ch 9 Par 9.2.3 204:} We recommend that by 2004 a further pilot victim compensation scheme be established that will initially target the poor (see 6.9 of this report). Specifically, the dependants of indigent murder victims should receive a minimum payment of R5 000 to R15 000 (increased to take account of inflation rates between now and the time of development of the scheme). If indigent murder victims’ dependants were paid out, we estimate that this would cost between R44.4 million and R255 million depending on at what level indigence or poverty was defined and the amount granted. We recommend that dependants of murder victims who are orphaned as a result of a violent crime receive special consideration, and additional resources to these victims be considered. An appropriate structure should explore this option and lay the foundation for its establishment in 2004.
The recommendations contained in the Issue Paper are to be forwarded to the South African Treasury, the ministers responsible for the Criminal Assets Recovery Fund and the National Legislature.  

Employers are to be encouraged to take a greater interest in the impact of violent crime upon the workforce.  

The state should consider augmenting disability grants paid to those disabled by criminal actions.  

Police record keeping systems should be improved to facilitate planning.  

A system of witness fees should be instituted, particularly for the benefit of victims who are also witnesses.  

Record keeping in hospital trauma units should be investigated to facilitate planning.  

An injury surveillance system should be set up in all public health facilities for planning purposes.  

Awareness of the impact of crime should be increased, particularly by means of the Victim Empowerment Programme.  

Steps should be taken to improve the process of restitution by offenders.  

Consideration should be given to the inclusion of more extensive rights to restitution in the Charter of Victims’ Rights.  

The Issue Paper should be distributed widely to elicit response from all stakeholders and amongst other developing countries to establish a debate about compensation schemes generally.  

Once the abovementioned recommendations have been implemented, consideration should be given to the desirability of establishing a full victim compensation scheme; the issues to be considered being stated as follows:  

- the financial feasibility of a compensation scheme relative to other government funding;

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131 Discussion Paper 97: Ch 9 Par 9.5 206.  
132 Discussion Paper 97: Ch 9 Par 9.6 206 - 207. The example is given of employers ensuring that employees are insured against disabilities resulting from crime.  
133 Discussion Paper 97: Ch 9 Par 9.7 207.  
134 Discussion Paper 97: Ch 9 Par 9.8 207.  
135 Discussion Paper 97: Ch 9 Par 9.9 207.  
136 Discussion Paper 97: Ch 9 Par 9.10 208.  
137 Discussion Paper 97: Ch 9 Par 9.11 208.  
140 Discussion Paper 97: Ch 9 Par 9.15 210. See Ch 4 Par 4 3 1 (supra).  
141 Discussion Paper 97: Ch 9 Par 9.16 210 - 211.  
142 Discussion Paper 97: Ch 9 Par 9.17 211 – 212.
the reach of the criminal justice system and whether a compensation scheme would be accessible to all – especially the poor;

- the administrative services necessary and the capability of the civil service to effectively run the scheme;

- the ability of the police to keep records, verify crimes and interface with a compensation granting body;

- the reliability of medical record-keeping and verification of injuries, as well as the ability of health authorities to interface with a compensation granting body;

- the resources and public service skills available to ensure the necessary checks and balances to minimise fraud;

- the relative strength of the victim empowerment programme, and the victim aid services it provides, which would need to complement any compensation process;

- the legal parameters of eligibility and types of injuries qualifying for compensation.

If, after implementation and assessment of the pilot schemes, it is decided to implement a full victim compensation scheme, the following guidelines should apply:\footnote{Discussion Paper 97: Ch 9 Par 9.17.2 212.}

- the scheme should adopt a 'safety net' approach... and should ensure that its major beneficiaries are the poor;

- South Africa should adopt a tariff scheme approach to compensation and not use a system based on common law. This is consistent with current international norms, and will be more cost-effective, less administratively burdensome and will not prejudice those who do not have an income, as the compensation rates would be standardised;

- payments for compensation should be made as once-off payments rather than as annuities, or pensions, unless the approach of supplementing the disability grant process is adopted...;

- the eligibility criteria for compensation (the parameters) should be finalised by the SA Law Reform Commission. Pragmatic concerns (e.g. finances) will need to be balanced against ensuring maximum benefit to applicants;

- any scheme should ensure that those in need, and only those victims considered ‘blameless’ and those who co-operate with the criminal justice system, are the beneficiaries;

- a public awareness campaign should go hand in hand with the development of the scheme;

- administration costs of the scheme should not exceed the benefits to victims.

Regarding eligibility, the following issues are to be considered:

- Compensation should be paid only in cases of death or serious injury,\footnote{Discussion Paper 97: Ch 4 Par 4.3.1 75.}
An intentional\textsuperscript{145} criminal act should be required with the victim being blameless;\textsuperscript{146} Claims for property, with the exception of personal items such as hearing aids and spectacles, should not be allowed;\textsuperscript{147} Compensation should be paid in the case of the “Good Samaritan” injured in the course of trying to prevent a crime or apprehend a criminal;\textsuperscript{148} Generally, compensation should be limited to crimes committed within South Africa’s national boundaries;\textsuperscript{149} Compensation should be limited to nationals, permanent residents, lawful aliens and visitors from countries with reciprocal agreements regarding compensation;\textsuperscript{150} A claim should become prescribed unless lodged within a stipulated period;\textsuperscript{151} Only victims or their dependants benefit;\textsuperscript{152} The victim must be prepared to assist in the prosecution of the offender;\textsuperscript{153} Compensation is limited to crimes committed after a certain date and retrospective claims are not allowed;\textsuperscript{154} Compensation is paid even if the offender is not identified and victims receive no restitution;\textsuperscript{155} Compensation should not be paid in respect of an injury for which there is an alternative source\textsuperscript{156} of reparation;\textsuperscript{157} Consideration will have to be given to the role of the claimant’s own previous criminal activities;\textsuperscript{158} and Only crimes reported to the police should be eligible for compensation.\textsuperscript{159}

Analysis of these recommendations shows them to be detailed and based on international practice, rather than radically innovative. The distinction drawn between

\textsuperscript{145} Including \textit{dolus eventualis} and sometimes even negligence, as in the case of culpable homicide. See following footnote.
\textsuperscript{146} \textit{Discussion Paper 97}: Ch 4 Par 4.3.2 76.
\textsuperscript{147} \textit{Discussion Paper 97}: Ch 4 Par 4.3.3 77.
\textsuperscript{148} \textit{Discussion Paper 97}: Ch 4 Par 4.3.4 77.
\textsuperscript{149} \textit{Discussion Paper 97}: Ch 4 Par 4.3.5 78.
\textsuperscript{150} \textit{Discussion Paper 97}: Ch 4 Par 4.3.6 78.
\textsuperscript{151} \textit{Discussion Paper 97}: Ch 4 Par 4.3.7 78.
\textsuperscript{152} Not employers and insurance companies. \textit{Discussion Paper 97}: Ch 4 Par 4.3.8 80.
\textsuperscript{153} \textit{Discussion Paper 97}: Ch 4 Par 4.3.9 80.
\textsuperscript{154} \textit{Discussion Paper 97}: Ch 4 Par 4.4.1 81.
\textsuperscript{155} \textit{Discussion Paper 97}: Ch 4 Par 4.4.2 81.
\textsuperscript{156} Whether from the state or private sector.
\textsuperscript{157} \textit{Discussion Paper 97}: Ch 4 Par 4.4.3 81 - 82.
\textsuperscript{158} \textit{Discussion Paper 97}: Ch 4 Par 4.4.4 82.
\textsuperscript{159} \textit{Discussion Paper 97}: Ch 4 Par 4.4.5 83.
“comprehensive” schemes and others is, it is submitted, redundant as all schemes set parameters regarding which victims qualify for compensation – or not; parameters are amended from time to time as dictated by current national circumstances; in short, victim compensation schemes are anything but uniform in their approach.\(^\text{160}\)

5.3 Great Britain

5.3.1 Legislation

5.3.1.1 Employers’ Liability (Compulsory Insurance) Act\(^\text{161}\)

The link between statutory insurance and compensation to victims of crime may not be immediately obvious, but:\(^\text{162}\)

> If an accident happens at a workplace, it is not uncommon for there to be a prosecution under the criminal code for failure to comply with statutory law followed by a separate action for negligence or breach of contract under civil law.

The liability of the employer vis-à-vis an injured employee\(^\text{163}\) can take on three forms:\(^\text{164}\)

- Vicarious liability for the negligence of fellow employees;

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\(^\text{161}\) 1969.

\(^\text{162}\) Clarke T Managing Health and Safety in Building and Construction (1999) 9: The (unreported) Derby Crown Court case involving the Derby City Council referred to by Clarke illustrates the alacrity with which English courts find in favour of criminal liability on the side of employers and their subcontractors. The criminal actions of third parties can also lead to industrial injuries.


> National legislation concerning employment injury benefits shall protect all employees, including apprentices, in the public and private sectors, including co-operatives, and, in respect of the death of the breadwinner, prescribed categories of beneficiaries.

Article 1 provides that “the term legislation includes any social security rules as well as laws and regulations.” The International Labour Organisation states on its website that International Labour Conventions have the legal status of international treaties [(September 2002) http://ilolex.ilo.ch:1567/english/conve.htm]

This must be understood to refer to ratified conventions. [Dugard J International Law: A South African Perspective 218] The Convention has not been ratified by Great Britain, SA and India.

\(^\text{164}\) Jones M A Textbook on Torts 252.
Primary liability for the breach of a personal, non-delegable duty; and

Liability for the breach of a statutory duty.

The relevance of this for victims of crime is:

- A breach of the statutory duties of the employer under industrial safety legislation amounts to a criminal act; and
- The employee also has a tortious claim for injuries arising from non-compliance with these statutory duties.

The Employers' Liability (Compulsory Insurance) Act compels the employer to take out insurance against liability for bodily injury or disease sustained by employees arising out of, or in the course of, their employment. Failure to insure constitutes a criminal act. The policy must be issued by an insurer authorised to do so in terms of the Financial Services and Markets Act.

While minimum cover of £5 000 000 is required, most employers negotiate cover of £10 000 000 or more. The Employers' Liability (Compulsory Insurance) Regulations also specify certain conditions that may not be included in a policy, but there is no prohibition on stipulating a right of recourse by the insurer against the employer in respect of amounts paid out in terms of the policy.

The Management of Health and Safety at Work Regulations provide that breach of a duty imposed by the Regulations does not per se confer a civil right of action. What is required – in addition – is an injury as a result of the contravention.

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166 S 5.

167 2000. The Financial Services Authority maintains a register of authorised insurers. Authorised insurers issue Certificates of Insurance to employers negotiating and renewing insurance policies. Employers are required to display these certificates (or copies thereof) at each place of business for the information of employees, or risk criminal prosecution.


170 1999. Regulation 22(1).
Jones\textsuperscript{173} cautions prospective plaintiffs:

\begin{quote}
(T)here is little consistency in the standards applied to breaches of industrial safety legislation... (T)he language used in legislation seems to be largely haphazard, yet it is upon the accident of language that the issue is made to turn. Moreover, unless the facts of the case fall within the precise statutory wording the claimant will be unable to maintain an action for breach of statutory duty...
\end{quote}

Contributory negligence has an impact on the claim,\textsuperscript{174} but courts are not concerned solely with whether the employee’s actions contributed to the injuries, but whether these actions themselves can be blamed on the employee.\textsuperscript{175}

Compensation is paid out under the aegis of the social security system where it cannot be claimed under these tort-inspired legal rules.\textsuperscript{176}

\textbf{5 3 1 2 \hspace{1em} Road Traffic Act}\textsuperscript{177}

Part VI of the Act deals with \textit{inter alia} the requirement of compulsory insurance (or giving of security) against third-party risks.\textsuperscript{178} A car owner allowing another person to use a car which is not insured – or not insured for that particular driver\textsuperscript{179} – will be personally liable if the driver does not possess the means to compensate a third party in the event of an accident.\textsuperscript{180}

\begin{itemize}
\item \textsuperscript{172} The harm suffered will have to be proved in accordance with normal tortious principles. See Harpwood \textit{v} Principles of Tort Law (1998) 20.
\item \textsuperscript{173} Op cit: 263.
\item \textsuperscript{174} In terms of the Law Reform (Contributory Negligence) Act 1945.
\item \textsuperscript{175} For example in cases where the employee works long hours in unpleasant conditions. See Caswell \textit{v} Powell Duffryn Associated Collieries [1940] AC 152 HL.
\item \textsuperscript{176} For a full exposition see: Lewis \textit{R} Compensation for Industrial Injury (1987).
\item \textsuperscript{177} 1988 (c. 52). Full text: (September 2002) http://www.hmso.gov.uk/acts/acts1988/Ukpga_19880052_en_1.htm
\item \textsuperscript{178} S 143(1)(a) of the Act states that “a person must not use a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act...”. S 143(1)(b) prohibits a person from causing or permitting another person to use an uninsured vehicle on a road.
\item \textsuperscript{179} Insurance is not required in respect of vehicles owned by “a person who has deposited and keeps deposited with the Accountant General of the Supreme Court the sum of £15 000...” [S 144(1)] or for vehicles owned by certain listed public authorities.
\item \textsuperscript{180} This would be the case where the car is insured ‘owner-driver only’.
\end{itemize}

\textit{Monk v Warbey} (1935) 1 KB 75; \textit{Richards v Port of Manchester} (1934) 152 LT 413.
Compulsory insurance policies are issued by authorised insurers and provide for:

- Death;
- Bodily injury;
- Damage to property; and
- Payment directly to a medical practitioner or hospital for emergency treatment.

Insurance is not required in respect of death or injury to passengers carried by reason of a contract of employment though it is required in respect of death or injury to passengers carried for hire or reward. In Cooper v Motor Insurers’ Bureau it was held that the driver is excluded from protection in terms of the Act.

Cover is not required in respect of:

- Death or injury of an employee in the course of his or her employment with the insured;
- Damages in excess of £250,000 in respect of damage to property;
- Damage to the insured vehicle;
- Damage to goods carried for reward in the insured vehicle;
- Liability for goods under a person’s control; or
- Contractual liability.

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181 S 145. Subss (5) and (6) deal with the requirements for being an authorised insurer.
182 See ss 158 – 159. Policies must also offer protection in compliance with the relevant laws of member states of the European Community.
183 The Road Traffic Acts of 1930 and 1960 did not require insurance covering death or injury to passengers except in vehicles in which passengers were carried for hire or reward or by reason of a contract of employment. The Road Traffic Act of 1972 and the current Act require insurance to cover the former eventuality, but not the latter. See Taylor P J: 743.
184 (1985) All ER 449 (QB). The owner of a defective motorcycle had allowed someone to ride it. An accident ensued and the rider claimed compensation on the basis of the owner’s negligence in not informing him of the defective brakes of the motorcycle. This does not mean that the driver would not have a claim based on tort against the owner, but then the means of the owner to satisfy such a claim becomes a possible stumbling block.
185
186 S 145(4).
187 While the compulsory insurance policy required by the Act provides cover for damage to vehicles of other parties, insurance cover for the vehicle of the insured is not a legal requirement. However, statistics show that 82% of insurance policies taken out in Great Britain during 1982 included comprehensive cover for damage to the insured’s vehicle. Meyer U “Third Party Insurance in Europe: Comparative Study of the Economic Statistical Situation” University of Bamberg 78 (September 2002) http://www.uni-bamberg.de/sowi/economics/meyer/forschung/kfz/study-english.pdf
Agreements regarding the restriction of liability vis-à-vis passengers\textsuperscript{188} or the fact that a passenger has willingly accepted the risk of negligence on the part of the user do not cancel any liability.\textsuperscript{189} However, it has been held that a voluntary passenger in a getaway vehicle would not be entitled to compensation.\textsuperscript{190} In Pitts v Hunt\textsuperscript{191} a plaintiff who rode home on a motor cycle with someone who had drunk too much and did not have a licence was denied compensation because he had participated in criminal activity and had encouraged the driver to drive dangerously. The court relied on the maxim \textit{ex turpi causa non oritur actio.} Thus the legislative condonation of the acceptance of the risk of \textit{negligence} on the part of the driver does not protect a passenger who knowingly participates in a criminal act.

The use of a vehicle for car-sharing (lift club) purposes where the passengers contribute to running costs, is covered by compulsory insurance policies. However, the scheme must be operated on a non-profit basis.\textsuperscript{192}

Accidents involving \textit{uninsured} and \textit{untraced} drivers are dealt with by the Motor Insurers’ Bureau, a company limited by guarantee, which administers a Central Fund financed by levies contributed by insurers.\textsuperscript{193} The system functions as follows:

- In terms of a series of agreements between the Bureau and the Secretary of State protection is provided for victims of uninsured drivers and untraced drivers;\textsuperscript{194}
- In the case of \textit{uninsured} drivers the Bureau undertakes to satisfy judgments which would have been covered had the driver been insured.\textsuperscript{195} One specific exclusion from this assumed liability is the case where a claim is made by a willing passenger who knew that the vehicle was being used without

\textsuperscript{188} Any prior agreement is void insofar as it restricts the liability of the user to take out a policy of insurance in respect of passengers, or to impose any conditions with respect to the enforcement of such liability of the user: S 149. S 149 does not specifically refer to paying or non-paying passengers, thus it operates in favour of all passengers. There is, however, some doubt as to whether the insured will be protected where he or she is being carried as a passenger. See Taylor P J et al Bingham and Berrymans’ \textit{Motor Claim Cases} 750.

\textsuperscript{189} S 149(3).

\textsuperscript{190} Ashton v Turner (1980) 3 All ER 870 (QB).

\textsuperscript{191} (1990) All ER 344 (QB).

\textsuperscript{192} S 150.

\textsuperscript{193} And thus indirectly from the premiums charged to insured members of the public. Motor Insurers’ Bureau “Notes for the Guidance of Victims of Road Traffic Accidents” (December 2003) http://www.apil.com/pdf/publicdocs/notes.pdf Also on The Law Society website: (December 2003) http://www.lawsociety.org.uk/

\textsuperscript{194} This takes place in terms of the Uninsured Drivers Agreement dated 21 December 1988. Taylor P J 765. Full text of Agreement at 771 \textit{et seq.}
insurance, or that it had been stolen, taken unlawfully or used in connection with crime;\textsuperscript{196} and

- In the case of \textit{untraced} drivers\textsuperscript{197} compensation is paid for personal injury, but \textit{not} damage to property. Where there is doubt as to whether the driver has been correctly identified the claimant may claim under both headings. The Bureau then decides how to deal with the claim.\textsuperscript{198}

Where a vehicle is used with the criminal intention of inflicting injury, the Bureau is liable to compensate the victim.\textsuperscript{199} This liability arises from the Motor Insurers’ Bureau Agreements – and not from a policy of insurance – as a person may not be indemnified against the consequences of his or her own criminal acts.\textsuperscript{200}

Where any accident leads to physical injury or death and the injured party requires medical treatment at a hospital, the insurer must pay the expenses reasonably incurred by the hospital, subject to certain limits as to \textit{quantum}.\textsuperscript{201} Where emergency treatment of the victim by a medical practitioner is required, the vehicle user\textsuperscript{202} must pay the practitioner:\textsuperscript{203}

- £15\textsuperscript{204} in respect of each person receiving emergency treatment; and
- A sum in respect of the mileage covered to and from the place where the emergency treatment is carried out.

\begin{itemize}
  \item \textsuperscript{196} The onus is placed on the claimant to take all reasonable steps to ascertain whether the car was insured. In terms of the Agreement certain procedural requirements are also imposed on the claimant. In terms of s 151(4) of the Act the same rule would apply even had the vehicle been insured.
  \item \textsuperscript{197} In terms of the Untraced Drivers Agreement dated 22 November 1972. Taylor P J \textit{et al} Bingham and Berrymans’ Motor Claim Cases \textit{766}. Full text of Agreement at \textit{784 et seq.}
  \item \textsuperscript{198} See penultimate footnote.
  \item \textsuperscript{199} \textit{Hardy v Motor Insurers’ Bureau} \textsuperscript{[1964]} 2 QB 745, \textsuperscript{[1964]} 2 ALL ER 742 \textsuperscript{[1964]} 3 WLR 433, \textsuperscript{[1964]} 108 Sol Jo 422, \textsuperscript{[1964]} 1 Lloyd’s Rep 37 CA; \textit{Gardner v Moore} \textsuperscript{[1984]} AC 548, \textsuperscript{[1984]} 1 All ER 1100, \textsuperscript{[1984]} 2 WLR 714 128 Sol Jo 282, \textsuperscript{[1984]} 2 Lloyd’s Rep 135, HL.
  \item \textsuperscript{200} See sources quoted in previous footnote.
  \item \textsuperscript{201} £2 000,\textsuperscript{37} for an in-patient and £200,\textsuperscript{04} for an out-patient – s 157(2).
  \item \textsuperscript{202} However, s 145(3)(c) requires that the insurance policy must cover this liability as well.
  \item \textsuperscript{203} S 158.
  \item \textsuperscript{204} Amount implemented by the Road Traffic Accidents (Payment for Treatment) Order 1987 SI 1987/353.
\end{itemize}
Once the insurer has paid compensation in terms of the Act, the driver or owner of the vehicle is indemnified against further claims. However, the insurer may claim from the driver:

- The full amount if the driver did not have a driving licence; and
- The difference between the amount paid and the ceiling of the insurer’s liability in terms of the insurance policy.  

Insurance for road traffic injuries to persons sustained in the course of their employment is dealt with under the Employers’ Liability (Compulsory Insurance) Act.  

5313 Social Security Contributions and Benefit Act, Social Security Administration Act and Social Security Act

The Social Security Contributions and Benefit Act provides for the levying of contributions payable by earners, employers and others. These monies go to the National Insurance Fund and are utilised for the payment of benefits and towards the cost of the National Health Service.

The Social Security Act created the Compensation Recovery Unit for the recouping of social security benefits from tortfeasors. The Social Security Administration Act provides that a person effecting a payment in consequence of an accident, injury or disease must deduct the gross amount of any relevant social security benefits due. If the amount of the benefit recoverable by the state from the compensator is greater than the amount to be paid to the injured person, the

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205 Where the former exceeded the latter. S 151(7).
206 S 1.
209 1998. Though there are many legislative enactments making up the complex system of social security law in Great Britain, the abovementioned three Acts can be described as the principle sources of law on this subject. Cane P Atiyah’s Accidents, Compensation and the Law (6th ed) 278; Clarke T Managing Health and Safety in Building and Construction 45.
210 S 1.
212 Harpwood V Principles of Tort Law 354.
213 S 82 of Part IV (as amended by the Social Security (Recovery of Benefits) Act 1997).
compensator is liable to pay the full amount of the benefit recoverable to the state.\textsuperscript{215}
The compensator’s liability is thus not limited to the amount due by the compensator to the injured party.\textsuperscript{216}

The Social Security (Recovery of Benefits) Act determines the heads of damages against which specified social security benefits may be recovered and illustrates that there is a plethora of social security benefits available.\textsuperscript{217}

In terms of the Social Security (Recovery of Benefits) Act\textsuperscript{218} and the Social Security (Recovery of Benefits) Regulations\textsuperscript{219} certain amounts are exempted from payment to the state, including awards under the Criminal Injuries Compensation Scheme\textsuperscript{220} and payments under the Powers of Criminal Courts (Sentencing) Act.\textsuperscript{221} The exclusion of these amounts is one of numerous examples of how the system allows for overcompensation of the victim at the expense of the state.

The following statement summarises the prevailing state of the system of social security:\textsuperscript{222}

\begin{quote}
The present system of social security is extraordinarily complicated, there being about 30 different cash benefits which may properly be called ‘social security…’
\end{quote}

\begin{flushright}
215  S 82(1)(b) of the Social Security Administration Act.
216  Jones M A \textit{Textbook on Torts} 617.
217  Schedule 2 deals with the calculation of compensation payments.
218  Schedule 1.
220  See par 5 3 2 (\textit{infra}).
221  In terms of s 130 which deals with compensation (restitution) orders against convicted persons. See Ch 4 par 4 2 2 5 (\textit{infra}).
222  Rogers W V H \textit{Winfield and Jolowicz on Tort} 21. On the same page (n 11) Rogers also refers to the fact that compensation in terms of the Criminal Injuries Compensation Scheme falls outside the legal and administrative framework of social security, despite the fact that it also represents an instance of the state providing financial assistance to “victims of misfortune.” See also Rogers W V H \textit{Winfield and Jolowicz on Tort} 32; Cane P \textit{Atiyah’s Accidents, Compensation and the Law} (6th ed) 280; Larkin P “Social security provision for disability: a case for change?” (1998) 9/5 \textit{Journal of Social Security Law} 11.
\end{flushright}
532 Motivation for Scheme

An official Justice Report of 1962 stated the following as the *raisons d’être* for the institution of a victim compensation scheme:

First, the analogy with war injuries and riot damage was regarded as strong. The State has always accepted the obligation to provide for the victims of war injury and the dependants of those killed in war. And the damage is in some cases at least, provided for by the State under the Riot (Damages) Act 1886.

Secondly, the State exhorts the citizen to protect his property against theft but discourages the citizen from carrying weapons to protect his property or his person.

Third, the citizen is under a duty to assist the State, e.g. by going to the assistance of a policeman effecting an arrest or suppressing violence and he may be deterred from doing so by the absence of compensation for injury.

Fourth, neglect of interests of the victims of crime has made it more difficult to follow an enlightened penal policy because every demand for better treatment for criminals is met by complaints that society is looking after the criminal better than the victim.

Fifth, the State having prohibited the victim from taking the law into his own hands to obtain redress, should provide him with an effective alternative.

Sixth, offenders are often imprisoned for long periods and so the State deprives the victim of any chance of effective redress against the offender.

Cane refutes these motivations as follows:

- In wars people are required by their governments to risk their safety. In any case, war pensions are treated as the “sacred cow” of the social security system.
- Citizens have more to gain than to lose from living in a weapon-free society.
- There is no reason why the altruistic act of the person assisting a police officer should be rewarded more highly than, for example, that of a person rescuing a child from a burning house.
- The underlying premise, namely that persons who suffer harm as a result of government policy ought to be compensated is of doubtful validity and can

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224 Cane P Atiyah’s Accidents, Compensation and the Law (6th ed) 253 – 255.
only be accepted if it could be proved that victims of penal policy were more deserving than victims of other forms of government policy.

- Taking the law into one’s own hands is not restricted to victims of crime and the state does not generally undertake to augment the insufficient means of defendants.
- Statistics prove that a relatively small percentage\(^{225}\) of offenders convicted of indictable offences receive custodial sentences.

Academic arguments in favour of the Scheme are:\(^{226}\)

- The state has a more direct responsibility in the case of crime than in the case of accidental injury because of its responsibility for the maintenance of law and order.
- The Scheme can be seen as supplementing the law of tort. Victims of crime are also victims of tort, but their claims are usually unenforceable due to the lack of means of offenders. The state is simply guaranteeing payment of a legally valid claim.
- Public sentiment requires that victims of crime be compensated and this expectation has been realised by the Scheme, which has been in existence for a substantial period.

The latter argument seems to be favoured by the English government which denies an actual liability to compensate the victim of crime, but at the same time bows to “public instinct”\(^ {227}\) which calls for this form of compensation. This can be summarised as follows:\(^ {228}\)

Society is seen to recognise and sympathise with the innocent victim’s suffering and this serves to reaffirm that the victim’s faith, and that of the general public in society and its institutions has not been misplaced...(the) role (of the Criminal Injuries Compensation Scheme) is to symbolise social solidarity with the victim of violence.

An American perspective views the matter as follows:\(^ {229}\)

\(^{225}\) About 20% in 1996.
\(^{226}\) Rogers W V H *Winfield and Jolowicz on Tort* 33.
\(^{227}\) Lord Dilhorne HL Debates 5\(^ {th}\) series Volume 257 column 1353.
\(^{229}\) Greer D S “A transatlantic perspective on the compensation of crime victims in the United States” (Fall 1994) 85 (2) *Journal of Criminal Law and Criminology* 333.
Crime victims do not have an unequivocal right to compensation from the state, in the sense that they do have a fully-fledged right to damages from tortfeasors. Correlatively, the state has no duty to provide such compensation (though it is almost universally the case that it will do so) either in recognition of a moral or social responsibility, or for strategic considerations linked to the maintenance of law and order, or to attempts to improve the administration of criminal justice. The absence of a duty enables the state to limit (and in extremis to withdraw) the provision of compensation. The imperfect nature of the victim’s right also tends to facilitate the refusal of compensation to undeserving claimants.

Despite the criticism levelled at the Scheme, public feeling supports it as an indispensable element of the aid rendered by the state to injured members of the populace.230

5 3 2 2 Background

The Criminal Injuries Compensation Scheme was introduced in 1964 to provide state-funded payments to victims of violent crime who suffer personal injuries.

In 1967 New Zealand231 instituted a single scheme whereby all accidental injuries – whether caused by industrial, traffic-related or criminal activity – were compensated by the state on a no-fault basis. In 1973232 Britain appointed a Royal Commission to consider:233

(T)o what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury (including ante-natal injury) suffered by any person:

(a) in the course of employment;
(b) through the use of a motor vehicle or other means of transport;
(c) through the manufacture, supply or use of goods or services;
(d) on premises belonging to or occupied by another; or
(e) otherwise through the act or omission of another where compensation under the present law is recoverable only on proof of fault or under the rules of strict liability; having regard to the cost of compensation, whether by way of compulsory insurance or otherwise.

230 Jones M A Textbook on Torts 472.
232 This was prompted by the thalidomide incident which led to the birth of about 400 deformed children as a result of the taking by their mothers of the drug thalidomide. Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Report) Cmd 7054 (1978).
The Pearson Report did *not* recommend that Britain adopt a comprehensive scheme of state funded compensation along the lines of the New Zealand system.\(^{234}\) It did *not* advocate the abolition of the tort system, but addressed the imbalance between the relatively liberal benefits payable in cases of industrial accidents compared to traffic accidents.

Originally the Scheme was administratively based. Payments were made *ex gratia* and were subject to judicial review, but not appeal.\(^{235}\) The Criminal Justice Act of 1988\(^{236}\) paved the way to placing the Scheme on a statutory footing. However, the legislative scheme was not implemented due to fears of the Criminal Injuries Compensation Board\(^{237}\) that this would promote delays in finalising claims.\(^{238}\)

As the administratively based scheme was “inherently incapable of delivering… a service which produces awards reasonable quickly, and in an understandable and predictable manner,”\(^{239}\) the relevant provisions of the Criminal Justice Act\(^ {240}\) were repealed\(^{241}\) and a statutory scheme was inaugurated. Currently both Schemes exist side by side, the former Scheme dealing with applications received before 1 April 1996. The statutory Scheme is receptive to claims made after that date. Many decisions under the administrative Scheme are also applicable *mutatis mutandis* to the legislative Scheme.\(^{242}\)

The Home Office\(^ {243}\) promulgated the current version of the Criminal Injuries Compensation Scheme\(^ {244}\) on 1 April 2001.\(^ {245}\) It is this document\(^ {246}\) that will serve as

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\(^{234}\) The reason stated was that consideration of a comprehensive scheme would have extended beyond the terms of reference of the Commission, which excluded most domestic accidents. See Rogers W V H *Winfield and Jolowicz on Tort* 37 for criticism of this conclusion. The Report contained 188 recommendations, but no legislative measures can be traced directly to it. See Rogers W V H *Winfield and Jolowicz on Tort* 37 n 99.

\(^{235}\) Jones M A *Textbook on Torts* 469.

\(^{236}\) Ss 108 to 117.

\(^{237}\) Now the Criminal Injuries Compensation Authority.

\(^{238}\) Jones M A *Textbook on Torts* 469.

\(^{239}\) Home Office *Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme* (1993 Cm 2434) Pars 2, 10 – 12.

\(^{240}\) 1988.

\(^{241}\) By the Criminal Injuries Compensation Act 1995.

\(^{242}\) Jones M A *Textbook on Torts* 471; Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 9.

\(^{243}\) Represented by the Secretary of State, Jack Straw.

\(^{244}\) In terms of ss 1 to 6 and s 12 of the Criminal Injuries Compensation Act.

\(^{245}\) As a result of a report: Home Office *Compensation for Victims of Violent Crime: Possible Changes to the Criminal Injuries Compensation Scheme* (1999).

\(^{246}\) The Criminal Injuries Compensation Scheme 2001. TSI (Issue Number One 4/01).
the basis of this discussion, as the Criminal Injuries Compensation Act is the enabling legislation and does not reflect the actual rules in terms of which the Scheme functions. There is also a Guide to the Scheme which sets out the working of the Scheme in lay terms. In addition to the latter there is a separate Guide dealing with compensation in fatal cases.

Claims officers of the Criminal Injuries Compensation Authority decide claims. Appeals can be made to adjudicators on the Criminal Injuries Compensation Appeals Panel. Though the Scheme functions under review of the Secretary of State, there is no right of appeal to the latter. The following extract from R (on the application of E) v Criminal Injuries Compensation Appeals Panel sets out the status and modus operandi of these bodies:

The Criminal Injuries Compensation Authority is a public body which has been established to administer the Scheme. Decisions made by the Authority whether to award compensation are essentially administrative decisions. The award of such compensation is a disbursement from public funds in circumstances in which Parliament has decided that it is in the general public interest to do so. The Authority has a general duty to the public at large to make payments where they are provided for by the Scheme, and a corresponding general duty to the public not to make payments which are unnecessary or unjustified.

The Panel becomes involved if an applicant wishes to appeal from a decision of a claims officer...

In discharging its functions, the Panel adopts an inquisitorial approach, consistent with the administrative nature of the Scheme and with its fundamental purpose of disbursing public funds in the circumstances prescribed or authorised by Parliament. The Scheme also provides that hearings should be informal. The Panel is assisted in its task by Presenting Officers...

It would not be in the general interests of applicants for the Panel to adopt a more adversarial approach to its hearings. Many applicants are unrepresented or represented by non-professionals. An inquisitorial approach is more likely in these circumstances to ensure that all the relevant facts are brought out into the open for proper consideration.

References below refer to the paragraphs of this document.


249 Pars 2 – 3.

250 Pars 3 – 4.

251 [2003] EWCA Civ 234 at [10].
5 3 2 3 Requirements for compensation

Compensation is paid in the event of criminal injuries sustained in Great Britain and directly attributable to:

- Crimes of violence, or
- Offences of trespass on a railway; or
- The (attempted) apprehension of (suspected) offenders, the (attempted) prevention of offences, or the giving of help to any constable engaged in such activity.

The offender must have acted intentionally or recklessly with regard to the infliction of injury per se. Thus a person wishing to commit suicide, who criminally damages a gas pipe in order to do so, has not committed a crime of violence vis-à-vis a policeman investigating a gas leak who is injured in the ensuing gas explosion. This is in keeping with the European Convention on the Compensation of Victims of Violent Crimes which requires compensation for victims of “intentional crimes of violence.” (Emphasis added)

The inclusion of the offence of trespass on a railway was brought about due to the mental stress suffered by train drivers as a result of people committing suicide by throwing themselves in front of trains. In terms of the Offences Against the Person Act this constitutes an offence. In the words of Cane “(i)t is the nature of a crime, not its consequences, which determines whether it is a crime of violence.” The

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252 In *R v Ministry of Defence, ex parte Walker* [2000] 2 All ER 917 a Ministry of Defence scheme, the Criminal Injuries Compensation (Overseas) Scheme to compensate military personnel for criminal injuries sustained abroad was considered. The Scheme excluded injuries resulting from war operations or military activity by warring factions. The House of Lords decided that an act, though criminal under international law, could nevertheless be “military activity” for the purposes of the scheme. Thus a soldier taking part in peacekeeping operations in Bosnia who was injured by a round fired at his accommodation block by a Serbian tank was excluded from compensation.

253 Par 8.

254 Including arson, fire-raising or an act of poisoning.

255 In terms of s 1 (1) (c) of the Criminal Damage Act 1971.


257 Council of Europe European Treaty Series No 116

258 Cane *P Atiyah’s Accidents, Compensation and the Law (6th ed)* 259.

259 1861. S 34.

260 Unlawfully endangering the safety of railway passengers.

261 Cane *P Atiyah’s Accidents, Compensation and the Law (6th ed)* 259.
author criticises this extension of the Scheme, asking why train drivers should be treated more generously than victims of, for example, train crashes or fires in public places, but the inclusion of the offence of trespass on a railway was due to “a great deal of political pressure exerted by the train drivers’ unions.”

In the case of injuries sustained as a result of the apprehension of an offender the victim will be compensated only if he or she was “taking an exceptional risk which was justified in the circumstances.” Thus the law enforcer who is injured in the normal course of duty will not be entitled to compensation in terms of the Scheme.

In *R v Criminal Injuries Compensation Board, ex parte Ince* it was held that to it was not necessary that an offence was in fact about to be committed. At the time of injury the victim was attempting to prevent an offence, having received information that an offence was imminent. It was irrelevant that the information was false. Furthermore, even though the deceased's death was due to his own carelessness, it was still attributable to the attempted prevention of an offence. “Directly attributable” does not mean “solely attributable.”

The conviction of the offender is not required – though this will aid in proving the claim – nor need the offender be identified. This is also the case where there can be no conviction due to age, insanity or diplomatic immunity. What is required,

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263 Op cit 259. See also Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 13; *R v Criminal Injuries Compensation Board, ex parte Webb* [1987] QB 74.
264 Par 12.
265 This category was included in the current scheme despite criticism that law enforcement officers are entitled to industrial injury benefits. Its inclusions was probably due to lobbying by the police and Fire Brigades Union: Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 13.
266 [1973] 3 All ER 808 [1973] 1 WLR 1334 137 JP 869. In this case the victim, a police officer, was killed in a collision when crossing a red traffic light while responding to a radio message addressed to all police cars stating that suspects were breaking into a nearby Territorial Army depot. See also *R v Criminal Injuries Compensation Board, ex parte Lawton* [1972] 3 All ER 582 [1972] 1 WLR 1589 136 JP 828.
267 See *R (on the application of Gravett) v Criminal Injury Compensation Appeals Panel* [2001] EWHC Admin 1193, 67 BMLR 21. Likewise the lack of a conviction can be considered in deciding whether a crime of violence has occurred.
268 Subject to one exception: See Par 17(a) which is discussed below.
269 Par 10. Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 15. In *R v Criminal Injuries Compensation Board, ex parte Welch* (Unreported) Queen’s Bench Division (Crown Office List) CO/3206/99 at [8] it was found that the term “insanity” is to be understood in its legal meaning:

From (the available evidence) it was quite impossible for the Board to be satisfied that at the time of committing the act Mr Gorman was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know that he
is proof that the injuries were caused by a crime of violence and not merely an accident. Cane\textsuperscript{270} points out the theoretical anomaly in requiring criminal intention to injure in the case of a sane adult offender on the one hand, and, on the other hand, determining in the case of a child or an insane person whether they had the requisite intention when they are legally incapable of forming intention. The Court of Appeal held in \textit{R v Criminal Injuries Compensation Appeals Panel, ex parte August and Brown}\textsuperscript{271} that the correct approach is not to regard the classification of particular offences as a \textit{question of law}, but to treat the inquiry whether a crime of violence has been perpetrated as a \textit{question of fact}, the answer depending on “a reasonable and literate man’s understanding of the circumstances in which he could under the scheme be paid compensation for personal injury caused by a crime of violence.”

The offence charged was buggery\textsuperscript{272} involving a thirteen year old, an offence which could be committed with or without physical violence and where the consent of the victim was immaterial. The court decided that it was open to the Board to take the applicant’s consent into consideration in deciding whether a crime of violence had been committed. In another case the court found that intercourse with a girl aged twelve did not \textit{per se} amount to a crime of violence.\textsuperscript{273}

Compensation is paid in respect of \textit{personal injury}, which includes not only physical injury, but also mental injury and disease. Mental injury or disease can result from a physical injury or a sexual offence (without any physical injury). In \textit{Millar (P’s curator bonis) v Criminal Injuries Compensation Board}\textsuperscript{274} P was conceived as a result of incestuous sexual intercourse between a man and his fifteen-year-old daughter. P had severe congenital mental and physical handicaps arising directly from the consanguinity of her parents. It was held that the concept of injury presupposes a pre-injury state capable of comparison with the post-injury state. As P never had, nor

\begin{footnotes}
\item\textsuperscript{270} Cane P \textit{Atiyah’s Accidents, Compensation and the Law (6\textsuperscript{th} ed) 261.  \\
\item\textsuperscript{272} Sexual Offences Act 1956 s 12.  \\
\item\textsuperscript{273} \textit{R v Criminal Injuries Compensation Board, ex parte Piercy} (Unreported) Queen’s Bench Division (Crown Office List) CO/399/96. See also Miers D \textit{Compensation for Personal Victimisation in the UK: Meeting European Standards} 13.  \\
\item\textsuperscript{274} 44 BMLR 70.
\end{footnotes}
could have, any unaffected existence, she had not sustained a personal injury. Personal injury can best be illustrated diagrammatically.  

![Diagram of Personal Injury](image)

Injuries arising from the use of a vehicle are not covered by the Scheme unless the vehicle was used deliberately to inflict injury. The latter liability is also covered in terms of the Motor Insurers’ Bureau Agreements. In *Gardner v Moore* it was decided that the victim could choose between the two systems, the court holding that remedies under the Criminal Injuries Compensation Scheme and the Motor Insurers’ Bureau Agreement are not necessarily mutually exclusive alternatives.

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275 See Par 9.

276 An example of this would be road rage. *R v Criminal Injuries Compensation Board, ex parte Marsden* [2000] RTR 21; *R v Criminal Injuries Compensation Board, ex parte Keane and Another* (Unreported) Queen’s Bench Division (Crown Office List) CO/650/96, CO/581/96.

277 Par 11. See Par 5 3 1 (supra).


279 (Supra) 562E. Injuries caused by dogs will be considered only if the dog was deliberately set on the injured person or if the attack was the result of the owner's failure to control an animal which was known to be vicious towards humans and the lack of control amounted to recklessness: *Guide* Par 7.20.
Compensation may be withheld or reduced if the applicant:

| Fails to take reasonable steps to report the matter to the appropriate authorities,\(^\text{281}\) or Fails to co-operate with the police in bringing the assailant to justice; or Fails to give reasonable assistance to the Criminal Injuries Compensation Authority in connection with the application. | Behaves in such a way (before, during or after\(^\text{282}\) the commission of the offence) as to render the giving of (full) compensation inappropriate (specific mention is made of the consumption by the victim of drugs or alcohol which contributes to the injury\(^\text{283}\)). | Appears by reason of his or her character (as shown by previous criminal convictions or other evidence available to the claims officer) to have rendered the granting of (full) compensation inappropriate. |

Regarding the previous convictions of the claimant, Miers\(^\text{284}\) states that “(t)he exclusion of those with criminal records has been an article of faith for the Scheme, irrespective of the absence of any causal relationship between the claimant’s character and the victimising event.” This applies not only to the conduct of the victim, but also to the conduct of the applicant where the victim has died since sustaining the injury (whether or not as a consequence thereof).\(^\text{285}\)

In the context of the applicant’s behaviour, Harpwood states.\(^\text{286}\)

\(^{280}\) Par 13. *R v Criminal Injuries Compensation Authority, ex parte Salt* (Unreported) Queen’s Bench Division (Crown Office List) CO/1661/98 provides an example of how English courts interpret these provisions. The court relied on the *Guide to the Criminal Injuries Compensation Scheme* made by the Secretary of State under The Criminal Injuries Compensation Act 1995 for the guidance of potential claimants, holding the Guide to be binding unless there are very good reasons to deviate from it. See also *R v Criminal Injuries Compensation Board, ex parte Maxted* (Unreported) Queen’s Bench Division (Crown Office List) CO/2552/92.

\(^{281}\) Only where there is a very good reason, will it be acceptable if the claimant did not make the report himself or herself, for example where the claimant is a child or has been injured in such a way as to render him or her unable to report the matter to the police: Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 16.

\(^{282}\) In *R v Criminal Injuries Compensation Board, ex parte Moore* [1982] 2 All ER 90 the applicant’s claim was unsuccessful due to his conviction of an offence subsequent to his making application.

\(^{283}\) Par 14.

\(^{284}\) Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 26. Regarding the precise meaning to be attached to the term “victim” in this context, see Miers D “Taking the Law into their own Hands: Victims as Offenders” in Crawford A & Goodey J (eds) *Integrating a Victim Perspective in Criminal Justice* (2000) 77.

\(^{285}\) Par 15.

\(^{286}\) *Op cit* 232.
In the past, the Board took a moralistic approach to compensation in that it would reduce or withhold a payment in the light of the claimant’s own ‘way of life’, even if it was unconnected causally with the injury.

She goes on to state that this attitude was criticised because it deprived the victim of a remedy when the law of tort would have allowed a claim. This led to the limitation of the grounds for the reduction or withholding of an award to those set out above. However, according to Cane287 the position is still that “even the most tenuous connection between the applicant’s conduct or character and the injuries can bar compensation” even though the Authority can no longer take into consideration the “way of life” of the claimant.

The Guide makes specific mention of children playing dangerous games,288 emphasizing that the behaviour of the assailant must amount to a crime of violence and that no award will be made where there is little to choose between the conduct of the assailant and the injured party. Likewise the Guide specifies instances of fighting where compensation is withheld.289

The Guide provides a detailed scale of penalty points indicating the extent to which an applicant’s previous convictions reduce or nullify an award.290

Awards will not be made if there is any likelihood that the assailant might benefit from the award. An award will also not be made to an applicant under eighteen years of age unless the claims officer is satisfied that it would not be against the victim’s interests.291

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287  Cane P Atiyah’s Accidents, Compensation and the Law (6th ed) 265.
288  Guide Par 7.22.
289  Guide Par 8.14:
   Where the injury is suffered in the course of a fight in which the injured party was a voluntary participant, even if the degree of violence had escalated beyond that foreseen by the injured party.
   Where the injured party struck the first blow, even if the degree of retaliation was not commensurate with the act of aggression.
   Where the incident formed part of a pattern of violence between the parties in which the injured party was a voluntary participant.
   Where the injured party was attempting to exact revenge.
   Where the attack was provoked by the injured party.
   Where the injured party's abuse of alcohol or illicit drugs contributed to the attack.
291  Par 16.
Where the victim and assailant were living in the same household as members of the same family at the time of the injury, the award will be withheld unless:

- The assailant has been prosecuted (or the claims officer feels that there are good reasons why a prosecution was not instituted); and
- In cases of violence between adults in the family: The applicant and assailant have ceased to live in the same household and are unlikely to do so again.  

5 3 2 4 Categories of claims

Compensation is paid out in respect of personal injuries and not for damage to or loss of property, with the exception of certain equipment under the category of special expenses. Loss of earnings are also provided for. There are five categories of claims. The total of all awards arising from an injury may not exceed £500 000, but must qualify for the minimum award, which is set at Level 1 (£1 000). The categories of claims are:

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292 Par 17. In the original system the co-habitation of the parties at the time of the injury was a absolute bar against compensation being awarded: *R v Criminal Injuries Compensation Board, ex parte Staten* [1972] 1 All ER 1034 [1972] 1 WLR 569 136 JP 311.

293 Par 23:

- A standard amount to be determined by the nature of the injury with reference to the Tariff of Injuries.
- An additional amount in respect of loss of earnings where the applicant has lost earning capacity for more than 28 weeks.
- An additional amount in respect of special expenses where the applicant has lost earning capacity for more than 28 weeks.
- Benefits where the victim died.
- A supplementary amount where the victim died otherwise than as a consequence of the injury.

294 Par 24 and 25.
Victim → Standard Amount

- Injury: Physical, Mental, Sexual
- Tariff of Injuries:
  - Level 1 (£1,000) to Level 25 (£250,000)
  - Lump sum payment

Standard Amount → Additional Amount: Loss of Earnings

- After 28 weeks unemployed
- Ceiling: 1 ½ times gross average industrial earnings
- Lump sum payment calculated on principles of tort

Additional Amount: Loss of Earnings → Additional Amount: Special

- After 28 weeks unemployed (or equivalent incapacitation)
- Physical aids
- Costs of (National Health Service and reasonable private health) treatment for the injury
- Special equipment
- Adaptations to accommodation
- Care (not available free of charge from public sector)
- Costs of the Court of Protection or of a curator bonis
- Calculated on principles of tort

Victim’s Estate → Funeral expenses

Qualifying Claimants → Supplementary Compensation

- Deceased would be entitled to compensation for loss of earnings and/or special expenses, but dies from causes not related to the criminal injury and before receiving the award.
- Calculated mutatis mutandis as Loss or Earnings and Special Expenses (supra)

Supplementary Compensation → Standard Amount

- Level 10 or 13

Standard Amount → Dependency

- Loss of Income
- Calculated on principles of tort

Dependency

- Payment in lieu of parent’s services at annual rate of Level 5: Special commitment given by parent
- Resultant losses: Actual costs incurred in replacing the deceased parent’s services
Under the administrative scheme compensation was calculated on a similar basis to tort damages, subject to certain restrictions. Following the precedent set by the tort system, payment was usually effected in the form of a lump sum.

In 1994 the Home Secretary, Michael Howard, attempted to introduce a tariff system. This move was the subject of severe criticism on the basis that the tariff did not provide for adequate compensation. Ultimately the House of Lords ruled that the Home Secretary had acted \textit{ultra vires} in attempting to introduce the new scheme without reference to Parliament. The Criminal Injuries Compensation Act of 1995 introduced a tariff-based scheme, albeit one more generous than the tariff proposed by the Home Secretary in 1994. The utilisation of a tariff-based scheme for non-proprietary elements constitutes the major distinction between the Criminal Injuries Compensation Scheme and the common law of tort.

Miers summarises the benefits of the tariff-based scheme as follows:

- First, decisions in straightforward claims could be made speedily against publicly accessible injury descriptions with corresponding levels of award.
- Second, in the absence of any discretion under the tariff, decisions could be taken by relatively junior officials, rather than by the more experienced, and more expensive, Board members.
- Third, being no longer tied to increases in common law damages, the government could control exactly the tariff sums payable for each level of injury.

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295 Jones M A \textit{Textbook on Torts} 470:
   - An earnings limit of one and a half times the gross average industrial earnings.
   - Deduction of all social security benefits and certain pensions.
   - No allowance for the cost of private medical treatment unless it was essential.
   - No exemplary damages.

See also Harpwood V \textit{Principles of Tort Law} 232; \textit{R v Secretary of State for the Home Department and another: ex parte C} Queen's Bench Division (Crown Office List) O/3598/97; \textit{Cantwell v Criminal Injuries Compensation Board} [2001] UKHL 36 2002 SCLR 185 2002 SC (HL) at [1]:
   - (T)he scheme provided for the assessment of compensation on the basis of common law damages...

296 See previous footnote.


298 Harpwood V \textit{Principles of Tort Law} 233.


300 Miers D \textit{Compensation for Personal Victimisation in the UK: Meeting European Standards} 9.
The Scheme operates on the basis of a scale of fixed Levels of Compensation ranging from Level 1 (£1,000) to Level 25 (£250,000). The Tariff of Injuries attaches a level to a particular injury. Provision is made for mental illness. Different levels are attached to injuries of abuse (physical and sexual) depending on whether the victim is an adult or a child (a person under the age of eighteen). No distinction is made on the basis of subjective factors such as gender, age (other than where the victim is a child) and the financial circumstances of the victim. Provision is made for the addition of items to the Tariff of Injuries for which there is no current provision.

Where a tariff award is made in respect of a physical injury or a sexual offence, no separate award will be made for any accompanying mental injury because compensation for the latter is included in the tariff amount. However, in the case of physical injuries only, an additional award will be made for a mental injury if it carries a higher tariff award.

- **Additional amount: loss of earnings**

This entitlement occurs only if the victim has lost earning capacity for more than 28 weeks (because he or she will receive statutory sick pay for the first 28 weeks of continuing injury). Social security benefits are thus deducted from compensation paid by the Criminal Injuries Compensation Authority, and not vice versa.

Various factors are taken into consideration when calculating loss of earnings. Lost earnings are calculated in terms of tables. Payment takes the form of a lump sum.

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301 For example minor multiple injuries are categorised as Level 1, while quadraplegia/tetraplegia is categorised at Level 25. Infection with HIV/AIDS comes in at Level 17, and so on. The Tariff of Injuries is detailed in nature, extending as it does from pages 22 to 54 of the document.


303 Pars 28 – 29. In such cases the Criminal Injuries Compensation Panel may make a recommendation to the Secretary of State.

304 Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 19.

305 Par 30.

306 Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 19.

307 Par 31:

- Emoluments at the time of injury;
- Emoluments which became payable during the time of incapacity (whether arising from the injury or not);
- Changes in the applicant’s pension rights;
- Future social security, insurance and pension benefits; and
- Any other future pension.
For these calculations a ceiling of one and a half times the gross average industrial earnings is set for the emoluments of the victim.  

- **Additional amount: special expenses**

This category also comes into effect only if the injured person was deprived of earning capacity for more than 28 weeks. The “special expenses” envisaged are:

- Loss of equipment used as a physical aid;
- Costs associated with National Health Service treatment for the injury;
- Costs of reasonable private health treatment; and
- Reasonable costs of special equipment, adaptations to the applicant’s accommodation, care (which is not available free of charge from the public sector) and costs of the Court of Protection or of a *curator bonis*.

While compensation for personal injury is calculated in accordance with the Tariff of Injuries, compensation for loss or earnings and special expenses is calculated in substantially the same way as for the law of tort.

- **Compensation in fatal cases**

In the case of fatality, only funeral expenses are recoverable by the estate of the deceased. However, qualifying claimants have claims for compensation.

A person who is criminally liable for the death of the deceased cannot be a qualifying claimant.

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308 Note 3 of the Scheme’s founding document contains these tables.
309 Par 34.
310 Miers D *Compensation for Personal Victimisation in the UK: Meeting European Standards* 19.
311 Par 37.
312 Par 38 defines “qualifying claimants” as:
   - Partners (including same sex partners and dependent former spouses);
   - Parents (including persons accepted as such by the deceased); and
   - Children (including persons accepted as such by the deceased).
313 Par 39.
The categories of compensation to which a qualifying claimant may be entitled are:

- **Supplementary compensation**

“Supplementary compensation” may be paid to a qualifying claimant where a deceased who would have been entitled to compensation for loss of earnings and/or special expenses dies from causes not related to the criminal injury before receiving the award or even making application therefor. The amounts are calculated as explained above for loss of earnings and special expenses *mutatis mutandis*, subject to the usual ceiling of £500 000.

- **Standard amount**

If the victim has died as a result of the criminal injury, the qualifying claimant will be compensated on Level 13 (£11 000). If there is more than one qualifying claimant, each receives compensation on Level 10 (£5 500). A former spouse does not qualify under this heading.

- **Dependency**

A qualifying claimant financially or physically dependent on the deceased has a claim for loss of income which will be calculated *mutatis mutandis* in the same way as loss of earnings are calculated where the victim did not die. The claims officer will take into consideration the amount of the deceased's earnings which the deceased utilised for his or her own maintenance in determining the value of the dependency, as well as the claimant’s own income from other sources. Where the deceased’s only normal income was derived from social security benefits, the claimant will have no claim under this heading.

The qualifying claimant’s remarriage prospects are not to be taken into account in assessing the amount claimable. Traditionally the remarriage prospects of widows

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314 Par 44. An award becomes vested in a victim as soon as the Authority has made the award and if the victim dies thereafter the award passes to his or her estate even though the victim had not accepted or received payment of the award before dying: *R v Criminal Injuries Compensation Board, ex parte Tong* [1977] 1 All ER 171 [1976] 1 WLR 1237 141 JP 105; *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 [1967] 2 All ER 770 [1967] 3 WLR 348.

315 Par 39.

316 Pars 40 – 41.
were taken into consideration in the law of tort when assessing their loss of support from their deceased husbands. In the evolving view of society this practice became unacceptable. The disregard of the widow’s remarriage prospects has been criticised because it “involves extraordinary generosity to one group of accident victims without regard to the needs of others.” A solution would be to effect periodical payments to widows – rather than a lump sum – subject to review as their circumstances change.

In cases where the qualifying claimant is under the age of eighteen, a payment in lieu of the “parent’s services at an annual rate of Level 5,” as well as other payments to cover “resultant losses” are available. The former amount (£2 000) is intended “to mark the special commitment given by a parent to a child” while the latter refers to the actual costs incurred in replacing the deceased parent’s services.

Dependency applications are not thwarted by the fact that an award had been made to the deceased before his or her death, but will be reduced by the amount paid to the deceased.

5 3 2 5  Deduction of other payments

The following amounts are deductible in full from compensation for the same contingency, but not from amounts based on the Tariff of Injuries:

- Social security benefits (or other state benefits); and
- Insurance payments.

Before the institution of the tariff-based scheme in 1996, deductions could generally be made from the total award, and not just from the heads of damage to which they

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317 Par 41.
318 In 1971 the Fatal Accident Act was amended to reflect this view. See Buckley v John Allen & Ford Ltd [1968] 1 QB 845; Winn Committee Report Report of the Committee on Personal Injuries Litigation Cmd 3691 1968.
321 Par 42.
323 Examples are the surviving parent giving up employment and paid help being obtained for the care of the minor.
324 Par 44. The £500 000 overall limit applies to the total of payments to the victim and payments to qualifying claimants.
325 Par 45.
referred. The institution of the Tariff of Injuries has brought about what Miers\textsuperscript{326} refers to as the “ring-fencing” of general damages, in that tariff-based amounts are protected from deduction.

Where the victim is alive, the amount for loss of earnings will be reduced by the amount of any pension the victim receives. Where the victim has died as a result of the injury, the amount due under the heading \textit{Dependency} will be reduced by any pension the qualifying claimant receives as a result of the death.\textsuperscript{327}

A comparison can be made between the provisions of the Social Security (Recovery of Benefits) Act\textsuperscript{328} dealing with the recovery from social security benefits of damages received in personal injury actions, and the equivalent provisions of the Criminal Injuries Compensation Scheme. Only amounts received in respect of damages for loss of earnings, the cost of care and loss of mobility\textsuperscript{329} during the \textit{relevant period} (five years)\textsuperscript{330} may be recovered from social security benefits, whereas the Criminal Injuries Compensation Scheme\textsuperscript{331} refers to “social security benefits (or other state benefits) or insurance payments” without any limitations. Also the limit of five years does not apply to the Criminal Injuries Compensation Scheme. The Act also does not apply in fatal cases, whereas the Criminal Injuries Compensation Scheme has the provisions set out above in this regard. An award will also be reduced by the full amount that the applicant has received in the form of:\textsuperscript{332}

- Damages awarded by a civil court; and
- Damages paid by way of a settlement; and
- Damages awarded by a criminal court.

In this case the “ring-fencing” referred to above does not protect tariff-based amounts. Miers\textsuperscript{333} states that, where the offender can be required to pay for the

\begin{itemize}
\item Miers D \textit{Compensation for Personal Victimisation in the UK: Meeting European Standards} 22.
\item Par 47.
\item 1997.
\item Social Security (Recovery of Benefits) Act 1997 Schedule 2.
\item Social Security (Recovery of Benefits) Act 1997 s 3.
\item Par 45.
\item Par 48.
\item Miers D \textit{Compensation for Personal Victimisation in the UK: Meeting European Standard} 23.
\end{itemize}
victim’s injuries, the taxpayer should be relieved of the burden, but by comparison with the annual total of awards, such sums are very small.  

An applicant will be required to reimburse the Criminal Injuries Compensation Authority upon receipt of any amount from one of the abovementioned sources subsequent to the Criminal Injuries Compensation Authority claim being paid out. However, no provision is made in terms of which the claimant is obliged to institute civil proceedings and there is no provision for the subrogation of the victim’s civil rights to the state.

5 3 2 6 Method of payment

A lump sum is the normal method of payment. However, provision is made for:

- Trusts;
- Repayment and/or administration of an award;
- Imposition of conditions attaching to an award;
- Interim payments; and
- Purchase of annuities.

Though an award vests in the applicant upon notification of acceptance thereof, provision can be made for the balance of a trust fund to revert to the Authority. No provision is made for payment of a regular, periodical income to the applicant.

5 3 2 7 Procedural aspects, the reconsideration of awards, re-opening of cases, reviews and appeals

Claims are determined by claims officers, and a time limit of two years is set for the institution of claims. The onus to prove a claim (on a balance of probabilities) is
placed on the applicant. Though legal representation is allowed, the cost thereof is not borne by the Scheme.\footnote{341} Although written notification of the decision by the claims officer to the applicant is required, the appropriate paragraph\footnote{342} does not require the giving of reasons by the claims officer.

Provision is made for the \textit{reconsideration} of an award before final payment in the case of new evidence or a change in circumstances.\footnote{343} A claims officer can \textit{re-open} a case “where there has been such a material change in the victim’s medical condition that injustice would occur if the original assessment of compensation were allowed to stand, or where he has since died in consequence of the injury.”\footnote{344} This is limited to a period of two years after the final decision unless the claims officer is satisfied that there is no “need for further extensive enquiries.”\footnote{345}

Provision is made for the \textit{review} of decisions by claims officers.\footnote{346} A review is conducted by a more senior claims officer. Reasons must be given with the written notification of the outcome of the review, unlike in the case of the original decision by the claims officer.\footnote{347} In \textit{R v Criminal Injuries Compensation Board, ex parte Cook}\footnote{348} the following was said:

\begin{quote}
and in the interests of justice to do so. Particular problems are encountered in cases of sexual abuse of minors where a decision has to be made regarding the point at which the victim can be said to become aware of his or her right to claim. This is a question of fact which will have to be decided on the merits of each case: *KR and others v Bryn Allyn Community (Holdings) Ltd (in liquidation) and another* [2003] EWCA Civ 85, [2003] 3 WLR 107, [2003] 1 FLR 1203, [2003] 1 FCR 385 and *R (on the application of M) v Criminal Injuries Compensation Appeals Panel* [2003] EWHC 243 (Admin), CO/4185/2002.
\end{quote}

\begin{quote}
Par 20.
Par 19.
Par 50.
Par 53.
Par 56.
Par 57. The criteria for re-opening were set out as follows in *R v Criminal Injuries Compensation Board ex parte Williams* (unreported) Queen’s Bench Division (Crown Office List) CO/209/99 at [11]:

I remind myself that my role is restricted to determining whether or not the decision is one which a reasonable Chairman, properly directing himself, could reach. In my judgment, the Chairman had to ask two questions. The first question is whether or not the applicant’s condition is directly attributable to the original injury. If the answer to that question is in the affirmative, the second question is whether or not injustice would occur if the original assessment of compensation were allowed to stand.

Pars 58 to 60. In *Regina v Criminal Injuries Compensation Board, ex parte A* [1999] 2 AC 330 the procedural aspects of review were canvassed.

Pars 50 and 60.

[1996] 2 All ER 144 [1996] 1 WLR 1037 per Aldous L J at p 150C.
\end{quote}
I believe it is clear that the board's reasons should contain sufficient detail to enable the reader to know what conclusion has been reached on the principal important issue or issues, but it is not a requirement that they should deal with every material consideration to which it has had regard.

In *R (on the application of M) v Criminal Injuries Compensation Appeals Panel*\(^{349}\) the importance of giving reasons was underlined:

> In my judgment the failure to give proper reasons is fatal. I shall assume, for the purposes of argument, that the failure to give proper reasons should not lead to the quashing of the decision if the conclusion reached by the Panel was the only possible conclusion on the evidence.

An applicant can appeal to the Criminal Injuries Compensation Appeals Panel against review decisions.\(^{350}\) Adjudicators appointed by the Secretary of State serve on the Appeals Panel.\(^{351}\)

The appellant may bring a friend or legal adviser to assist in presenting the case, but the costs of representation will be for the account of the appellant. The adjudicators may, however direct the Panel to meet reasonable expenses incurred by the appellant and any person who attends to give evidence at the hearing.\(^{352}\) The procedure at hearings is informal. The adjudicators are not bound by rules of evidence. The appellant, the claims officer presenting the appeal and the adjudicators may call witnesses to give evidence and may cross-examine them.\(^{353}\)

The appellant may be represented\(^{354}\) and proof\(^{355}\) on a balance of probabilities is required.\(^{356}\) Hearings take place in private, but the panel may, subject to the consent of the appellant, allow observers, such as representatives of the media. However, the identity of the appellant must be protected.\(^{357}\) As in the case of reviews, reasons must be given for the decision.\(^{358}\)

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\(^{349}\) [2001] EWHC Admin 720 at [72].

\(^{350}\) Pars 61 – 68. Pars 61 – 82 provide full details of the grounds for and procedure to be followed in appeals.

\(^{351}\) Par 2.

\(^{352}\) Par 74.

\(^{353}\) Par 75.

\(^{354}\) Par 74.

\(^{355}\) The onus of proof rests on the claimant.

\(^{356}\) Par 64

\(^{357}\) Par 76.

\(^{358}\) Pars 71 and 77.
Provision is also made for the rehearing of appeals where the appellant was not present at the original hearing.\footnote{359}

Decisions on appeal are subject to judicial review.\footnote{360} Regarding the courts’ role in the latter instance, the following principles were stated in \textit{R v Criminal Injuries Compensation Board ex parte Thompstone; R v Criminal Injuries Compensation Board ex parte Crowe}.\footnote{361}

\begin{quote}
Is the applicant an appropriate recipient of an \textit{ex gratia} compensatory payment made at the public expense? As with all discretionary decisions, there will be cases where the answer is clear one way or the other and cases which are on the borderline and in which different people might reach different decisions... the \textit{court can and should only intervene if the board has misconstrued its mandate or its decision is plainly wrong.} (Emphasis added)
\end{quote}

In terms of the Code of Practice for Victims of Crime promulgated in terms of the Domestic Violence, Crime and Victims Act, various obligations are placed upon the Criminal Injuries Compensation Authority and the Criminal Injuries Compensation Appeals Panel to ensure that claimants receive efficient service. One of the provisions is that, in the event of a claim for compensation being refused or reduced, an explanation must be given for the decision.\footnote{362}

\section*{5.3.2.7 Evaluation}

The Criminal Injuries Compensation Scheme adheres to the policy of compensating innocent victims only. In the scope of victim’s rights and restorative justice, this gives rise to questions of the exact meaning of the term \textit{victim}. This arises when the person attacked takes the law into his or her own hands and fights back, injuring his or her assailant and the Scheme has to make a value judgment of what constitutes an “innocent” victim.\footnote{363} In a case where a burglar had been shot (non-fatally) by a

\footnotesize
\begin{flushright}
\begin{tabular}{l}
\textbf{Pars 79 – 82.}
\textbf{R v Criminal Injuries Compensation Board, ex parte Lain (supra); R (on the application of Gravett) v Criminal Injury Compensation Appeals Panel (supra); R (on the application of Brierley) v Criminal Injury Compensation Authority [2001] EWHC Admin, CO/2106/2001; Harpwood V Principles of Tort Law 232.}\footnote{361}
\textbf{[1984] 1 WLR 1234 at 1239. This \textit{dictum} was underwritten by the Queen’s Bench Division in \textit{The Queen On The Application of Criminal Injuries Compensation Appeals Panel v Shields} [2001] ELR 164 at [23].}\footnote{362}
\textbf{At 13.5. See generally Ch 4 Par 4 3 2 3 (supra).}\footnote{363}
\textbf{See Par 5 3 2 3 (supra).}
\end{tabular}
\end{flushright}
householder, the Scheme withheld compensation, despite the burglar being entitled to a tortious claim. Miers justifies this on the basis that the taxpayer ought not to compensate offenders who just happen to become victims at the time of their own offending. While there is no doubt as to the probity of this attitude, it is conceivable that a situation of such great imbalance might arise that this principle would not be unassailable, for example, in the case of a youthful pickpocket shot when trying to steal a very small amount of money. This highlights the necessity to conduct an ongoing consideration of the content to be given to the concept of victim and the fact that private law and public law have different aims. What the South African perspective would be in the light of the Constitution, is a question which might vex the Constitutional Court in the future. The meaning of “victim-hood” becomes even more vexed when considering the Scheme’s inclusion of railway employees witnessing someone being injured while trespassing on a railway (usually to commit suicide). While the need to compensate such an observer is not disputed, the question arises whether the spectator is a victim of crime or a victim of a work-related injury. This kind of dilemma strengthens the view that the compartmentalisation of state-funded compensation according to the cause of the misfortune serves little purpose and is due for revisiting. This is borne out by Cane’s opinion that there are already various social security benefits available to victims of misfortune and there is no reason why victims of crime should be singled out for different treatment. Other writers have suggested that the Scheme is simply a cynical buying of victim cooperation or “essentially a symbolic act to show… concern for victims.”

The Scheme’s impact on English law is evidenced by *Hill v Chief Constable of West Yorkshire* where the Scheme’s existence was a factor in the court’s declining to impose a duty of care on the police in relation to victims of un-apprehended criminals. Some writers suggest that due to the success of the Scheme “…the law

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365 See previous footnote.
366 See Ch 1 Par 1 1 *(supra)*.
367 See Par 5 3 2 3 *(supra)*.
368 See generally Ch 6 *(infra)*.
372 [1989] A C 53. See also discussion of this case in Ch 3 Par 3 4 3. *(supra).*
relating to intentional torts has already been superseded. This conclusion is based on the sizable amounts paid out by the Scheme and the financial inability of offenders to effect restitution. Thus the Scheme is altering the application of English law. However, concerning abuse of power by agencies of the state, the demise of the tortious action is not foreseen. In Z v United Kingdom the European Court of Human Rights held that the Criminal Injuries Compensation Scheme, while providing assistance to victims of crime, did not on its own satisfy the absolute obligation to protect persons from torture and inhuman or degrading treatment or punishment imposed by the European Convention on Human Rights.

The tariff system is controversial, as it does not consider the personal circumstances of the victim. The main factor in its favour is that it promotes transparency and the swift finalisation of claims.

According to empirical evidence gleaned in various countries, the low number of eligible claimants actually being successful in their claims is due to a lack of communication of basic information regarding compensation schemes. The Code of Practice for Victims of Crime’s Section 13 deals with the rights of claimants in relation to the Scheme; many of these rights are calculated to improve communication between claimants and the Scheme. Section 5.3 places the obligation on the police to inform victims of victim support services available; presumably this would refer also to the existence and workings of the Criminal Injuries Compensation Scheme. Section 13 further states that claims ought to be finalised within twelve months of submission. This is not always possible due to, for example, delays in the development of a full medical prognosis or the finalisation of the criminal trial for the evaluation of issues such as provocation. However, in 1998 – 1999, 81.7% of claims received a decision within twelve months, the target having
been set at 90%. In many cases interim payments had already been made.\footnote{380} During 1998 – 1999 the first decision was accepted by claimants in 76.2% of claims. Of claims submitted to review, acceptance of 66.4% of decisions was recorded. Only 8.9% of claims submitted went on appeal before the Criminal Injuries Compensation Appeal Panel.\footnote{381} During the same period 40,164 awards were made totalling an amount of £113.8m. Of this amount £102.2m resulted from payments under the tariff and £11.5m was paid for loss of earnings and/or medical/care costs in personal injury claims and dependency, loss of parental services and funeral expenses in fatal claims.\footnote{382} A diagrammatical representation of disallowed claims displays the following tendencies:\footnote{383}

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Delay in reporting the matter to the police.</td>
</tr>
<tr>
<td>2</td>
<td>Failure to cooperate with the police.</td>
</tr>
<tr>
<td>3</td>
<td>Failure to cooperate with CICA.</td>
</tr>
<tr>
<td>4</td>
<td>Conduct before, during and after incident.</td>
</tr>
<tr>
<td>5</td>
<td>Applicant’s criminal record.</td>
</tr>
<tr>
<td>6</td>
<td>Claim not submitted within 2 years.</td>
</tr>
<tr>
<td>7</td>
<td>Injury below £1 000 minimum.</td>
</tr>
<tr>
<td>8</td>
<td>Injury not resulting form crime.</td>
</tr>
<tr>
<td>9</td>
<td>Other, e.g. pre-existing medical condition.</td>
</tr>
</tbody>
</table>

A calculation based on these figures shows that applicants’ own behaviour accounted for 47.8% of disallowed claims.

\footnote{380}{Criminal Injuries Compensation Authority Third Annual Report 1998 – 1999 Par 2.7 – 2.11.}
\footnote{381}{Criminal Injuries Compensation Authority Third Annual Report 1998 – 1999 Par 3.3.}
\footnote{382}{Criminal Injuries Compensation Authority Third Annual Report 1998 – 1999 Par 3.7.}
\footnote{383}{Criminal Injuries Compensation Authority Third Annual Report 1998 – 1999 Annex B.}

The total number of disallowed claims was 36,889.
Though Legal Aid is not available and there is no defendant against whom an order for costs can be made,\textsuperscript{384} many solicitors are willing to act on the understanding that their remuneration will be paid out of the ultimate award. Statistically, legal representation has been shown to have a positive effect on the success rate of claims.\textsuperscript{385} In 1990, Victim Support, the Law Society and the Trades Union Congress advocated giving the Criminal Injuries Compensation Board\textsuperscript{386} the power to pay applicants’ costs of investigating claims.\textsuperscript{387} This has not been generally implemented.\textsuperscript{388}

General legal opinion regarding the Criminal Injuries Compensation Scheme can be summarised as follows:

\begin{quote}
Despite strong criticism... the scheme has been regarded as a popular success.\textsuperscript{389}
\end{quote}

Comparing the Criminal Injuries Compensation Scheme with similar schemes in other European Union countries, Miers\textsuperscript{390} states:

\begin{quote}
That said, it seems to me that the UK model tends to maximal rather than the minimal provision.
\end{quote}

\begin{footnotes}
\item\textsuperscript{384} Guide Par 1.3. Applicants are referred to their local Citizens Advice Bureau or Law Centre for advice and to Victim Support for assistance.
\item\textsuperscript{385} Cane P Atiyah’s Accidents, Compensation and the Law (6th ed) 271.
\item\textsuperscript{386} Now the Criminal Injuries Compensation Authority.
\item\textsuperscript{387} Home Affairs Committee Compensating Victims Quickly: the Administration of the Criminal Injuries Compensation Board (HC 92, 1989 – 1990).
\item\textsuperscript{388} Par 21 allows a claims officer to refer an applicant for a medical examination and provides that “reasonable expenses incurred by the applicant in that connection will be met by the Authority.”
\item\textsuperscript{389} Jones M A Textbook on Torts 472.
\item\textsuperscript{390} Miers D Compensation for Personal Victimisation in the UK: Meeting European Standards 27.
\end{footnotes}
An employer is required to effect restitution when an employee has:

- Suffered an accident arising out of and in the course of employment, resulting in death, permanent total disablement, permanent partial disablement, or temporary disablement whether total or partial; or
- Contracted an occupational disease.

Any contract which seeks to limit the liability of the employer in terms of the Act is deemed to be unenforceable. However the employer is not liable:

- Where the total or partial disablement of the employee does not continue for a period exceeding three days;
- In respect of any injury not resulting in death, caused by an accident which is directly attributable to:
  - The employee having been at the time thereof under the influence or drugs, or
  - The wilful disobedience of an order or rule expressly intended to secure the safety of employees, or
  - The wilful removal or disregard of any safeguard or device provided for the purpose of securing the safety of employees. The burden of proving intentional disobedience rests upon the employer.

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391 8 of 1923. Because compensation payable to the employee is paid by the employer through the office of the Commissioner for Workmen’s Compensation, the decision whether this Act should be included in this chapter (dealing with state funded compensation) or Ch 4 (dealing with offender restitution) is vexed. It is dealt with in this chapter as the Act does not deal specifically with offender restitution and the compensation payable is not based on the criminal or common law civil liability or fault of the employer. However, the employee’s claim is forfeited where the employee’s own drunkenness or wilful act leads to the injury.

392 S 3. This includes employees employed by a contractor, but excludes casual employees.

393 S 17.

394 S 3(1)(a).

395 S 3(1)(b).
When the employee has contacted a disease which is not directly attributable to the occupation, or when the employee has filed a suit for damages against the employer – or any other person – in a civil court.

Disablement, which is the loss of the earning capacity, can be classified as total or partial. It can further be classified as permanent or temporary. Section 4 deals with the quantification of compensation. An accident arising out of employment implies a causal connection between the accident/injury, and the work done in the course of employment. Employment should be the distinctive and the proximate cause of the injury. The three tests for determining whether an accident arose out of employment are:

- At the time of injury the employee must have been engaged in the business of the employer and must not have been doing something for personal benefit;
- The accident must have occurred at the place where he or she was performing his or her duties; and
- The injury must have resulted from some risk incidental to the duties of service, or inherent in the nature or condition of the employment.

Workers employed in certain types of occupations are exposed to the risk of contracting certain diseases, which are peculiar and inherent to those occupations. A worker contracting an occupational disease is deemed to have suffered an accident out of and in the course of employment and the employer is liable to pay compensation.

Payment is not effected to the employee directly. It is deposited, along with the prescribed statement, with the Commissioner who will then pay it to the employee. A receipt of deposit from the Commissioner serves as sufficient proof of the discharge of the employer’s liability.

Where the amount payable as compensation has been settled by agreement, a memorandum thereof is sent by the employer to the Commissioner, who registers it.

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396 S 3(4).
397 S 3(5).
398 S 3(2).
399 S 8.
Where it appears to the Commissioner that the agreement ought not to be registered by reason of the inadequacy of the amount, or that the agreement has been obtained by fraud, undue influence or other improper means, he or she may refuse to record the agreement and may make such order (including therein any sum already paid under the agreement) as he or she thinks just in the circumstances. A registered agreement is enforceable under the Act.\textsuperscript{400} When an agreement is not registered, the employer remains liable to pay the full amount of compensation in terms of the Act.\textsuperscript{401}

A claim for compensation is made through the Commissioner. No claim for compensation is considered by the Commissioner unless a notice of accident has been given by the employee in the prescribed manner,\textsuperscript{402} except in the following circumstances:\textsuperscript{403}

- In cases of the death of the employee resulting from an accident which occurred on the premises of the employer, or at any place where the employee was working at the time of the accident if the employee died on such premises or at such place or in its vicinity;
- Where the employer has knowledge of the accident from any other source, at or about the time of its occurrence; or
- Where the failure to give notice was due to sufficient cause.

Employers commonly negotiate insurance policies to indemnify themselves against liability in terms of the Act. Section 14 of the Act specifically protects the interests of the employee in cases where the employer is insolvent, or in liquidation. In such cases the employee obtains the rights which the employer would have had against the insurer, despite any legal provisions regarding the employer’s insolvency. Should the amount of the insurer’s liability not provide full compensation to the employee (as required by the Act), the employee obtains the right to prove for the balance in the insolvency or liquidation proceedings.\textsuperscript{404}

The employee who accepts benefits in terms of the Act loses his or her civil claim against all parties, not just the employer.

\textsuperscript{400} S 28.
\textsuperscript{401} S 29.
\textsuperscript{402} S 10(1).
\textsuperscript{403} S 10(4).
\textsuperscript{404} S 14(2).
The fact that employers usually negotiate insurance policies to indemnify themselves, though not a statutory requirement, indicates that this Act stops just short of creating a system of statutory insurance. De facto, however, a similar effect is achieved.

5412 Motor Vehicles Act

Section 140 legislates the no-fault liability of the owner of a motor vehicle to pay damages where death or permanent disablement has resulted from an accident arising from the use of a motor vehicle. The amount payable in respect of death is a fixed sum of Rs50 000 and the amount payable in respect of permanent disablement is a fixed sum of Rs25 000. The claimant is not required to prove that the death or permanent disablement was due to any wrongful act, neglect or default of the owner of the vehicle or any other person. A claim is not affected by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made. These factors also do not influence the quantum of the amount recoverable. The claim is instituted before the Motor Accidents Claims Tribunal and is independent of any other claim which the injured party or dependents might have. If the owner is liable to pay damages on grounds of fault in addition to the no-fault liability provisions of section 140, the Act provides for a pro rata reduction of the amount payable in terms of section 140.

Section 146 imposes compulsory motor vehicle (or third party) insurance. In the case of a vehicle carrying dangerous or hazardous goods a policy of insurance under the Public Liability Insurance Act is also required. The insurance policy must comply with the following requirements:

- It must be issued by an authorised insurer.
- It must cover the insured against liability arising from the use of the vehicle in a public place in respect of:
  - Death of or bodily injury to any person;
  - Liability to the owner of goods carried in the vehicle; and
  - Damage to any property of a third party.

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406 Government of Tamil Nadu State Transport Authority website (July 2002) http://www.tn.gov.in/sta/roads.htm
6 of 1991. The Public Liability Insurance Act will be considered below. S 147.
Section 163 provides for fixed amounts of damages being paid in cases where the details of the vehicle causing the death or injury are unknown – the hit and run scenario:

- Rs 25,000 in cases of death.
- Rs 12,500 in cases of “grievous hurt.”

The Act further empowers the Central Government to promulgate rules regarding the functioning of a scheme to be administered by the General Insurance Corporation for the purposes of paying compensation. Claims are to be submitted to specially created Motor Accidents Claims Tribunals, with a right of appeal to the High Court.

Court fees payable in cases of claims are relatively low, presumably to assist the victim.

Traffic accidents are a major problem in India and the protection provided by the Act is deemed to be insufficient. In addition to the cover provided by the Act, the state of Tamil Nadu has instituted a scheme known as the Chief Minister’s Accident Relief Fund. Under this Scheme, relief is provided to victims of road accidents or their families on the following scale:

<table>
<thead>
<tr>
<th>Death</th>
<th>Rs 10,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Disability</td>
<td>Rs 6,000</td>
</tr>
<tr>
<td>Loss or one eye or one limb</td>
<td>Rs 4,000</td>
</tr>
<tr>
<td>Other cases</td>
<td>Rs 500</td>
</tr>
</tbody>
</table>

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409 By one of the general insurance companies nominated by the General Insurance Corporation of India for each district: Government of Tamil Nadu State Transport Authority website (July 2002) http://www.tn.gov.in/sta/roads.htm
410 S 163(3)(b)
411 S 163.
412 S 165.
413 S 173.
414 Government of Tamil Nadu State Transport Authority website (July 2002) http://www.tn.gov.in/sta/roads.htm
415 Court fees for claims of Rs1 lakh are Rs372,50 and for claims over one lakh, Rs372,50 plus one percent of the remaining claim amount, while court fees in other cases are around 10% of the amount claimed.
416 Government of Tamil Nadu State Transport Authority website (July 2002) http://www.tn.gov.in/sta/roads.htm
No application is required. Immediately after an accident, the Deputy Superintendent of Police sends a report to the Revenue Divisional Officer listing details of the accident, victims and injuries. The Revenue Divisional Officer sanctions relief as set out in the scale. This scheme is intended to provide immediate relief to victims of road accidents in the period before they receive statutory compensation under the Act. The amount granted under the scheme is not set off against the amount awarded in terms of the Act. This is thus an unadulterated form of victim compensation, payable by the state.

In addition, families of persons dying in accidents involving State Transport Undertaking buses in Tamil Nadu are entitled to relief at Rs50,000 per death under the Chief Minister’s Relief Fund. Orders are passed by Government on an ad hoc basis depending on the circumstances of the accident. The award is reduced by the amount awarded by the Revenue Divisional Officer as set out in the previous paragraph.

In Tamil Nadu a police officer investigating a traffic accident, must, without waiting for the result of the investigation or prosecution, immediately obtain the appropriate application forms from the injured party or the legal representative of the deceased and forward them to the Motor Accidents Claims Tribunal as a claim in terms of the Motor Vehicles Act. The police officer must also gather full particulars of the insurance certificate of motor vehicles involved in the accident and furnish them to the injured party or legal representatives of the deceased. An officer investigating an accident must, after a case is registered, forward copies of the first information report relating to the accident to the Motor Vehicle Claims Tribunal having jurisdiction; and to the President of the appropriate District Committee for Legal Aid and Advice. The officer investigating the accident must also, immediately after the accident is registered, furnish the particulars to the nearest Legal Aid Committee or Centre. Thus various duties are placed on the police force to assist the victim in obtaining relief.

5413 National Human Rights Act

This Act provides for the National Human Rights Commission which, inter alia:

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417 Ch III S 12(a).
(I)nquire(s), *suo motu* or on a petition presented to it by a victim or any person on his behalf, into a complaint of
(i) violation of human rights or abetment thereof or
(ii) negligence in the prevention of such violation,
by a public servant.

The Commission is granted such “functions as it may consider necessary for the protection of human rights.” Section 18 specifically grants the Commission the power to:

- Recommend the prosecution of the responsible persons (or other appropriate action) where the inquiry has disclosed violation of human rights or negligence in the prevention thereof by a public servant.
- Approach the Court for such directions, orders or writs as it may deem necessary.
- Recommend the grant of such immediate interim relief to victims as deemed necessary.

The Commission does not have the authority to make decisions that are *per se* binding on the government, but has powers to make recommendations and to approach the Supreme Court in order to harness its powers. However, the Commission’s recommendations are implemented as a matter of course by the state.

Section 30 of the Act provides for the constitution of Human Rights Courts by the Chief Justice of the High Court “for the purpose of providing speedy trial of offences arising out of violation of human rights.”

The National Human Rights Commission frequently directs the state to pay compensation to victims of human rights abuses by public servants.

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418 See previous footnote.
419 See following two footnotes.
For further examples see Mundrathi *Law on Compensation: To Victims of Crime and Abuse of Power* 172 – 174. Often the order of the Commission explicitly allows for a right of redress against the wrongdoer which can be exercised by the state, thus introducing an element of restitution (see Ch 1 Par 1 3 1). Usually, however, it is the state which pays the compensation.
The Commission ordered the Government of Bihar to pay compensation to the father of a boy who was killed in indiscriminate police firing.

On 19 May 1999 the Commission gave its recommendations on a case of what was claimed to be an “encounter” by the Uttar Pradesh police resulting in the killing of four persons. The Commission found it to be a case of “fake encounter” and ordered the Government to pay compensation of Rs4 lakhs to the next of kin of each of the victims within a period of four weeks.\footnote{One lakh is equal to a hundred thousand ($10^5$). A hundred lakhs make a crore or ten million: Wikipedia (Jul 2006) http://en.wikipedia.org/wiki/Lakh.}

Margaret Alva, a former union minister, approached the Commission concerning a denial of basic rights to shelter and security when people were ejected from their homes for the purposes of the Naval Sea Bird Project. The Commission ordered the Governments of Karnataka and India, \textit{inter alia}, to report on rehabilitation and resettlement measures and to release funds for the payment of compensation to victims.

When a request for compensation from the widow of a man electrocuted by an electric wire lying on the ground was denied by the Bihar State Electricity Board, the Commission petitioned the Government of Bihar to pay her Rs2 lakhs in lieu of immediate interim relief.

The Commission ordered immediate interim monetary compensation for nine members of a family in Raipur, Madhya Pradesh who were illegally detained by the police for fourteen days. During this period they were tortured and coerced to pay a sum of Rs50 000 to the concerned officials.

The Commission directed the Government of Uttar Pradesh to pay interim relief of Rs1 lakh to an eight-year old boy who came into contact with an electric transformer, leading to the amputation of his arms.

Often the order of the Commission explicitly authorises a right of redress against the wrongdoer to be exercised by the state, thus introducing an element of restitution. However, the state pays compensation to the victim, independent of any right of redress against the perpetrator.
542  Victim Compensation In Tamil Nadu

The state of Tamil Nadu has a Victims Assistance Fund in terms of which the Government of Tamil Nadu compensates victims of crime. There are also other forms of victim compensation specifically created for victims of caste/communal violence and murder or rape committed by the police.

5421 Compensation for victims of caste and police violence

These forms of compensation are prescribed by various Government Orders of the Government of Tamil Nadu and apply only in cases of:

- Caste or communal violence.
- Murder and rape perpetrated by the police.

- Government Order Ms No 629 of 3 May 1991

This Government Order imposes a uniform scale of compensation for death, injury and loss of property as a result of communal/caste clashes. The Government Order refers to the fact that, in the past, financial assistance was sanctioned on an ad hoc basis by the Government when riots had taken place and imposes a standardised scale of compensation to be disbursed from the Chief Minister’s Public Relief Fund:

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422 The state of Tamil Nadu is home to the Indian Society of Victimology. On 14 August 1992 persons interested in cause of victims of crime met at the Department of Criminology of the University of Madras (Chennai) in Tamil Nadu and resolved to found the organisation. Prof K Chockalingam was elected as President of the Society. World Society of Victimology Website (July 2002) http://www.fh-niederrhein.de/fb06/victimology/india.htm

<table>
<thead>
<tr>
<th>Nature of loss</th>
<th>Quantum of Relief</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death per person killed in a family (whether earning or non-earning)</td>
<td>Rs 10 000</td>
</tr>
<tr>
<td>Permanent incapacitation per each member in a family.</td>
<td>Rs 10 000</td>
</tr>
<tr>
<td>Temporary incapacitation</td>
<td>Rs 2 000</td>
</tr>
<tr>
<td>Grievous hurt/short of incapacitation</td>
<td>Rs 1 000</td>
</tr>
<tr>
<td>Rape</td>
<td>Rs 5 000</td>
</tr>
<tr>
<td>Loss of or damage to house:</td>
<td></td>
</tr>
<tr>
<td>(a) RCC roof or tiled house</td>
<td>(a) Actual loss or Rs2 500 whichever is lower.</td>
</tr>
<tr>
<td>(b) Thatched house</td>
<td>(b) Actual loss or Rs1 500 whichever is lower.</td>
</tr>
<tr>
<td>(a) &amp; (b) includes loss of movable property such as grains, clothes &amp; other household effects.</td>
<td></td>
</tr>
<tr>
<td>Loss of or damage to shops:</td>
<td></td>
</tr>
<tr>
<td>Tiled shops, including loss of goods in the shop.</td>
<td>Actual loss or Rs2 500 whichever is lower.</td>
</tr>
<tr>
<td>Thatched shops or bunks including loss of goods in the shop.</td>
<td>Actual loss or Rs1 500 whichever is lower.</td>
</tr>
<tr>
<td>Loss of earning assets like vehicle, a boat, cattle.</td>
<td>Actual loss or Rs2 000 whichever is lower.</td>
</tr>
<tr>
<td>For loss of movable property such as grains, clothes and other household effects without loss of or damage to house, loss of articles in shops without loss or damage to building containing the shop. Relief under items 6 &amp; 7 will disentitle relief under item 9.</td>
<td>Actual loss or Rs1 000 whichever is lower.</td>
</tr>
<tr>
<td>Damage to irrigation drinking water wells, tube wells, electric motor, fittings, fruit bearing trees etc. in the ownership of the victims.</td>
<td>Actual loss or Rs1 000 whichever is lower.</td>
</tr>
</tbody>
</table>

**Government Order Ms No 874 of 8 August 1996**

This Government Order points out that the following categories of loss were not canvassed in the Government Order 629:

- Death due to police firing;
- Death due to police torture; and
- Rape by the police.

The Government Order creates a scale of compensation which imposes higher amounts of compensation – in certain instances – than the scale contained in

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Government Order 629. The enhanced scale applies to victims of caste/communal incidents as well as to the victims of the police atrocities mentioned above. The provisions of Government Order 629 regarding time of payment and criminal proceedings are repeated verbatim.

- **Government Order Ms No 153 of 1 January 1998**

This Government Order increases the amount of compensation payable under certain categories, but creates no new categories for compensation.

- **Government Order Ms No 833 of 22 May 1998**

On recommendation of the National Commission for Minorities, following a decision of the Delhi High Court this Government Order raises the amount of compensation in cases of death as a result of communal and caste clashes to Rs2 lakhs.

- **Government Order Ms No 836 of 26 May 1998**

This Government Order serves only to increase the amounts of compensation payable under items 6 – 10 on the scale created by Government Order 629.

- **Evaluation**

The scales show that a broad spectrum of loss is covered. They are not limited to personal injury, but include loss of property. Compensation in cases of personal injury is not linked to the actual quantum of the loss, thus non-patrimonial or emotional loss where personal injuries are concerned is included. No reference is

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425 See above.
426 See above.
429 After the assassination of Prime Minister Indira Gandhi.
431 See above.
432 For example, category 1 refers to the death of a person irrespective of whether he or she was “earning or non-earning.” The death of a “non-earning” person would presumably lead to no financial hardship for the family, thus the object of the compensation must be to ameliorate emotional loss.
made to patrimonial loss in these cases. Only where damage to property is concerned, is reference made to actual financial loss.

It is specified that payment must take place within a month of the event causing the loss and that there must be no "waiting for the result of criminal proceedings." The objective is to provide immediate emergency compensation.

These Government Orders make no reference to other remedies, for example of a tortious or constitutional nature, thus do not preclude the parallel institution of such remedies. Whether the amount paid in terms of this system is to be offset against the amount claimed in a court action, is not stated. If the analogy of section 140(5) of the Motor Vehicle Act is followed, setoff will take place. However, if the example of the Tamil Nadu Chief Minister’s Accident Relief Fund is adhered to, setoff will not take place. Considering that this compensation is also paid from the Chief Minister’s Public Relief Fund, it would be reasonable to follow the latter route.

5422 Tamil Nadu Victims Assistance Fund

Initially an amount of Rs1 crore was earmarked for the Fund, but this amount was increased to Rs1,25 crore for 2000 - 2001.

The objective is to provide “financial assistance to the victims of murder, serious injuries, rape and particularly to help women, children and bread winners in distress.” The Victims Assistance Fund was created on the initiative of the Director General of Police, who was assigned funds for sub-allocation to Commissioners and Superintendents of Police. The Citizens’ Charter of the Tamil Nadu Police states as one of its objectives to “enable restitution and compensation to victims of crime.”

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433 See source quoted in footnote 58 (supra) Par 6.
434 See Ch 3 Par 3 2 4 (supra).
435 See Ch 3 Par 3 4 4 (supra).
Quantum of relief

The following payments to victims of crime or their heirs are authorised:439

<table>
<thead>
<tr>
<th>Event</th>
<th>Amount not exceeding</th>
<th>To whom paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>Rs 10,000</td>
<td>Legal heir</td>
</tr>
<tr>
<td>Grievous injury</td>
<td>Rs 5,000</td>
<td>Victim</td>
</tr>
<tr>
<td>Rape</td>
<td>Rs 5,000</td>
<td>Victim</td>
</tr>
</tbody>
</table>

The following factors are to be considered in deciding the quantum of the award:

- Relief obtained from other schemes such as the Chief Minister’s Relief Fund; and
- The indigent circumstances of the victim’s family.440

Thus amounts recovered from other avenues of state-funded compensation are to be taken into account when the amount of the award is determined. It is also clear that the Victim Assistance Fund is not intended to supersede the other forms of relief already discussed.

Procedural aspects

Each district has a District Victims Assistance Committee and the cities of Chennai, Madurai and Coimbatore have City Victims Assistance Committees. Each District Victims Assistance Committee has as Member-secretary the local District Superintendent of Police; in the City Victims Assistance Committees the Deputy Commissioner of Police (Headquarters) fulfils the same function. The structure is set out as follows:441

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439 No other crimes are mentioned. Government Order Ms No 89 of 24 January 1997 Par 1.
440 Government Order Ms No 89 of January 24, 1997 Par 2.
441 Government Order Ms No 89 of January 24, 1997 Par 2.
Applications are thus heard by committees made up of police officials and prosecutors. Originally the Committees made recommendations which were transmitted to the Director General of Police in Chennai who would then release funds to the Superintendents and Commissioners of Police for payment to claimants. After considering a report of the Director General of Police after the scheme had been operative for one year, it was decided that the Committees would be given the authority to sanction relief from the Victims Assistance Fund. The Committees were also directed to meet at least once per month. This change was brought about “to speed up the processing of genuine cases and to provide faster relief to the victims/legal heirs.”

No mention is made of appeal or review procedures. Therefore only the normal judicial review procedures would be at the disposal of a dissatisfied claimant.

Regarding future developments on the front of victim compensation in India, Shri I D Swami, Minister of State for Home Affairs stated:

(I)t is fifty years since our nation has got its independence and at the end of it we are yet to listen and respond to victims of crime and their advocates. The victims of crime are virtually invisible in the laws and policies that govern our justice systems. Tremendous strides are being taken by various legal and social bodies and also the Indian Society of Victimology, to enact victim’s rights laws in our country. The Bill on The Victims (Criminal Justice) Right to Assistance – 1996, drafted by the Indian Society of Victimology, will be given due importance and consideration by the present government to frame a national legislation to assist victims of crime in tune with the United Nations Declaration of Basic principles of Justice for Victims of Crime and Abuse of Power.

**Table: Names and Members of Committees**

<table>
<thead>
<tr>
<th>Name of Committee</th>
<th>Chairman</th>
<th>Member</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Victims Assistance Committee</td>
<td>District Collector</td>
<td>(i) District Superintendent of Police</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) Assistant Public Prosecutor (Administration)</td>
</tr>
<tr>
<td>City Victims Assistance Committees</td>
<td>Commissioner of Police</td>
<td>(i) Deputy Commissioner of Police (Headquarters)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) City Public Prosecutor</td>
</tr>
</tbody>
</table>

442 Government Order Ms No 89 of January 24, 1997 Par 4.
(July 20020 http://pib.nic.in/archieve/Ireleng/lf1999r261199.html
The Bill referred to above has not been promulgated as legislation, nor is there any sign that it has been tabled as a Bill in either houses of Parliament, the Rajya Sabha and the Lok Sabha.\textsuperscript{444}

Singh\textsuperscript{445} relies on article 41 of the Constitution to justify the introduction of a victim compensation scheme:

\begin{quote}
The state shall, within the limits of its economic capacity and development, make suitable provision for securing the right towards, education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of undeserved want.
\end{quote}

He sees the victim of crime as representing an example of “undeserved want.”

\textbf{5 5  New Zealand}

\textbf{5 5 1  Accident Compensation Corporation}

The history of the first victim compensation scheme in New Zealand parallels that of Great Britain up to a point: The concept of state-funded compensation for victims of crime can be traced back to workers’ compensation and compensation for traffic accidents. New Zealand shows with particular clarity how the three concepts are linked, the three separate schemes having been amalgamated into one scheme, the Accident Compensation Scheme,\textsuperscript{446} which compensates victims of \textit{all} accidents, whether industry, traffic or crime related.

In 1900 the Worker’s Compensation Act created no-fault cover in respect of industrial accidents. It provided injured workers with weekly benefits and, in the case of death, compensation for dependants. The Act required employers to insure themselves against injuries to employees. Benefits provided by the Act were small and limited to a period of six years from injury. The right to sue employers on the basis of negligence was retained. In 1928 the Motor Vehicles Insurance (Third Parties Risk) Act introduced a compulsory third party insurance scheme. The scheme ensured that the victims of motor vehicle accidents could claim damages for personal injury. In

\textsuperscript{444} Indian Parliament Website: Bills (July 2005) http://rajyasabha.nic.in/


\textsuperscript{446} See below.
1964 New Zealand was the first country to initiate a criminal injuries compensation scheme for victims of crime.\textsuperscript{447}

In 1967, as a result of concerns about the inadequacy of workers’ compensation benefits, a Royal Commission was established to report on workers’ compensation. The Woodhouse Report\textsuperscript{448} recommended a completely new no-fault approach to compensation for personal injury. It recommended a scheme to cover all motor vehicle injuries and all injuries to earners, whether occurring at work or not. The costs of motor vehicle injuries were to be covered by a levy on drivers and owners of motor vehicles and, in the case of industrial accidents, by a levy on employers. The tortious right to sue in respect of motor vehicle injuries and non-work injuries to earners would also be revoked.

The five guiding principles of the Woodhouse Report were:

- Community responsibility;
- Comprehensive entitlement;
- Complete rehabilitation;
- Real compensation; and
- Administrative efficiency.

In terms of the Accident Compensation Act\textsuperscript{449} the accident compensation scheme came into operation on 1 April 1974 under the administration of the newly established Accident Compensation Commission.

The Act covered work and non-work related injuries to earners, and motor vehicle injuries. In 1973 the Act was amended\textsuperscript{450} to provide cover also for students, non-earners and visitors to New Zealand. Three schemes were established:

- The earners’ scheme, funded from levies paid by employers on wages paid to employees, and levies paid by self-employed people;
- The motor vehicle accident scheme, funded from levies paid by owners of motor vehicles; and

\textsuperscript{447} In terms of the Criminal Injuries Compensation Act 1963. See also Par 2.1 (supra).
\textsuperscript{449} 1972.
\textsuperscript{450} Accident Compensation Amendment Act (No 2) 1973.
The supplementary scheme, funded by the state, for persons not covered by either of the other two schemes.

Benefits included:

- Hospital and medical expenses;
- Rehabilitation costs;
- Associated transport costs;
- Earnings-related compensation (payable from the seventh day after the accident at a rate of 80% of the average weekly earnings before the accident);
- Lump sum payments for permanent loss or impairment;
- Lump sum payments (up to a maximum of $10,000) for pain and mental suffering; and
- Funeral costs and lump sum payments to surviving spouses and children in cases of the accidental death of a breadwinner.

However, in its original form the arrangement was not financially viable. A political swing away from socialist ideology had the effect that legislation was passed in 1992\textsuperscript{451} to “establish an insurance-based scheme to rehabilitate and compensate in an equitable and financially affordable manner those persons who suffer personal injury.”\textsuperscript{452} Consequently the extent of compensation was reduced.\textsuperscript{453} Prior to the promulgation of the Injury Prevention, Rehabilitation, and Compensation Act,\textsuperscript{454} the scheme underwent numerous amendments in terms of several Acts.\textsuperscript{455}

Currently the Injury Prevention, Rehabilitation, and Compensation Act\textsuperscript{456} provides for a scheme by which all persons suffering personal injuries are compensated under the Accident Compensation Scheme. The latter operates on the \textit{no-fault} principle and provides compensation for victims of \textit{all} accidents, whether industry, traffic or crime.
related. In other words, victims of crime are treated in the same way as victims of accidents. The victim has no tortious claim in instances falling under the aegis of the Accident Compensation Scheme.457

5 5 1 1Structure

The Injury Prevention, Rehabilitation and Compensation Act458 perpetuates the existence of the Accident Compensation Corporation,459 a juristic person to which the administration of the Act is delegated.460 The Act refers to the existence of a social contract which entails “providing for a fair and sustainable scheme for managing personal injury”461 in the community.

However, the Act goes beyond the payment of compensation to victims: A primary function of the Corporation is the promotion of measures to curtail personal injury.462 Furthermore, provision is made for the disclosure of information by the Accident Compensation Corporation to the Department of Child, Youth and Family Services for the purpose of preventing injury to children arising from unlawful activity.463

The Act464 directs the Accident Compensation Corporation to maintain the following Accounts:

- The Employers' Account “to finance entitlements provided under this Act by the Corporation to employees for work-related personal injuries;”465
- The Residual Claims Account to deal with claims which arose before certain relevant dates and which have become the responsibility of the Accident Compensation Corporation;466

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459 S 259. The Accident Compensation Corporation was created by the Accident Insurance Act 1998.
460 S 262.
461 S 3. See Ch 2 Par 2 2 1 (supra).
462 S 263.
463 S 283.
464 S 166.
465 S 167. Funded from levies paid by employers in terms of s 168.
The Self-Employed Work Account “to finance entitlements provided under this Act in respect of self-employed persons who suffer work-related personal injuries in their self-employment;”

The Motor Vehicle Account “to finance entitlements provided under this Act in respect of motor vehicle injuries;”

The Earners’ Account “to finance entitlements provided under this Act in respect of personal injury to earners who suffer personal injury that is a non-work injury;”

The Non-Earners’ Account “to finance entitlements provided under this Act in respect of personal injury (other than motor vehicle injury or medical misadventure injury) to non-earners;”

The Medical Misadventure Account “to finance entitlements provided under this Act in respect of personal injury caused by medical misadventure.”

Funding of the various classes of entitlements is summarised in the following table:

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466 S 192. Funded from funds transferred from the Residual Claims Account set up in terms of s 303 of the Accident Insurance Act 1998.

467 S 201. Funded (mainly) from levies paid by self-employed persons and private domestic workers. S 201(2).

468 S 213. Funded inter alia from levies paid by every registered owner of a motor vehicle and levies paid by every person who holds a trade licence issued under s 34(1) of the Transport (Vehicle and Driver Registration and Licensing) Act 1986 and levies on the sale of fuel. S 213(2).

469 In terms of S 6 “earner... means a natural person who engages in employment, whether or not as an employee.”

470 S 218. That is any injury other than a work-related personal injury, a motor vehicle injury or a personal injury caused by medical misadventure – s 218(1). In terms of s 219(1) an earner must pay levies to fund the Earners’ Account, while in terms of s 223(1) a person who is or has been an earner may apply to purchase from the Corporation the right to receive weekly compensation in respect of a period for which he or she would not otherwise be entitled to receive weekly compensation.


472 S 228. Funded from “levies payable by registered health professionals or any organisation that provides treatment under this Act” and “if there is no such levy or the levy relates only to funding part of the Account, from the Earners’ Account (in the case of an earner) or the Non-Earners’ Account (in the case of a non-earner). S 228(2)(a) and (b).

473 New Zealand Department of Labour’s Accident Insurance Website: (November 2002) http://www.tocover.govt.nz/Html/whopays.htm
<table>
<thead>
<tr>
<th>Account</th>
<th>Coverage</th>
<th>Who Pays</th>
<th>How</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employers</td>
<td>Work-related personal injury to employees from 1 July 2000</td>
<td>The employees employer at the time of the injury</td>
<td>The employer pays an annual premium (which can be paid in instalments) directly to ACC</td>
</tr>
<tr>
<td>Self-Employed</td>
<td>Work-related personal injury to self-employed persons</td>
<td>The self-employed person themselves</td>
<td>The self-employed person pays an annual premium directly to ACC. This premium also includes the earners component shown below</td>
</tr>
<tr>
<td>Earners</td>
<td>Non work-related, non motor vehicle personal injury to employees and self-employed persons</td>
<td>The employee or self-employed person themselves</td>
<td>The employee has the premium deducted by the employer along with PAYE. This is collected by IRD and is paid to ACC</td>
</tr>
<tr>
<td>Non-Earners</td>
<td>Non work-related, non motor vehicle personal injury to those outside of the workforce</td>
<td>The Government meets the cost</td>
<td>This is funded from general taxation</td>
</tr>
<tr>
<td>Motor Vehicle</td>
<td>Personal injury arising out of a motor vehicle on a public road (including work-related motor vehicle injury)</td>
<td>Motor vehicle owners</td>
<td>NZ Post collect an annual licensing premium at the time of motor vehicle registration. In addition, there is a petrol tax (currently 2C per litre)</td>
</tr>
<tr>
<td>Medical Misadventure</td>
<td>Personal injury arising out of medical treatment</td>
<td>Earners and Non-Earners</td>
<td>These accounts are charged with the cost of medical misadventure claims on a pay-as-you-go basis</td>
</tr>
<tr>
<td>Residual Claims</td>
<td>Personal injury incurred to people who were still incapacitated and/or receiving statutory entitlements in relation to injuries suffered before 1 July 1999 or non-work, non motor vehicle injuries that occurred before 1 April 1992</td>
<td>Employers and self-employed persons</td>
<td>IRD collects the residual levy annually in May from employers and with terminal tax payments for self-employed</td>
</tr>
</tbody>
</table>

5512 Requirements for compensation

A person (who does not have to be a citizen or resident of New Zealand) has cover for personal injury suffered in New Zealand on or after 1 April 2002. This cover includes personal injuries suffered as a result of:474

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474 S 20(2).
- An accident;
- Medical misadventure;
- Treatment given to the person for personal injury for which the person has cover; and
- A work-related gradual process, disease, or infection suffered by the person.

*Personal injury includes the following:*\(^{475}\)

- The death of a person;
- Physical injuries suffered by a person;\(^{476}\)
- Mental injury suffered by a person because of physical injuries suffered by the person;
- Mental injury suffered by a person in the circumstances described in section 21;\(^{477}\) and
- Damage (other than wear and tear) to dentures or prostheses that replace a part of the human body.

Section 21 is headed “Cover for mental injury caused by certain criminal acts.” A person has cover for a mental injury if he or she suffers mental injury in or outside New Zealand and the causative act is of a kind listed in Schedule 3 of the Act. The offences listed in Schedule 3 are offences of a sexual nature. Thus mental trauma which does not fall under the purview of section 21 and does not arise from physical injuries suffered by the person, is not compensated in terms of the Act. Secondary victims, such as family members of the primary victim, are therefore not eligible for compensation. The same applies to a person enduring or witnessing a crime without being physically injured, for example the victim of a car hijacking who is not physically injured in the process. In such cases, the victim will have to sue in terms of the law of tort in the conventional way. Furthermore, “mental injury” is defined as “a clinically significant behavioural, cognitive, or psychological dysfunction.”\(^{478}\) Thus, only serious mental trauma is covered.\(^{479}\) Mental or nervous shock of a transient nature is not covered and the victim will have to resort to a tortious action. The

\(^{475}\) S 26(1).

\(^{476}\) Including, for example, “a strain or a sprain.” The reference to “a strain or a sprain” is taken directly from s 26(1)(b).

\(^{477}\) See following par.

\(^{478}\) S 27.

\(^{479}\) As was the case in terms of s 3 of the previous Act, the Accident Rehabilitation and Compensation Insurance Act of 1992. See Miller J M “Compensation for Mental Trauma Injuries in New Zealand” 3.
following statement of the Court of Appeal (which was made before the present dispensation vis-à-vis mental injuries was enacted) criticised what was to become, in effect, the current state of affairs:480

It would be a strange situation if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether or not some physical injury however slight also is sustained. Further it would create major difficulties should it be necessary in particular cases to separate physical and mental injuries.

A person ordinarily resident in New Zealand is covered also in respect of personal injuries suffered outside the country.481

Accident is defined as “the application of a force (including gravity) or resistance external to the human body, or involves the sudden movement of the body to avoid such a force or resistance external to the human body and... is not a gradual process.”482 However the concept includes, inter alia:483

- The inhalation or oral ingestion of any solid, liquid, gas, or foreign object on a specific occasion;
- A burn, or exposure to radiation or rays of any kind (excluding exposure to the elements), on a specific occasion;
- The absorption of any chemical through the skin within a defined period not exceeding one month; and
- Any exposure to the elements, or to extremes of temperature or environment, within a defined period not exceeding one month.

The occurrence of a personal injury does not create a presumption that it was caused by an accident.484

5 5 1 3 Categories of claims

The following benefits or entitlements are conferred by the Act.485

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480 ACC v E [1992] 2 NZLR 426 434. In this case an employee who had had a nervous break-down as a result of being sent on a stressful management course, was held to have suffered personal injury by accident. In terms of current legislation such a person would not receive compensation and would have to sue the wrongdoer.
481 S 22.
482 S 25(1)(a).
483 S 25(1)(b) – (e).
484 S 25(3).
Rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation;  
First week compensation;  
Weekly compensation;  
Lump sum compensation for permanent impairment; and  
Funeral grants, survivors' grants, weekly compensation for the spouse, children and other dependants of a deceased claimant and child care payments.

Section 123 provides that entitlements are inalienable.

When a claimant under the Act has also received an income-tested benefit in terms of the Social Security Act, an excess benefit payment is regarded to have been made and the Accident Compensation Corporation is obliged to pay the excess over to the government department administering the Social Security Act. The converse takes place when the Accident Compensation Corporation has paid before a payment in terms of the Social Security Act is effected.

5 5 1 4 Procedural aspects

Section 317 of the Act states:

(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—  
(a) personal injury covered by this Act…

485 S 69. Details regarding the exact extent of each entitlement are to be found in the First Schedule to the Act.
486 The purpose of social rehabilitation is to assist in restoring a claimant's independence to the maximum extent practicable. S 79.
487 The purpose of vocational rehabilitation is to help a claimant to, as appropriate,---  
(a) maintain employment; or  
(b) obtain employment; or  
(c) regain or acquire vocational independence. S 80(1).
488 1964.
489 S 252.
490 S 253. Provision is made in the Injury Prevention, Rehabilitation, and Compensation Act for the disclosure of information by the Accident Compensation Corporation to the Department responsible for the administration of the Social Security Act – s 281.
Thus the claimant who qualifies for compensation in terms of the Act is deprived of a tortious law suit for personal injuries. This would not include his or her right to sue for damage to property, and injuries not covered in terms of the Act. Furthermore, claimants’ rights to sue for exemplary damages are expressly preserved.

Part 3 of the Act has the heading: “Code of ACC Claimants' Rights, and Claims.” It deals with the procedural aspect of lodging a claim with the Accident Compensation Corporation. Section 54 states:

The Corporation must make every decision on a claim on reasonable grounds, and in a timely manner, having regard to the requirements of this Act, the nature of the decision, and all the circumstances.

Part 5 of the Act deals with dispute resolution. Provision is made for reviews of and appeals against decisions. As soon as practicable after receiving an application for review, the Accident Compensation Corporation must arrange for the allocation of a reviewer, even if it is considered that there is no valid right of review in the circumstances. The reviewer must comply with the principles of natural justice, exercise due diligence in decision-making and adopt an investigative approach with a view to conducting the review in an informal, timely, and practical manner. The reviewer makes an order of costs against the Accident Compensation Corporation if the review has been wholly or partially successful. Furthermore, the reviewer has the discretion to make an order for costs in favour of the unsuccessful applicant if the applicant has acted reasonably in applying for the review.

A claimant or the Accident Compensation Corporation may appeal to a District Court against a review decision or a decision as to an award of costs and expenses under section 148.

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491 See Par 5 1 1 (supra).
492 S 319(1).
493 Ss 39 – 66.
494 Ss 133 – 164.
495 S 137(2).
496 S 140.
497 S 148.
498 In 1992 the District Court took over the role of the Accident Compensation Appeal Authority, which became defunct in terms of the Accident Rehabilitation and Compensation Insurance Act.
499 S 149. In terms of s 161(1) the District Court may dismiss, modify or quash the review decision.
Provision is made for an appeal on a question of law – only – to the High Court by either party, and thence to the Court of Appeal.

5515 Suspension, withholding or cancellation of entitlements

The Accident Compensation Corporation may suspend or cancel an entitlement if a claimant is not entitled to continue receiving it. The Corporation may also withhold any entitlement for as long as the claimant unreasonably fails to:

- Comply with any requirement of the Act relating to the claim;
- Undergo medical or surgical treatment for the injury; or
- Agree to, or comply with, an individual rehabilitation plan.

A claimant is not entitled to any entitlement for:

- A personal injury that the claimant wilfully inflicts or causes to be inflicted on himself or herself;
- Death due to an injury inflicted in the circumstances described in the previous paragraph; or
- Death due to suicide.

However, the Corporation remains liable to provide a claimant with entitlements if the personal injury or death was the result of mental injury.

A claimant may not receive any entitlements while in prison or if convicted of the murder of the person from whose death the entitlement arose.

When a claimant has suffered personal injury in the course of committing an offence and is sentenced to imprisonment for committing the offence, the Accident Compensation Corporation may apply to a District Court asking for a determination that the Corporation must either provide the entitlements when the claimant is released, or that the Corporation must not provide all or certain specified entitlements.

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500 S 162.
501 S 163.
502 S 117(1).
503 S 117(3).
504 S 119.
505 S 121.
506 S 120.
at any time because it would be repugnant to justice for the claimant to receive them. The possibility of a perpetrator of an offence receiving compensation emphasises the fact that the victim of crime is treated in the same way as other victims of misfortune, and not placed in a separate category. In determining whether it would be repugnant to justice for the claimant to receive an entitlement, the court takes the following matters into consideration:

- The harm caused by the claimant's offence;
- The gravity of the offence;
- The claimant's personal culpability for the offence;
- The extent of other penalties the claimant has already suffered because of the offence;
- The claimant's personal circumstances;
- The nature of the entitlement;
- The strength of the claimant's need for the entitlement; and
- The resources the claimant has to meet that need.507

5 5 1 6 Evaluation

The following comments are representative of attitudes towards the Accident Compensation Scheme:508

Experience in New Zealand shows there is nothing which justifies a separate scheme for crime victims over the many other victims of accidental injury that inevitably arise from participating in a modern industrial society...

There is no need for lawyers; nor are there the other expensive trappings of a compensation system based on showing fault or negligence in the courts.

During the period of existence of the accident compensation scheme, exemplary damages have been awarded in certain cases.509 The following criticism of this approach has been voiced:510

507  S 122.
510  “Exemplary Damages – the next wave” 2.
By widening the scope and availability of exemplary damages, New Zealand courts have unwittingly made the process of litigation more expensive. Where exemplary damages are sought, there are inevitably voluminous pleadings... Such claims are inevitably met with applications to strike out or to refine the pleadings. This prolongs the duration of a claim and increases its cost... What started here as a genuine attempt to assist those victims whose rights to compensation had been reduced, has developed into a body of case law with a momentum of its own...

However, the following view has also been expressed:511

Thus it appears clear that the amounts sought in exemplary damages claims, particularly in negligence cases, will be so limited from now on that it will probably not be worthwhile for plaintiffs to bring the action.

The Scheme is thus perceived to be a success and has benefited victims of crime by placing the settlement of their claims outside the sphere of the litigation.

Compensation afforded by the Scheme falls short of tortious damages as far as quantum is concerned. Questions might arise regarding the justification of denying the victim's right to sue the offender for the shortfall. It can be argued that the objective of the Scheme is not to protect the offender from the consequences of his or her delinquency. Against this must be weighed the fact that the Scheme is funded by the transferral thereto of amounts that were previously paid by industry and the motoring public for insurance cover.512 This argument is not convincing where a crime was committed with the intention to injure (as opposed to, for example, an injury suffered as a result of the negligent driving of a car or a negligent industrial practice). The answer may lie in the amendment of the Scheme to allow restitution claims against perpetrators of intentionally injurious crimes (for example, rape and murder).

The Scheme is also open to criticism regarding mental trauma cases:

- Victims are not compensated unless some physical injury is suffered; and
- Secondary victims are not compensated.

However, in these cases, victims at least retain the right to sue offenders.

511 Miller J M “Compensation for Mental Trauma Injuries in New Zealand” 8.
512 Miller J “Compensating Crime Victims within New Zealand’s No Fault Accident Compensation Scheme: the Advantages and Disadvantages” 256.
A South African academic has expressed an assessment of the New Zealand Scheme in the following terms:\textsuperscript{513}

Viewed overall, the new system seems to be a great success. It has cured most, if not all, of the defects of the old system:\textsuperscript{514} it pays compensation quickly, reliably and economically to those who really need it, for as long as that need lasts. And it does so at much the same cost as the previous, inefficient system. Of course, nobody receives fantastic lump sum payments anymore – but the system of periodic payments guarantees generous compensation for life, which in a world beset by inflation is arguably better than a capital sum that might be inadequate for one’s future needs, even if wisely invested. Nor should one forget that very few claimants under the old system ever received the huge sums promised by the law of delict.

The same academic points out\textsuperscript{515} that the Scheme has proved to be financially viable because:

- The Scheme covers all victims of misfortune, thus saving on administrative costs; and
- The Scheme operates on a “pay-as-you-go” basis which means that no reserve funds need be built up, as the state can adjust levies and benefits from year to year.

Because New Zealand deals with all accident victims in the same way, the question arises whether victims of crime ought to be treated differently from other victims. The following statement is apposite:\textsuperscript{516}

Various answers have been offered but experience in New Zealand shows that there is nothing which justifies a separate scheme for crime victims over the many other victims of accidental injury that inevitable arise from participating in a modern industrial society.

Concern has been expressed that the Scheme removes the deterrent value of the offender’s potential tortious liability:\textsuperscript{517}

\textsuperscript{513} Hutchison D B \textit{Accident compensation: New Zealand shows the way} 12.
\textsuperscript{514} The fault-based, delictual system.
\textsuperscript{515} Op cit 12.
\textsuperscript{516} Miller J “Compensating Crime Victims within New Zealand’s No Fault Accident Compensation Scheme: the Advantages and Disadvantages.” 257.
(It might be desirable to create a new criminal offence whereby a person guilty of reckless conduct causing or likely to cause injury to any person (perhaps including himself) can be convicted and fined or imprisoned. This would serve the function, which is inadequately carried out by the law of negligence at present, of punishing the wrongdoer. Such a law would remove one of the objections to the abolition of the common law right of action for personal injury. It would also be freighted with whatever deterrent value the present tort law has in preventing accidents.

As yet, the issue has not been addressed conclusively by the New Zealand legislature.\(^518\)

### 5.5.2 Criminal Justice Assistance Reimbursement Scheme

The Tribunals Unit of the Department for Courts provides administrative and registry support services to a number of tribunals that do not fall under the jurisdiction of individual High or District Courts and are thus administered centrally from Wellington. The Criminal Justice Assistance Reimbursement Scheme is one of these tribunals.

An assessor (who is currently a judge) considers applications for compensation for any material loss caused by victimisation suffered in assisting the administration of justice.\(^519\) The assessor makes recommendations regarding applications to the Chief Executive, Courts\(^520\) for compensation from persons who have been victimised or suffered a loss of property or earnings due to their:

- Giving testimony as a witness for the prosecution or defence in a criminal case punishable by imprisonment;
- Assisting in the administration of justice by, for example, reporting a crime or voluntarily giving information to the police; or
- Being in a close relationship with one of the abovementioned persons and as a result being victimised and suffering a loss of property or earnings.\(^521\)

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\(^{518}\) Law Commission of New Zealand Dugdale D F *Promoting Protection from Accidental Injury and Death Address to the Aviation Industry Association of NZ (Inc.)* delivered at Rotorua on 21 July 2000. (September 2003) [http://www.lawcom.govt.nz](http://www.lawcom.govt.nz)

\(^{519}\) New Zealand Department for Courts Website (November 2002) [http://www.courts.govt.nz](http://www.courts.govt.nz)


\(^{521}\) Miller J "Compensating Crime Victims within New Zealand’s No Fault Accident Compensation Scheme: the Advantages and Disadvantages" 257 – 256.
In reply to a question in Parliament concerning families driven from their homes by intimidation and threatening behaviour by gang members, New Zealand Minister of Justice, Tony Ryall, replied:522

We have a witness protection scheme and a criminal justice reimbursement scheme for witnesses and their families. Police take complaints of victim intimidation very seriously and will prosecute. On conviction offenders can be ordered to compensate their victims.

Thus, offenders found guilty of crimes resulting from victim intimidation, will also be subject to sentences of reparation in terms of the Sentencing Act,523 in addition to any compensation that the victim might have received from the Criminal Justice Assistance Reimbursement Scheme.

56 Comparison

Firstly, a tabular comparison of the law dealing with state-funded compensation in the four countries targeted in this research will be given revealing differences and similarities regarding –

- Legislation providing compensation other than victim compensation schemes;
- Victim Compensation Schemes;
- Theoretical basis/objective of for victim compensation;
- Requirements for compensation;
- Categories of claims;
- Deductions from compensation awarded and factors influencing quantum;
- Method of payment; and
- Procedure.

Secondly, the main similarities and differences regarding state-funded compensation will be highlighted in order to give an objective overview of the characteristics of each scheme, thereby constructing a foundation for making recommendations suitable for implementation in the South African milieu.

523 See Ch 4 Par 4 2 4 (supra).
### Legislation other than victim compensation schemes to provide compensation

<table>
<thead>
<tr>
<th>South Africa</th>
<th>Great Britain</th>
<th>India</th>
<th>New Zealand</th>
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<tbody>
<tr>
<td><strong>Probation Services Act 1991:</strong></td>
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<tr>
<td>Minister of National Health and Welfare has (unutilised) powers to establish programmes regarding: Assessment, treatment, support, referral and mediation for victims of crime. Compensating victims of crime. Restorative justice as part of sentencing and diversion options.</td>
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<tr>
<td><strong>Compensation For Occupational Injuries and Diseases Act 1993:</strong></td>
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<tr>
<td>Employers contribute annually to the Compensation Fund which pays compensation in cases of disablement or death caused by occupational injuries sustained (or diseases contracted by) employees in the course of their employment.</td>
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<td><strong>Promotion Of National Unity And Reconciliation Act 1995:</strong></td>
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<tr>
<td>Truth and Reconciliation Commission established to investigate gross human rights violations to make reparation to victims. Reparation includes state-funded compensation, <em>ex gratia</em> payments, restitution, rehabilitation or recognition. Full amnesty granted to perpetrators.</td>
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<tr>
<td><strong>Road Accident Fund Act 1996:</strong></td>
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<tr>
<td>Road Accident Fund compensates for damages suffered (plus taxed party and party costs) for physical injury/death wrongfully caused by the driving of motor vehicles. Patrimonial and non-patrimonial losses covered, but not patrimonial damage to property. Payment for future losses can be in instalments instead of lump sum. Fund financed from levy on fuel.</td>
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<td><strong>Employers' Liability (Compulsory Insurance) Act 1969:</strong></td>
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<tr>
<td>Compulsory insurance for injury/disease of employee arising out of/in the course of employment.</td>
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<td><strong>Road Traffic Act 1988:</strong></td>
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<tr>
<td>Compulsory insurance (or giving of security) against third party risks arising from injuries and damage to property. Motor Insurers' Bureau administers Central Fund (funded by levies contributed by insurers) which compensates victims of accidents involving uninsured and untraced drivers and cases where car used with criminal intent to cause injury.</td>
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<td><strong>Social Security Act 1998:</strong></td>
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<tr>
<td>Social Security Administration Act 1992: Social Security Contributions and Benefit Act 1992: Vast number of social security benefits paid by state; Legislative measures to prevent overcompensation at the expense of the state by directing “compensator” to pay certain amounts directly to the state.</td>
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<td><strong>Workmen's Compensation Act 1923:</strong></td>
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<tr>
<td>In event of injury/disease of employee arising out of and in the course of employment, employer effects payment to Workmen’s Compensation Commissioner who then pays money over to employee. Employers usually have insurance for these contingencies. Employee has to choose between a claim in terms of the Act and a civil claim.</td>
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<tr>
<td><strong>Motor Vehicles Act 1988:</strong></td>
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<tr>
<td>No-fault liability of the owner of a motor vehicle for fixed sum damages in cases of death or permanent disablement—does not deprive claimant of tortious claim for balance of damages (former amount deducted from latter). Compulsory insurance required: issued by an authorised insurer; Providing cover against liability arising from the use of the vehicle in a public place for: Death of or bodily injury to any person; Liability to the owner of goods carried in the vehicle; and Damage to any property of a third party. Fixed amounts of damages paid by one of the general insurance companies nominated by the General Insurance Corporation of India in cases where the details of the vehicle causing the death or injury are unknown. Claims to Motor Accidents Tribunals, with a right of appeal to the High Court. Tamil Nadu Chief Minister’s Accident Relief Fund: Relief to victims of road accidents or their families on fixed scale.</td>
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<tr>
<td><strong>Injury Prevention, Rehabilitation, and Compensation Act 2001:</strong></td>
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<tr>
<td>All persons suffering personal injuries as a result of - an accident; medical misadventure; treatment given to the person for personal injury for which the person has cover and a work-related gradual process, disease, or infection are compensated by the Accident Compensation Commission.</td>
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<tr>
<td>Victim compensation Schemes</td>
<td>South Africa</td>
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<p>| Theoretical basis/ objective of for victim compensation | Victim empowerment on compassionate grounds - confidence in criminal justice. State responsibility - state has neglected duty in allowing commission of crime. Emphasises victim empowerment in criminal justice process. International law requires responsiveness by states to victims. | Analogy with war injuries and riot damage where the State traditionally accepts the obligation to compensate. State exhorts citizens to protect property, but discourages carrying of weapons. Citizen under duty to assist state and may be deterred by absence of compensation. Enlightened penal policy difficult because of complaints that society is looking after | The stated objective to provide financial assistance to victims of murder, serious injuries, rape, and to help women, children and bread winners in distress, indicates: An acknowledgement of state responsibility for the prevention of crime; A reference to public philanthropic instinct; and An acknowledgment that the occurrence of violent crime is unacceptably high. | Social contract which entails &quot;providing for a fair and sustainable scheme for managing personal injury&quot; in the community. A primary function of the Scheme is to promote measures to reduce the incidence and severity of personal injury, including measures that: Create supportive environments that reduce its incidence and severity; and Strengthen preventative community action; |</p>
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<tr>
<th>South Africa</th>
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<tr>
<td>Difficulties in enforcing restitution:</td>
<td>criminals better than victims.</td>
<td>Article 41 of the Constitution:</td>
<td>and encourage the development of preventative personal skills.</td>
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<tr>
<td>Minute percentage of convictions.</td>
<td>State prohibiting victim from taking law into own hands should provide effective alternative.</td>
<td>The state shall, within the limits of its economic capacity and development, make suitable provision for securing the right … to public assistance … in other cases of undeserved want.</td>
<td>Such measures include research, the provision of information or advice, the publication and dissemination of literature and information, campaigns, exhibitions, courses, and the promotion of safety management practices.</td>
</tr>
<tr>
<td>Lack of means of offenders.</td>
<td>Imprisoning offender for long periods deprives victim of redress.</td>
<td>The problem of police aggression is a further source of concern.</td>
<td>Provision is made for the disclosure of information to the Department of Child, Youth and Family Services to prevent injury to young persons arising from unlawful activity.</td>
</tr>
<tr>
<td>Benefiting the criminal justice system:</td>
<td>State has a direct responsibility in the case of crime because of its responsibility for law and order.</td>
<td>Scheme simply supplements the law of tort/offender’s lack of means.</td>
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<tr>
<td>Requirement that crime be reported promptly and that victim cooperate.</td>
<td>Scheme simply supplements the law of tort/offender’s lack of means.</td>
<td>Public instinct requires victim compensation.</td>
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<tr>
<td>Reduction of impact of crime on state:</td>
<td>Breaking cycle of retributive violence and vigilantism.</td>
<td>Existing compensation schemes do not per se improve reporting of crime.</td>
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<tr>
<td>Financial reliance of victim prevented by helping back to productive status.</td>
<td>Arguments against:</td>
<td>Existing compensation schemes do not per se improve reporting of crime.</td>
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<tr>
<td>Helping victim deal with psychological trauma - society takes plight seriously.</td>
<td>Cost to state.</td>
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<td>Violence against women:</td>
<td>Competing priorities for funding.</td>
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<td>Addressing financial dependence.</td>
<td>Compensation schemes do not per se improve reporting of crime.</td>
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<td>Enabled to leave abusive environment.</td>
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<td>Breaking cycle of retributive violence and vigilantism.</td>
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<td>Arguments against:</td>
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<tr>
<td>Compensation schemes do not per se improve reporting of crime.</td>
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**Requirements for compensation**

- To be finalised by SA Law Reform Commission.
- Pragmatic concerns need to be balanced to ensure maximum benefits.
- Only blameless victims who co-operate with criminal justice system eligible.
- Only death or serious injury.
- Intentional criminal act required.
- Crime:
  - A crime of violence;
  - An offence of trespass on a railway; or
  - The apprehension of an offender, prevention of an offence, or giving help to a constable engaged in such activity.
  - Conviction or identification of offender not required.
  - Personal injury, which includes mental injury and disease.
- Crime:
  - Murder;
  - Grievous injury;
  - Rape.
  - No mention of mental injury or disease.
  - Award subject to stipulated maximum.
  - Conviction or identification of offender not required.

**India**

- Article 41 of the Constitution:
  - The state shall, within the limits of its economic capacity and development, make suitable provision for securing the right … to public assistance … in other cases of undeserved want.
  - The problem of police aggression is a further source of concern.
- Scheme simply supplements the law of tort/offender’s lack of means.
- Public instinct requires victim compensation.

**New Zealand**

- Personal injury as a result of:
  - An accident;
  - Medical misadventure;
  - Treatment given to the person for personal injury; and
  - A work-related gradual process, disease, or infection.
- Personal injury includes:
  - The death of a person;
  - Physical injuries;
  - Mental injury (serious) suffered by a person because of physical injuries.
| South Africa                                                                 | Great Britain                                                                 | India                                                                                   | New Zealand                                                                                     |
|---|---|---|---|---|
| No claims for property except personal items.                                     | Lack of co-operation, behaviour or history of claimant can lead to loss/reduction of claim | Malicious injury caused by the person; Mental injury (serious) suffered by a person as a result of offences of a sexual nature; Damage to dentures or prostheses that replace a part of the human body. | suffered by the person; |
| Compensation paid in case of ‘Good Samaritan’ injured in the course of preventing crime/apprehending criminal. | Provision made to prevent offender from benefiting | Compulsion to role of the claimant’s own previous criminal activities. | No entitlement if claimant unreasonably fails to: |
| Only crimes committed in South Africa.                                              | Only victims/dependants benefit.                                             | No entitlement: Wilfully inflicted injury/death; Suicide; While in prison; Convicted of murder (death caused claim). | No entitlement: |
| Only nationals, permanent residents, lawful aliens and visitors from countries with reciprocal agreements. | Only victims/dependants benefit.                                             |                                         | No entitlement: Wilfully inflicted injury/death; Suicide; While in prison; Convicted of murder (death caused claim). |
| Prescription period.                                                               | Only victims/dependants benefit.                                             |                                         |                                         |
| Only victims/dependants benefit.                                                   | Only victims/dependants benefit.                                             |                                         |                                         |
| No retrospective claims.                                                            | Only victims/dependants benefit.                                             |                                         |                                         |
| Compensation if offender not identified.                                            | Only victims/dependants benefit.                                             |                                         |                                         |
| Not in respect of injury with alternative source of reparation.                     | Only victims/dependants benefit.                                             |                                         |                                         |
| Consideration to role of the claimant’s own previous criminal activities.           | Only victims/dependants benefit.                                             |                                         |                                         |
| Crime must be reported to the police.                                              | Only victims/dependants benefit.                                             |                                         |                                         |
|                                                                          |                           |                                         |                                         |
| **Categories of claims**                                                      | **Standard Amount**: Determined by nature of injury - Tariff of Injuries.   | **See under previous heading.**                                                       | **Entitlements are paid from:**  |
|                                                                          | **Additional Amount**: Loss of earnings.                                    | **New Zealand**                                                                        | The **Employers’ Account** to employees for work-related personal injuries; The **Residual Claims Account** for claims which arose before certain relevant dates and which have become the responsibility of the Accident Compensation Corporation; The **Self-Employed Work Account** for self-employed persons who suffer work-related personal injuries in their self-employment; The **Motor Vehicle Account** for motor vehicle injuries; The **Earners’ Account** for personal injury to |
|                                                                          | **Additional Amount**: Special expenses (Physical aids, costs of treatment, special equipment, adaptations to accommodation, care and costs of Court of Protection or of curator bonis). | **New Zealand**                                                                        | **Entitlements are paid from:**  |
|                                                                          | **Benefits** to qualifying claimants where victim died.                     | **New Zealand**                                                                        | The **Employers’ Account** to employees for work-related personal injuries; The **Residual Claims Account** for claims which arose before certain relevant dates and which have become the responsibility of the Accident Compensation Corporation; The **Self-Employed Work Account** for self-employed persons who suffer work-related personal injuries in their self-employment; The **Motor Vehicle Account** for motor vehicle injuries; The **Earners’ Account** for personal injury to |
|                                                                          |                                                                           | **New Zealand**                                                                        | **Entitlements are paid from:**  |
|                                                                          |                                                                           | **New Zealand**                                                                        | The **Employers’ Account** to employees for work-related personal injuries; The **Residual Claims Account** for claims which arose before certain relevant dates and which have become the responsibility of the Accident Compensation Corporation; The **Self-Employed Work Account** for self-employed persons who suffer work-related personal injuries in their self-employment; The **Motor Vehicle Account** for motor vehicle injuries; The **Earners’ Account** for personal injury to |
### South Africa

**Supplementary Amount:** Victim died otherwise than as a consequence of the injury.

### Great Britain

Amounts deductible in full from compensation for same contingency, but not from amounts based on the Tariff of Injuries: Social security benefits (or other state benefits); and Insurance payments. Following deductible in full (also from Tariff amounts): Damages awarded by a civil court; and Damages paid by way of a settlement; and Damages awarded by a criminal court.

### India

Award influenced by: Relief obtained from other state-funded schemes such as the Chief Minister’s Relief Fund; and Indigent circumstances of family.

### New Zealand

When a claimant has also received income-tested benefit under the Social Security Act, the ACC pays excess over to Department. (Converse when ACC has paid before a payment under Social Security Act).

### Deductions from compensation awarded and factors influencing quantum

<table>
<thead>
<tr>
<th>South Africa</th>
<th>Great Britain</th>
<th>India</th>
<th>New Zealand</th>
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<tbody>
<tr>
<td>Once-off payments (not annuities or pensions) unless the approach of supplementing the disability grant process is adopted. Major beneficiaries should be the poor. Tariff scheme - not common law: Consistent with international norms; Cost-effective; Less administratively burdensome; and Not prejudicial to those without income (compensation rates standardised);</td>
<td>Normally lump sum. Provision for: Trusts; Repayment and/or administration of an award; Imposition of conditions attaching to an award; Interim payments; and Purchase of annuities.</td>
<td>Lump sum only.</td>
<td>Rehabilitation and treatment; First week compensation; Weekly compensation; Lump sum compensation for permanent impairment; and Funeral grants, survivors’ grants, weekly compensation for the spouse, children and other dependants of a deceased claimant, and child care payments.</td>
</tr>
</tbody>
</table>

### Method of payment

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<thead>
<tr>
<th>South Africa</th>
<th>Great Britain</th>
<th>India</th>
<th>New Zealand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications be submitted to central office. A cut-off date provided. Provision for condoning late filing. If exclusionary criteria exist, information</td>
<td>Claim submitted to Criminal Injuries Compensation Authority. Claims officer makes decision – reasons need not be given.</td>
<td>District/City Victims Assistance Committee. Member-secretary: District Superintendent of Police/ Deputy Commissioner of Police. Committees meet at least once per month.</td>
<td>Juristic person with perpetual succession - Accident Compensation Corporation Decision by ACC made on reasonable grounds in a timely manner, having regard</td>
</tr>
</tbody>
</table>

### Procedure

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<thead>
<tr>
<th>South Africa</th>
<th>Great Britain</th>
<th>India</th>
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<tr>
<td>South Africa</td>
<td>Great Britain</td>
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<tr>
<td>----------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Application to include relevant medical information and evidence, with medical practitioner or district surgeon's report.</td>
<td>Claim to be instituted within two years and legal representation allowed, but costs for applicant's own account.</td>
<td>No specific mention of appeal/review procedure is made, but usual judicial review available.</td>
<td>to the Act, nature of the decision, and all circumstances.</td>
</tr>
<tr>
<td>Affidavit from the SAPS investigating officer detailing factual basis and status of case, with assessment whether injuries arose from criminal attack.</td>
<td>No legal aid, but solicitors usually prepared to take fees from award.</td>
<td>Review by reviewer appointed by ACC: Principles of natural justice; Investigative approach; Informal</td>
<td>Review by District Court against review decision or a decision as to an award of costs. District Court may dismiss, modify or quash the review decision.</td>
</tr>
<tr>
<td>Application processed by administrative staff who assess whether all the relevant documentation in place, acknowledge receipt and request absent information.</td>
<td>Applicant must prove claim on a balance of probabilities.</td>
<td>Costs order against ACC if the review wholly or partially successful or if applicant acted reasonably.</td>
<td>Appeal on a question of law to the High Court, and thence to Court of Appeal.</td>
</tr>
<tr>
<td>Some portion of applications would be analysed to assess presence of fraudulent applications.</td>
<td>Reconsideration of award before final payment provided for in cases of new evidence or changed circumstances.</td>
<td></td>
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</tr>
<tr>
<td>Administrative officer would assess complete applications and make recommendation to senior assessment officer.</td>
<td>Re-opening of case provided for in cases of change in medical condition/death.</td>
<td></td>
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</tr>
<tr>
<td>If original application incomplete and applicant failed to provide further particulars requested administrative officer recommends to the senior administrative officer that case be closed.</td>
<td>Review by more senior claims officer – must give reasons for decision.</td>
<td></td>
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</tr>
<tr>
<td>Senior administrative officer reviews completed applications and either request further information/evidence, or forwards application for board decision.</td>
<td>Appeals against review decision to Criminal Injuries Compensation Appeals Panel: Appeals conducted informally. Representation allowed (as above). Hearing in camera and identity of appellant protected, except with latter's consent. Reasons must be given.</td>
<td></td>
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</tr>
<tr>
<td>Uncontroversial applications below certain amount decided by single board member and subsequently ratified by board as a whole.</td>
<td>Appeal final, but judicial review allowed.</td>
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<tr>
<td>More controversial/larger applications motivated to board by administrative officer.</td>
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<tr>
<td>After the board's decision, applicant</td>
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<tr>
<td>South Africa</td>
<td>Great Britain</td>
<td>India</td>
<td>New Zealand</td>
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<tr>
<td>informed in writing. The administrative team complete requisitions, and instruct the financial office to make payments. In the case of rejected applications, the applicant would have the right to appeal to board, and an appeal board would review case. Decisions of appeal board not appealable or reviewable.</td>
<td></td>
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</tbody>
</table>
5 6 1  Compensation: Similarities

It is generally accepted that a modern state will assist victims of misfortune under certain circumstances. These circumstances are dictated, on the one hand, by the policy and means of the government, and, on the other hand, by the needs of the populace at a given moment. Each country's unique circumstances determine the kind of aid that is extended; so developed and developing countries will extend different kinds of aid. In all four countries various compensatory initiatives have arisen to deal with the needs of the community – as and when they arise – on an ad hoc basis.

While all four countries have various legislated dispensations in terms of which compensation is paid by the state to victims of criminally caused misfortune, in most instances the causative act is not required to be criminal per se; however, the cause of the harm often amounts to a criminal act.

The disbursement of state funds is rationalised by means of various theories – there is no one single, universally accepted theoretical basis for the disbursement of state funds to victims of misfortune; governments are, however, reluctant to accept a legally binding obligation in this respect, relying rather on the social contract theory in terms of which compassion shown by the state is believed to build confidence in the criminal justice system.

5 6 2  Compensation: Differences

South Africa has no compensation scheme dedicated to the compensation of victims of criminal injuries per se. Its compensation systems for traffic and work-related injuries are both unsatisfactory and both systems are consequently subject to serious criticism. The Truth and Reconciliation Commission has served as a unique, international example of the working of reparation for victims of human rights violations and thus the implementation of the principles of restorative justice.

Britain's Criminal Injuries Compensation Scheme provides for the compensation of victims of criminal injuries. Though compensation for victims of crime is, like social security, disbursed from state funds, it is managed as a completely separate entity. No explanation for this phenomenon is given in the literature or in government documentation. While the Criminal
Injuries Compensation Scheme compensates victims of crime to the exclusion of other kinds of victims; the social security system compensates victims of misfortune without excluding victims of crime; this can lead to “double-dipping” and has as a consequence the over-disbursement of state funds. The problem of “double-dipping” is compounded by the complexity and large number of social security benefits available to claimants.

India has no victim compensation scheme dedicated to the compensation of victims of criminal injuries per se, with the minor exception of the Tamil Nadu Victim Assistance Fund.

New Zealand’s Accident Compensation Commission compensates all victims of misfortune – whether criminally caused or not – in terms of the same rules. No distinction is thus made based on the source of funds for victim compensation and the target/destination of such compensation.

In the final chapter conclusions will be drawn from the information reflected in this and previous chapters and recommendations will be made regarding restitution and compensation to victims of crime based on above-mentioned information.
Chapter 6

Recommendations

6.1 Conclusions

Restorative justice has in the past few decades focussed attention on the predicament of victims of crime. The concept does not hold the same meaning universally and care must be taken to avoid accusations of the political manipulation thereof, for example, as in England where the government is accused of using it as a ruse to introduce increasingly punitive measures against persons accused of crime. As a common denominator, however, it is safe to assume that restorative justice accentuates the role of the victim of crime in the criminal justice process. Traditional viewpoints have delegated the victim to a secondary position because crimes have been seen as actions injurious to and punishable by the state. Restorative justice promotes the view that crime is a violation of relationships rather than a simple breaking of the law and that the appropriate response should go beyond punishment or retribution and encompass putting right the wrong caused to victims and society. This positioning of the victim at the centre of the criminal justice system brings two differing aspects of the victim’s status to the fore: The victim as a person deserving aid, and the victim as participant in the process of determining the penalty imposed on the offender, or, expressed differently, the victim as passive injured party and the victim as active role player. This thesis has concentrated on the victim as passive party, deserving of redress. Much cautionary material has been written regarding the dangers of the participatory model of criminal justice allowing the victim to usurp the criminal justice process, thus endangering the due-process rights of the accused. This threat to the due-process rights of accused persons might be overemphasised, as the community – represented by the state – should remain a powerful, impartial and decisive participator in the criminal justice process, armed with the authority granted by the state – and thus the community – to its office bearers.

Ubuntu displays a marked similarity to the values of restorative justice, emphasising the harmonisation of damaged relationships within the community in a way which strives to be fair to all parties. The argument that the level of anger in South Africa is such that the populace demands crime to be dealt with retributively and is not ready for restorative justice programmes is countered by the attainments of the Truth and Reconciliation Commission, showing that victims of profoundly evil criminal acts are
often prepared to involve themselves in participative processes and extend forgiveness to offenders. In fact, South Africa has proved to the world that restorative justice has a valuable role to fulfil in the face of the most serious classes of criminal action.

Regarding the affordability of a state-funded victim compensation scheme, this thesis – being a work of law, not economics – cannot provide a final answer. However, pointers regarding affordability are to be found in the fact that the current industrial and traffic injury compensation schemes are consuming valuable resources without producing satisfactory outcomes.

Comparing developing countries such as South Africa and India, on the one hand, to developed countries such as Great Britain and New Zealand, on the other hand, shows unequivocally – if unsurprisingly – that developed countries provide a superior dispensation of redress for victims of crime, both regarding *restitution* (recompense obtained from the perpetrator), as well as *compensation* (recompense obtained from the state).

While all four countries share the influence of the English legal tradition, they differ vastly in their historical development. Nevertheless, the importance of perpetrator-funded restitution for victims of criminal injury is common to the distinctive tradition of each of the countries compared in this work – and this was the case long before English influence was felt in the three ex-colonies. All four countries have criminal procedure legislation formalising the victim's restitutionary claim against the perpetrator. Restitution in New Zealand differs from the other three countries in that its comprehensive victim compensation scheme deprives the victim of crime of a tortious claim, except in cases of damage to property. The other three countries all grant victims common law, delictual/tortious rights of redress against perpetrators.

South Africa’s highest court has set its face firmly against the granting of punitive damages. The courts in the other three countries grant punitive damages in limited, precisely prescribed instances. Regarding state liability, constitutional law is universally relied on as a basis for granting victims of crime a claim against the state, but this development is more vigorous in the countries where acute criminal victimisation is coupled with the absence of comprehensive victim compensation schemes, namely South Africa and India. While it is debated whether the victim’s
claim against the state is a constitutional or a delictual/tortious remedy, once the claim has been granted, the rules of law of delict/tort are applied.

Concerning state-funded compensation, the legal systems of the four countries targeted in this research share the following similarities:

- There are various examples of legislation in terms of which compensation is paid by the state to victims of criminally caused misfortune. In most instances the causative act is not *per se* required to be of a criminal nature, but the cause of the harm often amounts to a criminal act in practice.
- States accept the burden – whether on legal or moral grounds – of compensating those suffering certain kinds of misfortune.¹

Remaining on the subject of compensation, the four legal systems differ substantially in the following respects:

- South Africa has no state-funded victim compensation scheme dedicated to the compensation of victims of criminal injuries *per se*.
- Great Britain’s Criminal Injuries Compensation Scheme provides for the compensation of victims of criminal injuries.
- Great Britain’s social security system offers a variety of benefits to victims of misfortune and is criticised because this fragmentation leads to the possibility of overcompensation of some victims at the expense of the state.
- India has no victim compensation scheme dedicated to the compensation of victims of criminal injuries *per se*, with the isolated and limited exception of the Tamil Nadu Victim Assistance Fund.
- New Zealand’s Accident Compensation Commission compensates *all* victims of misfortune – whether criminally caused or not – in terms of the same rules.

Both positive and negative lessons emerge from the experience of other countries:

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¹ Such victims are not always identified as victims of crime and the rationale behind compensation often does not arise from the criminality *per se* of the cause of harm though the result is effectively the compensation by the state of victims of crime.
<table>
<thead>
<tr>
<th>Major Strengths</th>
<th>Weaknesses</th>
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<tbody>
<tr>
<td>ENGLAND</td>
<td>England has highly sophisticated and intricate systems of restitution and compensation. By instituting workers' compensation, it initiated the idea of state-funded compensation for victims of injuries.</td>
</tr>
<tr>
<td>GB</td>
<td>The system’s intricacy leads to the proliferation of costly administrative machinery and the possibility of over-compensation at the expense of the community.</td>
</tr>
<tr>
<td>INDIA</td>
<td>The existence of India’s ad hoc victim compensation schemes shows a growing awareness of the plight of victims and illustrates that even poor countries can initiate some remedies to alleviate the role of victims of crime.</td>
</tr>
<tr>
<td>INDIA</td>
<td>India has little to contribute to improving and restructuring restitution and compensation in South Africa, as its restitutionary legislation is not effective and it has no universal victim compensation system.</td>
</tr>
<tr>
<td>NEW ZEALAND</td>
<td>New Zealand maximises the benefits of Britain’s sophisticated and comprehensive system of victim redress by substituting Britain’s convoluted compensation system with a unified scheme of compensation for all victims of injury. New Zealand capitalizes on the benefits of restorative justice measures by harnessing the non-homogeneous cultural mores of various sectors of the populace.</td>
</tr>
<tr>
<td>NZ</td>
<td>The New Zealand system which limits the amount that can be claimed, has led to a proliferation of claims for exemplary (punitive) damages which by their nature are very costly and time consuming. The South African bench has shown itself to be dubious of granting exemplary damages, thus this feature of New Zealand jurisprudence will probably not manifest itself in South Africa, unless specific legislation dealing with the matter is introduced.</td>
</tr>
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</table>

Following from the above general conclusions, the following points will now be considered:

6.1.1 IS SOUTH AFRICA COMPLIANT WITH THE REQUIREMENTS OF RESTORATIVE JUSTICE?

In the absence of a single universal set of norms, Miers² has provided a formulation of the restitutionary elements which a domestic legal system ought to contain, basing his research on internationally accepted norms:

- “The legislation should provide that a compensation (restitution) order can be an alternative, an additional or a substitute penal sanction.” In South Africa there are no instances where restitution is equated with punishment; on the

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contrary, section 300(3)(b)\(^3\) of the Criminal Procedure Act pertinenty states that a restitution order has the same legal force as a civil judgment

- “Victims should be informed of their opportunities for obtaining restitution and compensation, and courts should be provided with relevant information about the victim’s loss or injury.” The Victims’ Charter places the obligation on police, prosecutors and courts to inform the victim of his or her rights, but it has not yet been implemented.\(^4\) The draft bill proposed by the South African Law Reform Commission also addresses these issues, but has not even achieved Bill status yet.\(^5\)

- “In sentencing the offender, the court is to take into account the victim's need for compensation, and any efforts (successful or otherwise) by the offender to compensate the victim.” The main legislation dealing with restitution, section 300 of the Criminal Procedure Act, is not peremptory and the court is not compelled to consider the possibility of a restitution order. A restitution order is granted only on application.\(^6\)

- “The court should be particularly alive to the possibilities of making compensation orders where it imposes a probation order or a suspended sentence.” Section 297 of the Criminal Procedure Act creates the possibility of restitution being made a condition of a suspended sentence, but as this section is seldom invoked, South African courts cannot be said to be “particularly alive” to the matter.\(^7\)

Turning to state-funded compensation, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power\(^8\) raises the expectation of state-provided compensation for victims of violent crime\(^9\) and the earmarking of

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3. See Ch 4 Par 4 2 1 2 (supra).
4. See Ch 4 Par 4 3 1 6 (supra).
5. See Ch 4 Par 4 3 1 7 (supra).
6. See Ch 4 Par 4 2 1 2 (supra).
7. See Ch 4 Par 4 2 1 1 (supra).
9. Art 12 reads: “When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
   (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
   (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
national funds for this purpose. South Africa has examples of legislation where victims of crime may be compensated by the state, but no victim compensation scheme.

South Africa cannot consider its criminal justice system compliant with the requirements of restorative justice. However, closer scrutiny shows that the principles of restorative justice are being applied in a community justice system that exists—largely unofficially—side by side with the state’s criminal justice system. It is submitted that the latter can learn valuable lessons about the practical application of restorative justice from the former. It is also necessary that the community justice system be legalised and regulated to avoid due-process abuses, the most extreme example of which takes the form of vigilante courts.

6 1 2 Specific conclusions

In conclusion, and against the background of a growing perception that victims of crime in South Africa do not receive adequate support from the state, the following specific conclusions are drawn from the preceding chapters:

- The South African government subscribes to the principles of restorative justice; 12
- Restorative justice advocates restitution and compensation for victims of crime; 13
- South Africa’s dispensation for victims of crime does not comply with the standards required by restorative justice; 14
- The common law of delict/tort in South Africa, England and India all present the victim with a notional right of redress against the offender; 15
- In none of these three states do delictual/tortious remedies offer adequate recompense to victims of crime; 16

11 See Ch 1 Par 1 1 (supra).
12 See Ch 2 Par 2 2 2.
13 See Ch 1 Par 1 3 1 (supra).
14 See above.
15 See Ch 3 Par 3 2 (supra).
16 See Ch 4 Par 4 4 (supra).
South African legislation creates little scope for the realisation of any restitutatory prospects the victim might have;\textsuperscript{17}

In New Zealand, the victim’s tortious remedy against the perpetrator has \textit{de jure} been replaced\textsuperscript{18} by state-funded victim compensation;\textsuperscript{19}

In England, the tortious remedy of the victim against the perpetrator has \textit{de facto} been replaced by state-funded victim compensation, though the tortious right against the perpetrator can be enforced where feasible;\textsuperscript{20}

South African legislation and practice dealing with restitution orders in the context of criminal trials are inadequate in material respects;\textsuperscript{21}

Nevertheless, South African courts allege a commitment to effecting restitution;\textsuperscript{22}

Restitution on its own is not an adequate means for redressing harm suffered by victims of crime;\textsuperscript{23}

State-funded victim compensation schemes exist in Great Britain and New Zealand and are seen to function effectively in addressing the needs of victims of crime;\textsuperscript{24}

In India schemes have been pioneered to grant a limited degree of state-funded compensation to victims of crime;\textsuperscript{25}

South Africa has no scheme dedicated to offering state-funded compensation to victims of crime.\textsuperscript{26}

\begin{itemize}
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\item In New Zealand, the victim’s tortious remedy against the perpetrator has \textit{de jure} been replaced\textsuperscript{18} by state-funded victim compensation;\textsuperscript{19}
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\item South Africa has no scheme dedicated to offering state-funded compensation to victims of crime.\textsuperscript{26}
\end{itemize}
6.2 Recommendations

At the outset it was stated that this thesis would have a quantitative nature revealing the status quo, but that there would also be a qualitative phase advocating the transformation of the current situation; according to Alasuutari, “…the best place for grand theoretical models is in the final pages.”

South Africa can benefit by considering retrospectively the mistakes made by other countries and avoid potential pitfalls, while espousing proven advantages. Simultaneously, South Africa can improve and adapt principles imbedded in foreign systems to address local exigencies. South Africa has social problems similar to India. The failure of its workers’ compensation and traffic accident compensation dispensations are integral to the recommendations made in this chapter regarding victim compensation.

The recommendations below are informed by the conclusions in the previous paragraph. This thesis proposes that redress for victims of crime – in the material sense – rests on the twin pillars of:

- **Restitution**, to be addressed by the enactment of:
  - The Child Justice Bill; and
  - Revised legislation to improve on the Criminal Procedure Act; and
- **Compensation**, to be addressed by the institution of a state funded compensation scheme.

Restitution and compensation cannot function in isolation; their success depends on an effective synergy between them.

Redress should be guided by the principles imbedded in:

- The Constitution;
- Customary law;
- Ubuntu; and

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27 Ch 1 Par 1 3 1 (supra).
☐ Restorative justice.

The following model illustrates the propositions set out above:
6.2.1 Guiding principles: The Constitution, customary law, ubuntu and restorative justice

In terms of the Constitution, customary law has the force of law in South Africa; it is of more than merely historical or background interest. The Law Reform Commission’s consideration of indigenous customary law has been limited to an espousal of the general principle of restitution, without an analysis of the specific rules in terms of which indigenous customary law effects restitution:

Tradtitionally African principles are based on reparation and less emphasis is placed on the retributive aspect of crime. The victims of crime are therefore central in those judicial systems. The question arises whether the so-called African principles should also be accommodated in the search for a system which will give due recognition to the victims of crime. The search for restoring the role of victims of crime may also have far reaching consequences for the Government’s Reconstruction and Development Programme.

The South African Law Reform Commission should be briefed to consider – in a detailed and insightful manner – the principles of indigenous customary law when giving consideration to the implementation of restorative justice principles in order to apply the constitutionally endorsed principles of ubuntu – and thus gain the credibility of the majority of the populace for the outcome. The perceived lack of adequate provision being made for restitution is viewed as a shortcoming in modern South African law as opposed to customary African law where restitution is the touchstone. South Africa should follow the example set by the New Zealand Court of Appeal, which has acknowledged that customary practices can be adapted to make the criminal justice system compliant with restorative justice principles in a way that corresponds with the community’s recognised responses. There is evidence indicating that many principles of restorative justice are already being applied informally in certain South African communities, in the form of community courts. In these courts no distinction is drawn between civil and criminal matters; a solution is sought for problems that have ruptured the equilibrium of the community.

29 See Ch 2 Par 2 2 2 (supra).
30 See the reference to R v Lepupa in Ch 4 Par 4 2 4 3 (supra).
31 Conferencing and sentencing circles are examples of this synergy. See Restorative Justice Briefing Paper 2001 Prison Fellowship International: (June 2004) http://www.restorativejustice.org/.../What%20is%20Restorative%20Justice%20-%20revised1.doc - See Ch 2 Par 2 3 3 (supra). In 1995 the Third Legal Forum (themed Access to Justice) convened in Durban by the Ministry of Justice pioneered the giving by the
that this tendency has arisen spontaneously and without doctrinaire adherence to the precepts of restorative justice, indicates that these practices could give guidance to exponents of restorative justice in South Africa and elsewhere; these initiatives warrant official recognition in order to preclude lawless vigilante justice.\textsuperscript{34}

6 2 2 Child Justice Bill

The Child Justice Bill ensconces restorative justice in respect of children accused of committing crimes. It provides, \textit{inter alia}, for preliminary inquiries to be held in respect of children before they plead. The object is to decide whether the matter is to be conducted in the courts or by way of diversion. The concept of diversion includes various kinds of restitution. The bill also provides for instances of restitution taking the place of punishment.

The Child Justice Bill has been exhaustively and publicly discussed. It should be passed as legislation once the constitutionality problem regarding diversion programmes has been resolved. The obvious way to resolve this issue is by excluding diversion in cases of serious offences.\textsuperscript{35} By integrating restorative justice, including restitution, into South African law, the hitherto neglected interests of the victim will be acknowledged and addressed. Diverting juvenile offenders out of the mainstream criminal justice system in the case of less serious offences promotes the aims of restorative justice as the victim is allowed to express his or her views on the harm caused. Reconciliation between the offender and the victim/community is encouraged.\textsuperscript{36} The main problem surrounding restitution, namely the lack of means of the offender, is partially addressed as the Bill provides not only for monetary restitution, but also for symbolic restitution to a specified person, group of persons or institution and the provision by the child of some service or benefit to a community charity or welfare organisation.

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\textsuperscript{34} See generally Schärf W & Nina D \textit{The Other Law: Non-state Ordering in South Africa} (2001).

\textsuperscript{35} Concerns have been expressed regarding the constitutionality of diversion programmes in cases of serious offences. It is contended that diversion could defeat the expectations of the victim in these cases, while removing the safeguards offered to the child by a full trial.

\textsuperscript{36} See Ch 4 Par 4 3 1 5 (supra).
6.2.3 Revised legislation for restitution

A common response to the mention of restitution is that restitution cannot alleviate the plight of the victim, this being due to the universal lack of means of offenders. This assumption has been challenged in the case of victims of sexual abuse in South Africa: Research shows that the majority of abuse offenders are employed and have a disposable income. Another possibility for enabling offenders to affect restitution (despite their incarceration), is the concept of paid labour being rendered by offenders, what in the United States of America is referred to as “Prison labor.” Thus restitution is an aspect of victim entitlement that cannot be dismissed summarily and should play a substantial role in addressing the plight of victims of crime as it is the most valuable form of redress placing the burden where it fairly belongs: On the shoulders of offenders; in fact, victims prefer to receive redress from offenders.

Currently the Criminal Procedure Act has three main sections which deal with restitution by perpetrators:

- Section 297, which provides, *inter alia*, for the postponement or suspension of sentence on condition that the perpetrator effect restitution;
- Section 300, which authorises courts to award damages where an offence causes damage to, or loss of, property; and
- Section 301, which deals with the payment of damages to innocent purchasers of unlawfully obtained property.

Section 300 is the main restitutionary provision. However, there are serious shortcomings in this legislation:

- The victim has to apply for an order of restitution;
- An order of restitution is limited to patrimonial loss;

37 See Ch 5 *(supra).*
38 Rasool S Vermaak K Pharoah R Louw A & Stavrou A *Violence Against Women: A National Survey* (2003) Institute for Security Studies, South Africa 56. According to this study 60% of sexual abuse offenders were gainfully employed.
40 See Greenbaum B L *Compensation for Victims of Sexual Crime in South Africa: Is gender bias obstructing financial redress for victims of sexual violence?* (2005) UCT, where it is argued that it is within the means of the state to enhance restitutionary legislation in order to alleviate the hardships of victims of sexual offending. See also Sarnoff S K *Paying for Crime: The Policies and Possibilities of Crime Victim Reimbursement* (1996) 17; 80.
An order of restitution is enforceable merely as a civil judgment and not as a fine; and

- The victim loses the right to institute a civil claim for the shortfall left by an order of restitution.

Appropriate legislation is required to remedy these shortcomings. It is a positive aspect that a large part of the groundwork is present in the South African Law Reform Commission’s draft bill. Subject to some remediable shortcomings, the draft bill forms a sound foundation for restitutionary legislation:41

<table>
<thead>
<tr>
<th>Strengths</th>
<th>Proposals to rectify weaknesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>The concept of <em>victim</em> is extended to cover <em>all</em> persons suffering from the consequences of the commission of the crime.</td>
<td>Courts must be authorised initially to impose a period of imprisonment to be served if payment is not effected.</td>
</tr>
<tr>
<td>The quantum of damages is extended to cover all damages (in accordance with the criteria of civil delictual law).</td>
<td>The immovable property of the offender must not be protected from a sale in execution.</td>
</tr>
<tr>
<td>The machinery for enforcement of payment is extended beyond the force of a civil judgment.</td>
<td></td>
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<tr>
<td>Rights of absentee victims are protected.</td>
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<tr>
<td>Courts are <em>compelled</em> to consider restitution.</td>
<td></td>
</tr>
<tr>
<td>Courts are empowered to order restitution <em>suo motu</em> without a request from the victim.</td>
<td></td>
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<tr>
<td>The victim is given a role and relevance in the sentencing process by the introduction of the victim impact statement.</td>
<td></td>
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<tr>
<td>The victim impact statement serves as a vehicle to bring the degree of the loss suffered to the attention of the court.</td>
<td></td>
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<tr>
<td>The prosecution is also given the</td>
<td></td>
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</tbody>
</table>

41 It proposes, inter alia, a sentence of reparation that must be considered as part of the substantive penalty in every case. See Ch 4 Par 4 3 1 7 (*supra*) for details.
responsibility to bring the victim’s loss to
the attention of the court by means of the
victim impact statement.

Legal machinery is created to protect the
interests of the victim even after the
release of the offender.

6.2.4 State-funded victim compensation

Various factors are given in favour of state-funded victim compensation: Victim
empowerment builds confidence in the criminal justice system, the state
acknowledges its responsibility for not preventing crime, international law calls for it,
the criminal justice system benefits as victim compensation schemes require prompt
reporting and victim cooperation with the police, the impact of crime on the state is
reduced because possible financial reliance of victims on the state is prevented by
helping them back to a productive status, victims’ psychological trauma is eased by
the assurance that society takes their plight seriously, the cycle of violence against
women is broken by addressing their financial dependence (allowing them to leave
abusive environments) and the cycle of retributive violence and vigilantism is
disrupted.

South Africa is plagued by the problem that its population denigrates the criminal
justice system as being biased in favour of the offender. This has led to a loss of faith
in the system and could undermine its authority. There is evidence that victims and
their supporters are taking the law into their own hands, leading to the erosion of the
rule of law. Having undergone radical political changes, South Africa is a country
which is in a phase of reconstruction: It is imperative that the population should
believe that the country’s criminal justice system supports law-abiding citizenry; if not,
this could lead to a loss of confidence in the general administration of the country.
Africa provides ample evidence of the dire consequences of such an outcome.
Compensation is a fundamental component of victim support and restorative justice.
Expenditure on victim compensation can at least hold its own against competing calls
on the fiscus.

Furthermore, victim compensation reinforces the rights of victims without
simultaneously upsetting the delicate balance between their rights and those of the
accused – concerns have been expressed that some of the victim-orientated
modifications brought about to the English criminal justice system have reduced some important civil rights safeguards for the accused without delivering any real benefit to victims.42

South Africa is a country where a large number of its inhabitants live in crowded, insecure surroundings and are thus prone to repeat victimisation; these repeat victims who are at the mercy the same offenders are particularly deserving of the state’s assistance in fiscal form.43

Restorative justice cannot come of age in South Africa without the introduction of state-funded victim compensation. No matter how well-drafted legislation dealing with restitution might be, the lack of means of offenders will remain an insuperable problem in offender-victim restitution; compounding this, is the fact that the prosecution rate of offenders is very low.44 By criminalising certain forms of behaviour, the state tacitly acknowledges that society – and consequently the individual – deserves to be protected from the vicissitudes caused by such criminal acts. Also, delivery of legal aid in South Africa does not realistically guarantee victims the means to enforce the restitutonary claims they have. Developed countries, like Great Britain and New Zealand, have victim compensation schemes, while developing countries, like India and South Africa, have not evolved to this point. The major factor against state-funded victim compensation is the burden it places on the fiscus. The incremental introduction of victim compensation can partially address this concern.45 The value of a victim compensation scheme in the context of restorative justice is summarised in the following statement:46

If reparation to victims is to be an overarching goal of restorative justice, compensation programs can serve a very valuable purpose: it (sic) can supplement restitution in those cases where offenders are unable to fully repair the harm done to victims... Moreover, in those cases where it would take years for offenders to pay back their victims, compensation funds could pay the victim immediately, and offenders would then pay into the fund.

45 For the reasons already stated: See Ch 5 Par 5 2 2 (supra).
The introduction of victim compensation will have the further benefit of rectifying the perception that the practice of restorative justice in South Africa is biased in favour of the offender while marginalising the victim.47

Turning to the administrative format of victim compensation schemes, there are two viable models:

- Schemes dedicated exclusively to the compensation of victims of crime, following the example of Britain’s Criminal Injuries Compensation Scheme; and
- Unified schemes compensating all victims of misfortune, following the example of New Zealand’s Accident Compensation Scheme.

Most victim compensation schemes fall under the first category. The reason for this phenomenon seems to be purely historical: Workers’ compensation was the forerunners of traffic accident compensation, victim of crime compensation being a more recently innovated form of state-funded compensation. However, this thesis advocates adherence to the essential characteristics of a unified scheme in South Africa for the following reasons:

- The equality argument which asserts that victims of crime should not be treated differently from victims of other kinds of misfortune.48
- Having separate compensation schemes for various categories of victims leads to unnecessary complications when a decision has to be made regarding the causation of a particular injury in order to direct the claim to the appropriate fund.49

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48 The fact that a conviction is not required under most systems supports this – how can a person strictu sensu be a victim of crime when no-one is convicted of the commission of the crime in question? It is a paradox if “victims of crime” are treated differently from victims of other forms of misfortune when there may not be a crime of which an offender has been convicted.

49 See R v Criminal Injuries Compensation Board, ex parte Welch (Unreported) Queen’s Bench Division (Crown Office List) CO/3206/99.
The distinction between occupational and other injuries is obsolete as it dates from an era when workers’ compensation was the only social insurance and welfare programme in operation.\(^{50}\)

Modern society should have a system of compensation based on the financial consequences of an injury rather than its causation. All victims of injury have the same financial needs irrespective of the cause of their injuries.\(^{51}\)

A proliferation of benefits available to victims of misfortune leads to the danger of the overcompensation of some victims of misfortune at the expense of others and the state.

A single system allows for a more equitable dispensation than a number of systems paying benefits on varying scales from public funds.

The previous point does not mean that precise parameters cannot be set to qualify for compensation as a victim of crime which differ from those set for other victims of misfortune.\(^{52}\)

In South Africa the Compensation for Occupational Injuries and Diseases Act’s\(^{53}\) Compensation Fund and the Road Accident Fund are not functioning optimally in compensating victims of industrial misfortunes and road accidents, respectively – both systems are the subject of critical investigation. In fact, the parliamentary portfolio committee considering the Road Accident Fund Amendment Act was of the opinion that social security support systems in South Africa are due for complete overhaul.\(^{54}\)

A single scheme administered by one bureau of officials will be more cost effective to administer than separate systems because a duplication of functions is avoided.

\(^{50}\) Coverage against employment injuries and diseases (Second Draft) (Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System by Prof M P Olivier and Adv E Klinck July 2001) Par 16.7.

\(^{51}\) See previous footnote.

\(^{52}\) For example, the requirement can be imposed that a victim of crime has to be blameless to qualify for compensation, while a victim of an industrial mishap is not debarred as a result of his or her own negligence.

\(^{53}\) See Ch 5 Par 5 2 1 (supra).

\(^{54}\) See Ch 5 Par 5 2 1 (supra). During September 2006 the Department of Transport published Strategy for the Restructuring of the Road Accident Fund as Compulsory Social Insurance in relation to the Comprehensive Social Security System (Notice 1315 of 2006) in which it invited comment on a proposed no-fault scheme to replace the Road Accident Fund system. By limiting the levels of benefits available the new Scheme envisages protecting the lives and livelihoods of road accident victims across a broader spectrum, while leaving cover for risks relating to lifestyle protection to discretionary protection in the form of personal insurance.
A unified computer database operated by a single scheme will prevent double compensation of a claimant.

The existence of a single scheme for the compensation of victims of misfortune generally allows for flexibility as categories of victims can be added to or omitted from the list of beneficiaries as changing circumstances/financial resources dictate.

The financial burden of victim compensation could be ameliorated by cross-subsidisation and the spreading of risk between the areas of compensation currently falling under the aegis of the South African Compensation Fund and Road Accident Fund respectively.55

As victim compensation does not aspire to grant full compensation to the victim in the manner of the law of delict, it is suggested that the method of payment followed by the New Zealand system56 be investigated in preference to the once-off method of payment favoured by the South African Law Reform Commission;57 this pattern is favoured in the recently passed Road Accident Fund Amendment Act of 2005.58 In this way the victim’s needs may be monitored and the compensation payable can be adjusted as his or her needs change. This will ultimately lead to the prevention of state funds being paid to persons who no longer require assistance.

Regarding the method of compensation employed, there are two fundamental options:

- Schemes paying compensation chiefly in the form of a lump sum, following the example of Britain’s Criminal Injuries Compensation Scheme; and
- Schemes paying compensation in the form of periodical payments, following the example of New Zealand’s Accident Compensation Scheme.

Adoption of a periodical payment system is advocated for the following reasons:

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55 Coverage against employment injuries and diseases (Second Draft) Par 16.16.
56 See Ch 5 Par 5 5 2 (supra).
57 See Ch 5 Par 5 2 2 (supra).
58 See Ch 5 Par 5 2 1 4 (supra).
As affordability is the major stumbling block to the institution of a victim compensation scheme in South Africa, it makes sense to pay victims (of all kinds of misfortune) amounts they actually need for treatment and survival as and when they need them rather than to make lump sum payments based simply on a tariff of injuries with no reference to the financial consequences suffered by the victim as a result of the injury.

A single system will facilitate cross-funding which will ultimately benefit victims of injury. The argument that funds obtained from employer contributions should be allocated strictly to compensating occupational injuries does not hold water, as in modern society these contributions have taken on the nature of taxation rather than insurance. This applies also to the Road Accident Fund which is financed from a levy on fuel sold and from loans. The citizen is not given the choice as to what his or her taxation is to be spent on – why should the situation regarding victim compensation be any different?

Payments can be reduced or increased as the victim’s needs change.

The possibility of the victim squandering – or otherwise being dispossessed of a relatively large lump sum payment and ending up needy, is reduced. This is particularly relevant bearing in mind that a large sector of the local population is unsophisticated and vulnerable to devious manipulation.

Victims can be protected from inflation on an ongoing basis. While inflation might be at relatively low levels at present, the future it is not reliably predictable.

The operation of a single system for the compensation of all victims of accidental injury does not mean that differing criteria cannot be set for victims of different kinds

59 Employee’s compensation is still an instance of statutory insurance in Great Britain. In SA, however, the Compensation Fund is administered as a state fund.

60 The progression from an insurance-based system to a tax-based system is borne out by the history of the Road Accident Fund: The (original) Motor Vehicle Insurance Act 29 of 1942 insured the owner of a motor vehicle. This insurance was undertaken by private insurance companies. If the owner failed to reinsure every twelve months the cover lapsed. During the 1960s three insurance companies were found not to have sufficient income to cover claims and went into liquidation. In 1965, the MVA Fund was created as the re-insurer of those companies which undertook third party insurance. Today funding is derived from a fuel levy.


61 Bearing in mind especially one of the premises of this treatise, namely the unacceptable extent of crime in SA. See Ch 1 Par 1 1 (supra).
of misfortune. A victim compensation scheme should adhere to the following principles.

- Only blameless victims who co-operate with the criminal justice system should be eligible for compensation.
- Compensation should be available only in cases of death or serious injury, though this could change as and when competing calls on the fiscus diminish.
- A *prima facie* intentional criminal act should have occurred. This means that a successful prosecution need not be required in all cases, for example where the perpetrator has died.
- No claims for property – except personal items – should be entertained.
- Compensation may be paid in the case of a “Good Samaritan” injured in the course of preventing a crime or apprehending a criminal.
- Only crimes committed in South Africa should attract compensation.
- Only nationals, permanent residents, lawful aliens and visitors from countries with reciprocal agreements should be eligible for compensation.
- Only victims or dependants of victims should be eligible for benefits.
- The precise parameters of the concept of “dependant” should be defined by the legislature, as the concept of extended family is central to customary law.
- Retrospective claims should not be accepted.
- Compensation should be payable even if the offender is not identified.
- No compensation ought to be paid in respect of injuries where alternative sources of reparation are available.

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62 See Ch 5 Par 5 5 3 (*supra*).
63 See Ch 5 Par 5 2 2 (*supra*).
64 For example, in the Memorandum on the Objects of the Welfare Laws Amendment Bill (B90-1997), it is stated that the Bill aims to amend s 10 of the Child Care Act 74 of 1983, in order to exempt members of the extended family of the child from the prohibition against receiving and caring for children younger than seven years of age. South African Government Website (December 2005) http://www.info.gov.za/documents/bills/1997.htm
65 The occasions where this might happen will be reduced if the recommendation of a periodical payment system made above is accepted.
The previous point does not however imply that victims should automatically be deprived of the delictual right to sue the perpetrator for personal injuries. In New Zealand this exclusion has led to a proliferation of claims for exemplary (punitive) damages. As South African courts have hitherto shown their reluctance to grant exemplary damages, it seems unlikely that this phenomenon will manifest itself in South Africa. It is submitted that any redress which the victim manages to obtain from the perpetrator can be deducted from the amount he or she would receive from the state. By nullifying this common law right of the victim, the perpetrator would be protected from the consequences of his or her wrongdoing, and that certainly is not the object of victim compensation.

The claimant’s own previous criminal activities ought to be taken into account when deciding eligibility and/or quantum.

In order to qualify for compensation, the claimant must report the crime to the police.

Briefly stated, what is recommended is the consolidation of the Road Accident Fund and the Compensation for Occupational Injuries and Diseases Act’s Compensation Fund; these two bodies should be amalgamated to create a unified Compensation Scheme to compensate victims of crime, as well as victims of traffic and industrial injuries. General qualifying criteria will have to be drafted, with specific criteria applying in cases of traffic, industrial and crime related injuries, respectively.

Turning to the question of finance – while bearing in mind that this is a work of law not governmental finance – it is suggested that funding for the proposed scheme be obtained from the following sources:

- Funding currently channelled to the Road Accident Fund;

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66 As is the case in New Zealand; see Ch 5 Para 5 5 1 5 (supra).
67 Ch 3 Para 3 3 2 (supra).
68 Currently there is a low rate of crime reporting to the police (except in cases where required in terms of insurance policies). This requirement will have positive consequences in this regard. See SA Law Reform Commission Sentencing (A New Sentencing Framework) Project 82 Report (2000) 5 – 6 (2 7 – 2 8) Para 2 3 12.
69 See Ch 5 Para 5 2 2 4 for the recommendations of the SALRC in this regard. See also Para 6 3 (infra) regarding suggestions in a Private Member’s Bill creating a victim compensation fund: Democratic Alliance website (Jul 2006) http://www.da.org.za/DA/Site/Eng/News/Article.asp?ID=6654
• Funding currently channelled to the Compensation for Occupational Injuries and Diseases Act’s Compensation Fund;
• Fines imposed as sentences by criminal courts;
• Bail forfeited to the state;
• Funds appropriated by Parliament from time to time for the purposes of victim compensation;
• Any donations or bequests made to the fund by local and foreign individuals or bodies corporate;
• Dedicated taxes on goods and services (e.g., the consumption of alcohol or the purchase of firearms or ammunition);
• Proceeds of crime confiscated in terms of the Prevention of Organised Crime Act;\(^\text{70}\) and
• A surcharge on criminal convictions.

\(^{70}\) 121 of 1998. See Ch 4 Par 4 3 1 4 (\textit{supra}). In October 2006 it was announced that South Africa would distribute R73.8-million in seized assets of crime to agencies and departments involved in combating crime. “Proceeds of crime to combat crime” (October 2006) http://www.southafrica.info/what_happening/news/crime-201006.htm
The changes and innovations proposed are illustrated by the following diagram:

Research has shown that a pressing need exists for measures aimed at creating an environment conducive to the effective enforcement of offender restitution for victims of crime. Restitution alone cannot alleviate the plight of the vast majority of crime victims, no matter how efficient the enforcement structures created by the state. All measures of debt enforcement have to function within the constraints imposed by the Constitution. While the main reason for the low viability of restitution in South Africa is the poverty of offenders, even affluent countries like Great Britain and New Zealand share this problem. It is unlikely that offenders will ever be able to redress fully the havoc wrought by their deeds. It is therefore necessary that the state intervene in
creating and funding a victim compensation scheme within the parameters suggested.

The already parlous predicament of victims of crime is exacerbated when the community fails to heed their needs. The South African government has pledged its support for restorative justice. Without the necessary resources this notional commitment grants victims of crime meagre benefits. Restorative justice is not simply an academic catchphrase: If the state continues to pay only lip service thereto, it does so at the risk of alienating the growing voice of concern for the suffering of victims of crime.

The exigency of the situation has been highlighted in the trial of *S v Scott-Crossley*,71 in which the first accused was convicted of murder, executed by placing the deceased in a lion enclosure. The direct relevance to this research lies in the first accused’s evidence in mitigation. He testified that the ubuntu process had started as soon as his family had held meetings with the deceased’s family during the year preceding the trial. The accused’s family was willing to support the deceased’s family, both financially and emotionally, and thus ameliorate the loss. The defence specifically denied that this was a case of the accused attempting to buy his way out of prison. The accused indicated that he was prepared to pay R30 000 toward funeral costs, to build a house worth R100 000 and to pay R1 000 per month for ten years – the deceased’s estimated future earnings – to the family. However, the accused would have to be allowed to work in order to meet these commitments. Strict correctional supervision was mooted by the defence as being the most appropriate sentencing option provided by law.

The accused was sentenced to life imprisonment and quoted in the media as saying, “We are sorry that the family didn't accept our offer of financial compensation.”72 The restitutionary rights of the family thus took second place to the interests of the community in seeing the offender punished. The deceased was a farm labourer and, even in the absence of a victim compensation scheme to assist the survivors, it is likely that they will become dependent on the state for bare survival, either directly or

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indirectly. While the incarceration of the accused was no doubt an appropriate sentence, and met with the approval of the family of the deceased and the community, it is surely inequitable that the public interest has to be served at the direct expense of the victims.

As long as South Africa offers no state-funded compensation to victims such as those in the Scott-Crossley case, courts will be confronted by the dilemma of having to reconcile the interests of victims of crime with those of the community as a whole. The interests of justice demand that courts impose sentences of imprisonment in cases such as the Scott-Crossley case; on the other hand, imprisoning the perpetrator will – in the vast majority of cases – lead to the restitutionary claims of victims dwindling to nothing. This dilemma is highlighted by statistics showing South Africa to have the highest prison population in Africa – and the fifteenth highest in international terms – which has the effect of rendering restitution by offenders an even more remote possibility. The state has to take a part of the responsibility for these high levels of incarceration due to its institution of minimum prison sentences and the long periods for which accused persons are kept in prison awaiting trial. State funded victim compensation is the primary instrument to resolve the conflict between the interests of the community and those of victims of crime in this instance.

On 20 July 2006, the Democratic Alliance submitted a Private Member’s Bill in Parliament seeking to establish a compensation scheme for victims of violent crime. The Bill proposed a fund managed by a group of trustees, appointed by the Minister of Safety and Security. The Fund would be financed by fines imposed as sentences by the court; bail money forfeited to the state; money appropriated by parliament and private donations. The offender would have to have been convicted for the victim to qualify for compensation. Compensation would not be paid to persons who have

73 See previous footnote: “About 100 people packed in the courtroom cheered and ululated after the sentence was read, while (the deceased) Chisale’s niece Fetsang Jafta declared: ‘I’m satisfied with the outcome.’”
74 S A has 413 persons imprisoned per 100 000 of the population, while the top country, USA, has 714. 58% of countries have rates below 150 per 100 000. UK has 142 per 100 000.
75 See footnote 23 (supra).
already been awarded damages by a court or who are claiming damages through the courts. How this Bill is received, remains to be seen.

It was pointed out at the beginning of this work\textsuperscript{77} that every person has the constitutional right to freedom and security of the person, which includes the right to protection against violence from both public and private sources. Giving effect to this protection is one of the duties of the state. The courts do not possess sufficient means to be effective in redressing the harm done to victims of crime. Restorative justice requires state intervention in order to become a reality –

- Legislative intervention is required in order to give substance to the victim's restitutionary rights, and
- Restitution has to be bolstered by appropriate fiscal support in the form of state-funded compensation.

\textsuperscript{77} Ch 1 Par 1.1 (\textit{supra}).
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