Recovery For Pain and Suffering Under The Criminal Injuries Compensation Schemes*

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This paper analyses the recoverability for pain and suffering as a head of damage under the criminal injuries compensation schemes in Canada and elsewhere. Practice varies from jurisdiction to jurisdiction and the reasons put forward to justify exclusion of recovery of this class of damage are examined. The conclusion reached is that a "true" compensation scheme should allow such recovery and that the real reason for excluding it is political expedience, i.e., *a legislature can give the appearance of compensating victims of crime without the fiscal consequences of completely doing so.*

Cet article analyse la question de l'indemnisabilité du quantum doloris *sous les divers régimes d'indemnisation des victimes d'actes criminels au Canada et ailleurs. L'auteur examine les diverses raisons avancées pour justifier l'exclusion de ce chef de dommage et conclut qu'un régime d'indemnisation authentique devrait assurer la réparation de ce préjudice et que la raison réelle de son exclusion est l'opportunisme politique du corps législatif qui donne l'impression d'indemniser les victimes sans vouloir assumer la totalité du fardeau financier correspondant.*

INTRODUCTION

Pain and suffering at common law refers to only the suffering attributable to the injury sustained by the victim and to any consequential medical treatment. Compensation is awardable for both past and future pain and suffering, and both its severity and its duration are taken into account. The common law test of this head of general damage is subjective; thus, no award can be made where the victim is unconscious and cannot experience pain. This head of general damages also extends to cases where a person endures mental suffering from the knowledge that his life has been shortened or that his enjoyment of life has been curtailed through physical handicap.

All Canadian criminal injuries compensation schemes[1] award damages for pecuniary loss. Non-pecuniary losses stand in a different

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[1]Hereafter referred to as "compensation schemes".

category, and controversial debate continues over the question whether they should be compensable and, if so, to what extent.

COMPENSATION FOR NON-PECUNIARY DAMAGE UNDER CANADIAN COMPENSATION SCHEMES

The non-pecuniary loss most often compensated in Canada is "pain and suffering". Newfoundland,[2] Ontario,[3] and the Yukon[4] specifically provide that compensation may be awarded for pain and suffering. Both Newfoundland and the Yukon specify that the pain and suffering must result from the victim's injury, while Ontario does not include this requirement. This omission in the case of Ontario is insignificant, for the purpose of such a scheme is clearly to compensate only that damage which flows from the victim's injury.

In none of those three jurisdictions must the pain and suffering be experienced *by* the victim. In theory this could mean that awards for pain and suffering could be made to a party, other than the victim, who is able to appear before the Board as a claimant. In each jurisdiction, for example, a dependent of the victim may make a claim before the Board. Could that dependent receive an award under the head of pain and suffering? In this context it is particularly noteworthy that Newfoundland's original act awarded damages for "pain and suffering of the victim"[5] but was later amended to read "other pecuniary loss or damages, including pain and suffering, *resulting from* the victim's injury . . .".[6] The pain and suffering would seem then to extend to include that experienced by persons other than the victim.

Two other jurisdictions will award compensation under the head of pain and suffering. Saskatchewan restricts such an award to "pain and suffering *of the victim*"[7] and New Brunswick restricts compensation to "pain and suffering, where the award is *for the benefit of* a victim".[8]

Accordingly, there are five jurisdictions in which awards may be made specifically for pain and suffering under the particular statutory scheme. In two of them the pain and suffering must be that experienced by the victim. In three of them this is not specified in the legislation and in each of these it is at least possible for the dependent of a deceased victim to apply for an award under this head.

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[2]*Criminal Injuries Compensation Act*, S. Nfld. 1968, no. 26, s. 16(*e*).

[3]*The Compensation for Victims of Crime Act*, S.O. 1971, c. 51, s. 7(1)(*d*).

[4]*Compensation for Victims of Crime Ordinance*, O.Y.T. 1975, (1st), c. 2, s. 4(1)(*e*).

[5]*Supra*, footnote 2.

[6]Criminal Injuries Compensation Act, S. Nfld. 1973, no. 94, s. 5 (emphasis added).

[7]*The Criminal Injuries Compensation Act*, S.S. 1978, c. 47, s. 13(*e*) (emphasis added).

[8]*Compensation for Victims of Crime Act*, R.S.N.B. 1973, c. C-14, s. 17(1(*d*) (emphasis added).

As a rule, the dependents of a victim may make a claim before the Board only if the victim has died.[9] However, even if the victim is alive a claim may be made by a person responsible for his maintenance. This has been allowed from the outset in Ontario[10] and the Yukon.[11] That person, generally a parent or spouse, could apparently make a claim for pain and suffering. This was not originally permitted in Newfoundland, where the legislation limited awards to other than the victim or his dependents to only "a person, in respect of pecuniary loss suffered or expenses incurred by that person, as a result of an injury to the victim where the maintenance of the victim is the responsibility of the person".[12] This was amended in 1973[13] and in this matter the Newfoundland act is now the same as that of Ontario and the Yukon. In all three jurisdictions the heads of damage under which a person responsible for the victim's maintenance may receive compensation are nowhere specified. It could be argued that such a person could receive compensation under all those heads, including "pain and suffering", for which the acts permit compensation without explicitly restricting it to only certain persons.

There are, therefore, three classes of person who may be eligible to receive awards for pain and suffering: the victim himself, his dependents, and persons responsible for his maintenance.

In Ontario, awards to victims for pain and suffering are common. An award has been made to a dependent widower in respect of the pain and suffering he experienced upon the death of his spouse,[14] but he appears to have been claiming as a victim in his own right. It is not clear, however, if a person responsible for the maintenance of the victim has ever been awarded compensation for pain and suffering that he experienced. There are many cases in which the parent of an injured child has appeared as an applicant before the Board and received compensation for pain and suffering,[15] but such compensation seems to have been made in respect of the pain and suffering experienced by the

[9]Ontario Act, s. 5(*f*); Yukon Territory Ordinance, s. 3(*d,e,f*). The original Newfoundland Act did not specify that compensation could be awarded to a dependent only if the victim perished but this was amended by S. Nfld. 1973, no. 94, s. 3 to agree with the other provinces.

[10]*Supra*, footnote 3, at s. 5(*e*).

[11]*Supra*, footnote 4, at s. 3(1)(*e*).

[12]*Supra*, footnote 2, as s. 13(1)(*e*).

[13]*Supra*, footnote 6, at s. 3.

[14]*Ontario Ninth Report*, award no. 200-157, at 11.

[15]*Ontario Eighth Report*, award no. 200-2059, at 29; award o. 200-2237, at 34; award no. 200-2346, at 38; award no. 200-2419, at 40; award no. 200-2514, at 41; award no. 200-2580, at 43; award no. 200-2697, at 45; award no. 200-2704, at 45.

child and the awards seem to have been made for the child's benefit.[16] There is only one reported award which seems to suggest that a distressed parent could recover for the pain and suffering he or she might experience upon the death of, or injury to, his or her child. The report of that award reads:

> The applicant was the mother of a 15 year-old girl who was found in the river under a bridge near Tillsonburg. As a result of the incident the mother suffered a mental breakdown and required psychiatric treatment. Award: $2,162.00.[17]

It is not clear from this report if the award contained some element in respect of the applicant's pain and suffering as a result of her child's death, or if it reflected merely the expenses the applicant had incurred in seeking and obtaining psychiatric treatment. However, the full transcript of the case does reveal that the mother was claiming as a victim herself rather than as a person responsible for the maintenance of the daughter/victim. Miers[18] quotes the Chairman of the Ontario Board as saying,

> [The mother's] . . . condition was distinguishable and much more serious than that of a parent simply grieving over the loss of a child. Compensation for mourning and for sorrow because of the loss of a loved one should not be awarded under the present legislation. . . .

Another case came before the Board one year later. The published report shows that the Board is not disposed to award compensation in respect of the pain and suffering experienced by a parent by reason of the injuries suffered by their child.[19]

> The victim, aged 19, died as a result of injuries sustained during a brawl at a Toronto restaurant. The applicant, the mother of the victim, incurred no financial loss as the result of the death of her son. While the Board has every sympathy for the applicant no award could be made.

It is unclear from this abstract if the mother could have been awarded compensation in respect of pain and suffering. The manner in which the mother presented her claim is not detailed, and she may have made no claim for an award under the head of pain and suffering. Thus, the fact that an award was not made does not negate the possibility that such an award might have been made had it been requested.

There is only one reported case[20] in which a dependent of a deceased victim recovered under this head, which may indicate that the

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[16]For example, in award no. 200-2177 (*Ontario Eighth Report*, at 32) the monies awarded in respect of pain and suffering were to be paid to the Accountant of the Supreme Court of Ontario, presumably in trust for the applicant's son, the victim.

[17]*Ontario Fourth Report*, award no. 100-84, at 40.

[18]D. Miers, *Responses to Victimization* (Oxford: Professional Book Ltd., 1978), at 130.

[19]*Ontario Fifth Report*, award no. 200-514, at 75.

[20]*Ontario Ninth Report*, award no. 200-157, at 11.

Ontario Board in awarding damages for a dependent's pain and suffering will insist upon more suffering than it requires when it makes such an award for the benefit of a victim himself. After all, a certain amount of suffering will normally be experienced by the dependent of the victim who is killed by a criminal, and the paucity of awards under this head suggests that a very substantial amount of suffering is a prerequisite to compensation. If this is the case it may well be that the parents of a deceased child victim have not, in any of the cases which have so far come before the Board, experienced "enough" suffering for the Board to feel that an award under the head of pain and suffering is warranted.[21] Just as at common law, recovery for mere "grief" is not permitted, but awards for real pain and suffering by dependents and persons responsible for the victim's maintenance should theoretically be available. The matter is still open.

In summary, awards for pain and suffering are explicitly permitted in Newfoundland, Ontario, the Yukon, Saskatchewan, and New Brunswick. In all jurisdictions such awards may be made to the victim for the pain and suffering he experiences himself. In Ontario, Newfoundland, and the Yukon it is at least possible that awards may be made in respect of the pain and suffering experienced by either the victim's dependents or (theoretically) a person responsible for the victim's maintenance. All that is known for certain is that in Ontario the dependents of a deceased victim may receive compensation for the pain and suffering that they themselves experience. Such pain and suffering does not appear to found an award at law [22] and in this respect the scheme in Ontario, and possibly the schemes in Newfoundland and the Yukon, deviate markedly from the principles of the common law.

In Alberta, compensation may be awarded under any one or more of five heads.[23] None of those heads, with the possible exception of "maintenance of a child born as a result of rape", includes compensation for non-pecuniary damage. Although the Alberta legislation does not specify that it is only in respect of one of those five heads that compensation may be awarded, such is its clear intention. This view is strengthened by the fact that the act does provide for payments in respect of pain and suffering in one particular circumstance.

> Where the injury to a person occurred [while he was endeavouring to assist any person, preserve the peace, or assist a peace officer in carrying out his duties with respect to law enforcement] the Board may, in addition to [the five enumerated heads of pecuniary loss], award compensation to the injured

[21] Indeed, there seems to be nothing in the Ontario Statute which would prohibit a person responsible for the maintenance of a victim from receiving an award for pain and suffering experienced as a result of that victim's death while permitting the dependent of the victim to receive such an award.

[22] *Blake* v. *Midland Rail Co.* (1852), 118 E.R. 35 (Q.B.); *Royal Trust Co.* v. *Canadian Pacific Railway Co.* (1922), 38 T.L.R. 899, [1922] 3 W.W.R. 24 (P.C.).

[23] *The Criminal Injuries Compensation Act*, R.S.A. 1970, c. 75, s. 13(1).

> person, in an amount not exceeding $10,000.00, as damages for physical disability or disfigurement and pain and suffering.[24]

There is no difficulty in interpreting this provision. The compensation must be paid to the injured person, and, by implication, it is *that* person's pain and suffering which alone is compensable.

The situation in Manitoba is similar to that in Alberta. Like Alberta, Manitoba lists specific heads under which compensation may be awarded.[25] They are "expenses", "maintenance of a child born as a result of rape", and "other pecuniary loss". Only the maintenance can be seen as non-pecuniary loss[26] and that only with difficulty. Manitoba's scheme is somewhat more generous to Good Samaritans.

> Where the injury to a person occurred [while he was endeavouring to arrest any person, preserve the peace, assist a peace officer in carrying out his duties with respect to law enforcement in Manitoba, or prevent lawfully the commission of a criminal offence or suspected criminal offence] the Board may, in addition to [the three heads of pecuniary damage available to any claimant] award compensation to the injured person, in an amount not exceeding $15,000.00, as damages for physical disability or disfigurement and pain and suffering.[27]

In the Manitoba Legislative Assembly the Attorney-General explained why pain and suffering are not compensated under that act:

> In addition, it was felt that one of the basic provisions in the Workmen's Compensation Act and the administrative regulations is that a person is compensated for their actual economic loss and not for pain and suffering, the imaginative assessment of what are purely subjective things. Under existing Workmen's Compensation Regulations there is compensation paid for actual disfigurement or loss of a part of a physical body, but there is no compensation for pain and suffering as such, and it seems to us only logical that what ought to be compensable in respect to a workman who's injured while he's gainfully employed, surely there ought to be the same standard applied to a person who has been subjected to injury as a result of a criminal act. So there shouldn't be a double standard, that one should be able to get more if you're injured as a result of a criminal act than you would if you were gainfully employed. So the amendments will provide that the compensation that is paid is for economic loss only, that is loss of earnings, loss of what otherwise that person would have been entitled to obtain if they hadn't been injured, and loss for actual disfigurement or loss of any facilities of the human body.[28]

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[24]*Ibid.*, at s. 13(2).

[25]*The Criminal Injuries Compensation Act*, S.M. 1970, c. 56, s. 12(1).

[26]There may be an argument that a person suffers no pecuniary loss by having a child. Before the Quebec Superior Court in *Dame Cataford et al.* v. *Docteur Moreau* (1st June, 1978, District of Terrebonne, No. 66, 320, as yet unreported), "An actuary and an economist testified that the child would cost $5,807.00 over eighteen years but would bring in, in the form of social benefits or allowances $7,557.00, thus creating a net surplus of $1,750.00:" Kouri, "Non-Therapeutic Sterilization — Malpractice, and the Issues of 'Wrongful Birth' and 'Wrongful Life' in Quebec Law", (1979) 57 *Can. Bar Rev.* 89 at 98.

[27]*Supra*, footnote 25, at ss. 6(1)(*b*) and 12(2).

[28](1971), 18 *Manitoba Debates* 2573 (July 7/71).

From this it will be seen that pain and suffering are not compensated in Manitoba for two reasons. First, the assessment of such damage is difficult. Second, victims are viewed as entitled to no more compensation than are workmen receiving compensation under the Workmen's Compensation Act. It is not clear whether this second point is based upon a matter of principle, or merely upon the fact that it is the Workmen's Compensation Board which in Manitoba administers the criminal injuries compensation scheme, and that it would present some problems for the Board to treat in different manners two types of claimants who might come before it. As we shall see,[29] the Board in British Columbia has experienced no difficulty in administering two different acts, giving compensation to two different types of claimants, under two different remedial schemes.

From the remarks of the Manitoba Attorney-General it would seem that compensation could be paid for "actual disfigurement or loss of any facilities to the human body", which might well describe the head of non-pecuniary damage known as "the physical injury itself". But in fact the Manitoba scheme does not permit compensation to be paid to a general claimant under any non-pecuniary head. In Manitoba, as in Alberta, only the "Good Samaritan" may receive an award under a head of non-pecuniary damage, and that head is "damages for physical disability or disfigurement and pain and suffering". In Alberta at least this has been taken to mean simply damages for pain and suffering.[30]

The act in the Northwest Territories lists six heads under which compensation may be awarded.[31] The fifth head is broadly similar to that of the Yukon and of Newfoundland and reads:

> Other pecuniary loss or damages resulting from a victim's injury and any expense that, in the opinion of the judge, it is reasonable to incur.

The fifth head in the Yukon reads:[32]

> Other pecuniary loss or damages *including pain and suffering* resulting from the victim's injury and any expense that, in the opinion of the judge, it is reasonable to incur.

If, in fact, pain and suffering were pecuniary losses or damage, as the Yukon act would seem to suggest, then they are indeed compensable in the Northwest Territories, and in every other jurisdiction of Canada.

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[29]*Infra*, at 64-68.

[30]That the Alberta Board considered the "physical disability or disfigurement" portion to be unnecessary and included in "pain and suffering" was made clear in the *Alberta First Report* where, at 25 *et seq.*, it described this head as "pain and suffering" *simpliciter*.

[31]*Criminal Injuries Compensation Ordinance*, O.N.W.T. 1973, (1st), c. 4, s. 5(1). In *Re Evans*, (1978) 3 A.C.W.S. 162, Tallis J. held that compensation for pain and suffering was not recoverable under the Northwest Territories scheme because it was not specifically included.

[32]*Supra*, footnote 5, at s. 4(1)(*e*) (emphasis added).

But it is universally accepted that "pain and suffering" is a non-pecuniary, and not a pecuniary, head of damage.

That pain and suffering are not compensable in the Northwest Territories was made clear by the Legal Advisor to the Northwest Territories Council, in the Northwest Territories Council debates.[33]

> Claims for pain and suffering would be entertained by the court in what are called good Samaritan cases, for instance when a person is aiding a peace officer or attempting to prevent a crime. Otherwise if he is a victim as a result of a crime committed against him or an innocent victim of a crime nothing is awarded for pain and suffering. The only province that does get this right is Ontario as it makes awards for pain and suffering. No other province does this except in the good Samaritan cases. There is one exception in this bill . .
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> [T]his bill's basic thrust is more to the point of view of pecuniary losses. To include pain and suffering as a general head of damage means that anybody who receives a punch in the nose could claim the minimum under pain and suffering. This would increase the number of claims under this to a very considerable degree. It also makes the task of ascertaining the damages very difficult.

The exception referred to by the Legal Advisor is found in one rather anomalous head of compensation. In the Northwest Territories compensation may be awarded for "humiliation, sadness and embarrassment caused by disfigurement".[34] No explanation was given as to why this head of damage was included. It is true that the inclusion of such a head would probably not increase the number of claims to a considerable degree, as was feared would be the result if "pain and suffering" was included as a compensable head. On the other hand the statement that the task of ascertaining damages for pain and suffering would be very difficult certainly applies to the task of ascertaining damages under this head also. The only significant difference between pain and suffering, and humiliation, sadness and embarrassment caused by disfigurement seems to be that disfigurement is easily and objectively ascertainable whereas pain and suffering is not. But even though the disfigurement is easily ascertainable, the humiliation, sadness or embarrassment resulting therefrom is not. Furthermore, it is as difficult to convert such humiliation into monetary terms as it is to convert pain and suffering. This sixth head of compensation in the Northwest Territories must be regarded merely as a legislative anomaly..

The schemes in Quebec and in British Columbia remain to be discussed. They differ in one significant respect from those in the other Canadian jurisdictions. Both are administered by the Workmen's Compensation Boards, and neither enunciates in its statute a list of compensable heads of damage. The only other Canadian jurisdiction whose scheme is administered by the provincial Workmen's Compensa-

[33][1973] *Northwest Territories Council Debates* at 926. See also *Re Evans, supra,* footnote 31.

[34]Supra, footnote 31, at s. 5(1)(*f*).

tion Board is Manitoba. Manitoba's act specifies that the amount of the benefits payable to a victim of a criminal act shall be equivalent to the benefits that would have been payable had the victim been a workman within the meaning of the *Workmen's Compensation Act* who had been injured in the course of his employment.[35] But it is only the amount payable under each head, and not the heads themselves, that are referenced to the *Workmen's Compensation Act.* Indeed, the provision just paraphrased is made subject to an earlier clause which lists the precise heads of compensation. The Manitoba act, despite its Workmen's Compensation aspect, properly belongs with those of the jurisdictions other than British Columbia and Quebec which belong in a class by themselves.

Apart from the general right to apply for compensation in Quebec, a Good Samaritan, or his dependents if that Good Samaritan has been killed, may receive an award for property damage up to a maximum of $1,000.[36] The Quebec legislation also provides that persons other than the victim may receive awards up to a maximum of $750. if they have paid for the victim's funeral expenses or the cost of transportation of his body[37] and that the compensation payable to the parents of a deceased child victim is limited to $2,000.[38] With the exception of these three provisions — and it should be noted that under the third the act does not specify the head or heads under which those parents may demand compensation — there is only one section which speaks to either heads of compensation or the quanta payable under those heads. That section reads:[39]

> The advantages from which a crime victim or his dependents may benefit under this Act are those provided in divisions (III), (IV) and (V) of the *Workmen's Compensation Act.*

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[35]*Supra,* footnote 25, at s. 23(3).

[36]*Criminal Victims Compensation Act,* S.Q. 1971, c. 18, s. 5, as amended by S.Q. 1976, c. 10, s. 4.

[37]*Ibid.,* at s. 5.

[38]*Ibid.,* at s. 5. The view that this $2,000 award represents compensation for the parents' sorrow is strengthened by the speech in the Quebec National Assembly of M. Bellemare (Union Nationale) who referred to the sum of $2,000 in reference to the 1974 murder of a youth, an "histoire sordide qui . . . a imposé aux parents de cet enfant une grande souffrance et une perte incalculable" [(1976) 17 *Débats de* l'Assemblée Nationale 1928] as being "disproportioné quant aux malheurs et aux sévices qu'ont subis des familles" [*Ibid.,* at 1927]. On the other hand, he also referred to the financial loss when he said that "Aujourd'hui, deux ou trois ans après l'événement, les dépenses encourues ont été terribles dans le temps, [$2,000] n'est pas beaucoup." [*Ibid.,* at 1928].

But it seems that the government had in mind the loss of the support that the parents could have expected from their child when he grew up, hence the sum of $2,000 represents this pecuniary loss. M. Levesque (Liberal) declared that his advisors "en sont arrivés à ce chiffre qui est la moyenne des sommes qui sont . . . édictées par les tribunaux." [*Ibid.,* at 1929]. Those sums, as M. Choquette (Liberal) then pointed out, must "représenter l'expectative de soutien futur pour les parents qu'ont procuré cet enfant." [*Ibid.,* at 1929]. The government thus seems to have been imagining this $2,000 sum as representing the loss of the child's support once he grew up.

Accordingly, this head of compensation is viewed as one going to presumptive pecuniary loss.

[39]*Supra,* footnote 36, at s. 4.

> In addition, any mother who is herself providing for the maintenance of a child born as the result of rape may be granted, for the maintenance of the child a monthly payment of compensation equally to that granted under the *Workmen's Compensation Act* to a widow having one child. However, payment of the benefit may be made to a person other than the mother if, due to the death of the mother or for other cause, such person provides for the maintenance of the child to the satisfaction of the Commission.

To an anglophone, the word "advantages" (the word in French is "avantages") may be thought to refer, perhaps, only to the quantum and not to the heads of compensation. That is the situation in Manitoba where the Workmen's Compensation scheme is used to determine the limits of compensation payable under each head but not the heads of compensation themselves. But there is no reason to believe that this is the situation in Quebec, where the act contains no clause specifying those heads of compensation. It seems that the heads of compensation as well as the quantum of compensation payable under those heads are to be found in Divisions (III), (IV) and (V) of the Quebec Workmen's Compensation Act. For if pain and suffering were to be compensable, what limits would be placed upon compensation payable under this head? No limits are specified in the act establishing the criminal injuries compensation scheme. Neither are limits specified under the *Workmen's Compensation Act,* for the simple reason that pain and suffering is not compensable under that act. If pain and suffering were to be compensable in Quebec, awards under that head would be subject to no limit. Since awards under every head in every other province and under every other head in the province of Quebec itself are subject to statutory limits, this would be a very strange result. The only sensible explanation is that pain and suffering — and loss of amenities of life and loss of expectation of life — are not compensable under the Quebec scheme.

In the debates of the National Assembly the Attorney-General felt it self-evident that a compensation scheme should parallel the Workmen's Compensation scheme.[40]

> [N]ous avons suggéré des barèmes d'indemnité. Nous avons suggéré que les barèmes soient ceux qui s'appliquent en matière d'accidents du travail. Je pense que cette suggestion rend à la fois justice à ceux qui peuvent être victimes de crimes violents et également à ceux qui sont des accidentés du travail. Ne semblerait-il pas légèrement contradictoire, sinon illogique, que l'Etat indemnise de façon plus généreuse ceux qui sont victimes de crimes que ceux qui sont victimes d'accidents du travail? Il me semble, qu'établir une discrimination entre les accidentés du travail et les victimes de crimes violents serait une notion malvenue. C'est la raison pour laquelle je me suis rallié à cette idée que l'on établisse les barèmes des indemnités attribuables aux victims du crime sur la même base que les barèmes des accidentés du travail.

This view was adopted by the spokesman for the Union Nationale:[41]

> Et d'un autre côté, il serait indécent et injuste que les victimes d'actes criminels reçoivent plus ou davantage que les compensations versées aux victimes des accidents du travail.

[40](1971), 11 *Débats de l'Assemblée Nationale* 4009 (Nov. 2/71).

[41]*Ibid.*, at 4017.

Since these "indecent" and "unjust" results are obtained in most other jurisdictions in Canada, the reader may feel that somewhat more of an explanation is called for. In fact the Attorney-General's argument seemed to him to be strengthened by the fact that in British Columbia compensation to victims of criminal acts was also referenced to the heads and quanta of compensation awarded to workmen injured in the course of their duties:

> [L]e système que nous proposons à la Chambre aujourd'hui est assez proche du système qui existe en Columbie-Britannique. Cette province possède une loi d'indemnisation des victimes d'actes criminels qui, justement, se base sur les barèmes payés en matière d'accidents du travail. Nous avons donc suivi l'exemple de cette province, sans suivre l'exemple d'autres provinces canadiennes où l'on a adopté en gros le project des commissaires visant à l'uniformité des lois[42]

Since the Attorney-General was speaking on November 2nd, 1971, and the present British Columbia act did not come into force until 1972, he must have been referring to its predecessor "Good Samaritan" statute.[43] He would undoubtedly be surprised to see how its administering board has interpreted and applied the successor to that statute.

The act in British Columbia is quite specific concerning the case of an award by means of periodic payments. It specifies that compensation in the form of periodic payments to a victim disabled by his injuries should "be of the same amount and for the same duration as payments made to a disabled workman [under certain sections of the *Workers' Compensation Act*]".[44] Similarly, if the victim died as a result of the crime, payments to his dependants should "be of the same amount and for the same duration as payments made to the dependents under [the *Workers' Compensation Act*]".[45] These cover the field, for the act specifies that the Board "may award compensation to the victim or his dependents as provided by this act",[46] and the Board being a creature of statute, and being statutorily authorized only to make payments to victims and to the dependents of deceased victims, may make no payment to other persons. A person responsible for the maintenance of a child victim may not claim for expenditures he makes on behalf of that victim, as he may do in other provinces, but appears before the Board only as agent for the

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[42]*Ibid.*, at 4010.

[43]*Law Enforcement Officers Assistance Compensation Act*, S.B.C. 1969, c. 13.

[44]*Criminal Injuries Compensation Act*, S.B.C. 1972, c. 17, s. 3(1)(*b*)(i).

[45]*Ibid.*, at s. 3(1)(b)(ii).

[46]*Ibid.*, at s. 2(3).

victim.[47] One exception to this is the case of a mother of a child born as a result of rape, who may request maintenance payments.

Medical payments are explicitly authorized in addition to those payments which would be made as under the *Workers' Compensation Act.*[48] Once more it must be noted that the section so providing is restricted to the case of persons awarded periodic payments.

It must be noted that the British Columbia statute nowhere states that the heads specified are the only ones under which compensation may be paid to a recipient of periodic payments. However, that such is the case is supportable for three reasons. First, the Board is a creature of statute which should find all its powers within the statute and no heads other than those just described are found in the British Columbia statute. Second, the draughtsmen have described the heads in great detail, suggesting that this topic received a great deal of attention. This would be inconsistent with the idea that other heads under which compensation could be awarded had simply not been mentioned in the act. Third, and perhaps most important, the heads under which compensation is permitted in the act contain all those heads under which most persons would agree that compensation "should" be made.

Of these three reasons only the first applies to a consideration of lump-sum awards, but in respect of the heads of damage compensable under lump-sum awards the act is silent. It provides that periodic payments may be transformed into lump-sum payments, whence such lump-sum payments would in the final analysis be made under just those heads under which periodic payments are made. But concerning awards made initially in a lump-sum form the act says little. For example, it does not even state explicitly that the Board might make payments in respect of lost wages. The act does however specify certain minor heads of pecuniary damage.[49]

This silence in the act has given the administrators the power to make awards under whatever head they choose. Indeed, awards are made under just those non-pecuniary heads of damage that are recoverable at common law, and the Board has followed the example of

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[47]Awards may be made only to victims and their dependents. *Supra,* footnote 44, at s. 3(1). The only reference in the Act to persons responsible for the maintenance of a victim is found in s. 10(3), which allows him or her to file "for compensation for the infant child of a deceased victim." But the child may make application for expenses paid by his parent, and that parent can represent the child before the Board. Neither of these seems to be expressly permitted by the Act but the Board's reports are replete with cases in which both were allowed. That parent's expenses may be reimbursed directly to him (British Columbia Act, s. 3(1)(*d*)). In effect this gives the parent the right to recover for expenditures he makes on the victim's behalf.

[48]*Supra,* footnote 44, at s. 17(1).

[49]The Board is explicitly authorized to repair artificial limbs, clothing, eyeglasses, dentures and hearing aids (*Ibid.*, at s. 17(2)) and to pay for his rehabilitation (s. 16).

other jurisdictions in describing the heads of non-pecuniary damage under which it makes awards as actually being pecuniary heads of damage.[50] In its second report[51] the Board stated:

> Compensation awards include . . . other pecuniary loss or damages including and reflecting intangible elements such as pain and suffering, loss of anemities [and] loss of life expectancy.

It is noteworthy that this silence on the part of the statute has enabled the Board in British Columbia to make awards not only for pain and suffering, but also for loss of amenities of life and for loss of expectation of life. No other Canadian jurisdiction makes awards under the latter two heads.

We have already seen that, in addition to the victim himself, his dependents may receive awards.[52] It might be thought that, as in Ontario, the Board in British Columbia would make awards for the pain and suffering experienced by other claimants as a result of the victim's death. Such awards could be made only to the dependents of a deceased victim and not to those persons who have been responsible for the victim's maintenance while alive. We have already noted that in Ontario such dependents may receive awards in respect of their own pain and suffering.[53] But that position has been rejected in British Columbia in a reported award where the Board, while seeming to accept for the sake of argument that such pain and suffering had been experienced by the dependents of the deceased victim, stated that, "[c]ompensation cannot, in any event, be granted for the pain, sorrow and bereavement caused by the deceased's death".[54]

In summary, awards under non-pecuniary heads of damage are not made in Quebec. They are made in Alberta and in Manitoba, but only to "Good Samaritans". In the Northwest Territories they are made only in respect of humiliation, sadness and embarrassment brought about by disfigurement. In New Brunswick and Saskatchewan the victim may receive compensation for the pain and suffering which he himself has experienced. In Newfoundland, Ontario and the Yukon awards may be made for the pain and suffering resulting from the victim's injury or death and experienced by the victim himself, his dependents (if he is deceased), and those persons responsible for his maintenance. It is not known what effect this has in Newfoundland and in the Yukon. In Ontario, awards have been made for the pain and suffering experienced by the dependents of the deceased victim and may or may not have been

[50]Newfoundland, Northwest Territories, and Yukon Territory, (*supra*, footnotes 31 and 32).

[51]*British Columbia Second Report*, at 4.

[52]*Supra*, footnote 47.

[53]*Supra*, footnote 14.

[54]*British Columbia Fifth Report*, at 12.

made — but probably have not been made — for the pain and suffering experienced by persons responsible for his maintenance. Finally, in British Columbia awards for non-pecuniary damage may be made for pain and suffering, loss of the amenities life and loss of the expectation of life, the three heads under which such awards might be made at common law. Such awards in British Columbia are restricted to the pain and suffering experienced by the victim himself. Jurisdictions refusing to make awards under the head of pain and suffering have done so for three reasons. Pain and suffering is difficult to assess, it is expensive to compensate, and it is not available to equally deserving persons receiving benefits under the corresponding Workers' Compensation Schemes.

COMPENSATION FOR NON-PECUNIARY DAMAGE IN NON-CANADIAN JURISDICTIONS

Most United States jurisdictions do not permit awards for non-pecuniary damage. Some explicitly prohibit such awards.[55] Most exclude them either by specifying those heads under which compensation may be awarded and including only heads of pecuniary damage in that list,[56] or by referencing their awards to those made under Workers' Compensation Plans, which never include compensation for non-pecuniary damage.[57] Many of the states[58] follow the same pattern as Manitoba, giving unemployed persons compensation for presumptively lost wages. Although such compensation cannot be said to reflect pecuniary loss, neither does it reflect non-pecuniary loss.

Some jurisdictions expressly provide for pecuniary loss which is compensable if that pecuniary loss arises from pain and suffering.[59] This would seem to be superfluous, for pecuniary loss arising from pain and suffering which in turn arises from the victimization is nothing more than pecuniary loss arising from the victimization itself. Problems of causation can play a role here, but it is likely that pecuniary loss

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[55]For example, Illinois (*Illinois Annotated Statutes*, c. 70, ss. 74, 776), Oregon (*Oregon Revised Statutes*, c. 147, s. 035(2((*a*)), and Tennessee (*Tennessee Code Annotated*, Title 23, c. 35, s. 06(5)(*c*)).

[56]For example, New Jersey (*New Jersey Statutes Annotated*, Title 32, c. 413, s. 12) and Virginia (*Virginia Code Annotated*, c. 19.2, s. 368.11B). Some States allow recovery only for "economic loss", as for example Kansas (*Kansas Statutes Annotated*, c. 74, s. 7302), Minnesota (*Minnesota Statutes Annotated*, c. 299B, s. 04) and Ohio (*Ohio Revised Code Annotated*, c. 2743, s. 51(*e*)). Others allow recovery only for "out-of-pocket loss", as for example Kentucky (*Kentucky Revised Statutes*, c. 346, s. 130(3)), Massachusetts (*Massachusetts Annotated Laws*, c. 258A, s. 5) and Michigan (*Michigan Compiled Laws Annotated*, c. 18, s. 361).

[57]For example, Florida (*Florida Statutes Annotated*, c. 960, s. 13), Maryland (*Maryland Annotated Code*, Article 26A, s. 12(*b*)) and Wisconsin (*Wisconsin Statutes Annotated*, c. 949, s. 06).

[58]For example, Florida (*Florida Statutes Annotated*, c. 960, s. 13(3)), Maryland (*Maryland Annotated Code*, Article 26A, s. 12(*b*)).

[59]For example, Kansas (*Kansas Statutes Annotated*, c. 74, s. 7301(i)), North Dakota (*North Dakota Century Code*, c. 65-13, s. 03(6)), and Ohio (*Ohio Revised Code Annotated*, c. 2743, s. 51(*e*)).

resulting from the pain and suffering which in turn results from the victimization is compensable even in those United States jurisdictions which are silent on this matter. An exception is Tennessee:[60]

> No compensation shall be awarded for any personal injury or loss alleged to have been incurred as a result of pain and suffering, except for victims of the crime of rape and victims of crime involving sexual deviancy.

Compensation for the pain and suffering itself, rather than pecuniary loss arising therefrom, is expressly permitted in Hawaii.[61]

> The Criminal Injuries Compensation Commission may order the payment of compensation under this Part for . . . pain and suffering to the private citizen. . . .

It is at least arguable also that compensation for pain and suffering may be awarded in Alaska where the scheme provides:[62]

> The Board may order the payment of compensation under this Chapter for (1) expenses actually and reasonably incurred as the result of the personal injury or death of a victim; (2) loss of earning power as a result of total or partial incapacity of the victim; (3) pecuniary loss to the dependents of the deceased victim; and (4) any other loss resulting from the personal injury or death of the victim which the Board determines to be reasonable.

The use of the unqualified word "loss" in clause 4 is in direct contrast to the qualified phrase "pecuniary loss" in clause 3. It could be argued that the loss referred to in clause 4 includes not only pecuniary but also non-pecuniary loss. On the other hand, the word "loss", unlike the word "damages", automatically suggests pecuniary loss only. Only in Hawaii, then, is pain and suffering explicitly compensable in the United States.

In the United Kingdom compensation for non-pecuniary damage is clearly awardable, because "compensation will be assessed on the basis of common law damages".[63] The only head of damage under which compensation is expressly prohibited is that of exemplary or punitive damages.[64] The Criminal Injuries Compensation Board has also made it clear that certain claimants may receive compensation in respect of pain and suffering.

> The Board will consider applications for compensation arising out of rape and sexual assaults, both in respect of pain, suffering and shock and in respect of loss of earnings . . . and . . . in respect of the expenses of child birth.[65]

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[60] *Tennessee Code Annotated*, Title 23, c. 35, e. 065(*c*).

[61] *Hawaii Revised Statutes*, s. 351-52(4).

[62] *Alaska Statutes*, Title 18, c. 67, s. 110.

[63] *Eleventh Report of the Criminal Injuries Compensation Board*, (1975), cmnd. 5291, at 28, para. 10.

[64] *Ibid.*, at 29, para. 11.

[65] *Ibid.*, at 28, para. 9.

Such compensation may not be for the pain and suffering experienced by the dependents of a deceased victim: "[T]he compensation is based on the actual pecuniary loss suffered . . . by the victim's dependents and . . . there is no payment for the sorrow, pain and suffering caused by the bereavement".[66]

The situation is slightly different when the claimant is the person responsible for the victim's maintenance, rather than his dependent: "In Scottish cases, the law of Scotland enables us to make an award in respect of [the grief of the parents of a deceased child victim], but in England and Wales we can do no more than pay the funeral expenses".[67]

In New Zealand victims of crimes, like victims of other accidents, may receive compensation for non-pecuniary damage.[68]

> Where a person suffers personal injury by accident in respect of which he has cover under this Act, there may be paid to him . . . a further lump sum by way of compensation . . . in respect of —
> (*a*) the loss suffered by a person of amenities or capacity for enjoying life, including loss from disfigurement; and
> (*b*) pain and mental suffering, including nervous shock and neurosis:
> Provided that no such compensation shall be payable in respect of that loss, pain or suffering unless . . . [it] . . . has been or is or may become of a sufficient degree to justify payment of compensation under this subsection . . . .

Since the compensation awarded in respect of these heads must be paid to the victim himself, it is clearly his pain and suffering that is compensated. The ambiguity in the legislation of certain Canadian jurisdictions is not present in New Zealand.

In only two Australian states, Tasmania and Victoria, does the respective legislation list the heads of damage under which compensation may be made. In Tasmania compensation may be awarded for "the pain and suffering of the victim arising from the injury",[69] and in Victoria, for the "pain and suffering of the victim".[70]

In both Queensland and South Australia the claimant receives funds from the state in an amount equal to that which a court would have ordered the criminal, if convicted, to pay to him "by way of compensation for injury suffered ["sustained" in South Australia] by [the claimant] by reason of the commission of the offence".[71]

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[66]*Tenth Report of the Criminal Injuries Compensation Board*, (1974), cmnd. 5791, at 6, para. 5.

[67]*Ibid.*, at 6, para. 5.

[68]New Zealand Statutes *Accident Compensation Act*, 1972, no. 43, s. 120(1).

[69]*Criminal Injuries Compensation Act*, 1976, no. 32, s. 3(*d*).

[70]*Criminal Injuries Compensation Act*, 1972, no. 8359, s. 15(i)(*e*).

[71]Queensland *Criminal Code Amendment Act*, 1968, no. 44, s. 4, inserting s. 633(8) into the *Criminal Code;* South Australia *Criminal Injuries Compensation Act*, 1967, no. 97, s. 4(i).

In New South Wales,[72] the order which the judge may make against the criminal, and which is paid to the victim by the state, is referenced to the *Crimes Act* of 1900.[73] That act provides that a sum "be paid out of the property of the offender to any aggrieved person, by way of compensation for injury, or loss, sustained through, or by reason of, such felony".[74] But it is only the sum awarded in respect of the injury, rather than the loss, that is paid by the state.[75] Since "injury" has been taken to include all damages which are recoverable at law and which are consequences of the victim's bodily injury,[76] this should include all non-pecuniary damages as well as pecuniary damages.

The legislation in Western Australia[77] was originally similar to that of Queensland and South Australia, and was interpreted[78] to permit compensation only for mental and nervous shock as in the tort in *Wilkinson* v. *Downton,*[79] but not for mere "pain and suffering". A 1976 amendment[80] now permits compensation for both injury and loss, but neither is defined to include pain and suffering, loss of the amenities of life, or loss of expectation of life.[81] It remains to be seen how "injury and loss" will be construed.

In summary, the Criminal Injuries Compensation Schemes of the bulk of the jurisdictions of the Commonwealth award compensation in respect of pain and suffering, and frequently under all the non-pecuniary heads of damage available at common law. This is in direct contrast to the situation in the United States, where compensation in respect of non-pecuniary heads is almost totally rejected. The Canadian situation, with some provinces permitting compensation for non-pecuniary damages and some refusing such compensation, reflects this country's traditional legislative schizophrenia.

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[72]*Criminal Injuries Compensation Act,* 1967, no. 14, s. 4(1).

[73]S.N.S.W. 1900, no. 40.

[74]*Ibid.*, s. 427.

[75]*Criminal Injuries Compensation Act,* S.N.S.W. 1967, no. 14. ss. 3(*b*), 4(1), 5(1)(*a*), and 5(2).

[76]See the remarks of Under Secretary of Justice Downs in "Compensation and Restitution for Victims of Crime" (1975) 25 *Proceedings of the Institute of Criminology,* University of Sydney, at 16.

[77]*Criminal Injuries (Compensation) Act,* S.W.A. 1970, no. 69.

[78]*The Applicant* v. *Larkin, Withnell, and Wilkinson* [1967] W.A.R. 199 (S.C.) at 201.

[79][1897] 2. Q.B. 57.

[80]S.W.A. 1976, no. 76.

[81]"Injury" means bodily harm, including pregnancy, mental shock, and nervous shock. "Loss" means loss of earnings, loss arising from damage to items of personal apparel and loss arising from the necessity to replace or repair spectacles, hearing aids etc. S.W.A. 1969, no. 70, s. 3 (as amended).

SHOULD NON-PECUNIARY DAMAGE BE COMPENSATED UNDER THE SCHEMES?

Reasons for denying compensation for non-pecuniary loss to victims of violent crimes fall into two categories. Some of the reasons are pragmatic. Fraudulent claims would be more difficult to detect than would be fraudulent claims under pecuniary heads. The assessment of damages under non-pecuniary heads is much more difficult than is the assessment under pecuniary heads. The cost of a programme which includes non-pecuniary heads of compensation will be much higher than the cost of a programme which does not. If the scheme is to be administered by an existing Board, the natural Board to choose is that administering the Workers' Compensation Act. If such a Board is not accustomed to making awards for non-pecuniary loss, it might produce administrative chaos for the Board to make awards in respect of non-pecuniary loss to victims of crime but not to those other claimants who come before it.

Those reasons based on principle rather than on pragmatism inevitably reduce themselves to questions of the rationale of the scheme. It was surely a perception of the rationale behind the scheme which enabled the Quebec Attorney-General[82] to state without explanation that it was contradictory, if not illogical, for the state to give greater compensation to victims of crimes than to victims of industrial accidents. Perhaps this is the reason why the topic is hardly discussed. When it is canvassed, the commentator's discussion generally reduces itself to a statement of his position as to the rationale of the scheme, or, in some cases, to a statement that it would be inconsistent with the scheme's rationale for compensation to be awarded in respect of non-pecuniary damages, although that rationale itself is very often not expressed. Consider, for example, the following statement by Morris and Hawkins, with emphasis on the last sentence.

> One difficult question which arises . . . is whether compensation should be paid not only in respect of physical injury and its economic consequences but also for the 'pain and suffering' attendant upon the injury. Our position is that we would not include such an element in our compensation scheme. We cannot bear the knife for the victim nor endure his pain; the limit of our collective responsibility seems to us to be the removal of the sharper pains of financial suffering from his physical suffering. And from his dependents. Let us take an example: should there be compensation for 'pain and suffering' in a rape case? Many of the present schemes include such compensation and some of the legislative debates make much of the woman's suffering and the appropriateness of financial recompense. One can agree with the suffering and yet properly raise the question whether compensation should be paid . . . . But for the misery, pain and degradation of the rape, we take the rather hard line that no compensation should be paid. Otherwise, we move into areas of assessment of suffering in which money is not a possible balance

[82] *Supra*, footnote 42.

> and in which any payment we make can only be of the heart balm or symbolic nature. When we move into that area we exaggerate the proper role of compensation schemes.[83]

Turning now to a consideration of both the pragmatic and the theoretical arguments against the award of compensation for non-pecuniary damages, it is sometimes suggested that the inclusion of compensation for non-pecuniary damage imposes a financial burden on the state. In the case of Alberta[84] the exclusion of non-pecuniary heads has curtailed awards to less than half the number granted in Ontario. On the other hand, awards in Manitoba for pecuniary loss alone exceed those made in Ontario for both pecuniary and non-pecuniary loss combined. It is, therefore, impossible to make a general statement that the exclusion of non-pecuniary heads of compensation necessarily produces a less expensive scheme. The particular scheme and its application as a whole must be considered.

The validity of the argument that in order to save administrative costs the scheme must be administered by Workers' Compensation Boards, and that such boards will be unable to function if they are required to make awards to some claimants in respect of non-pecuniary loss when they are prohibited from making such awards to other claimants depends upon the simultaneous validity of two sub-arguments. First, there must be sound fiscal reasons for putting the administration of the compensation scheme into the hands of a pre-existing board. Second, it must be that such a board would have difficulty in awarding compensation for pain and suffering.

The first sub-argument is one that is universally taken for granted. In fact it seems self-evident that the establishment of a new board will be much more expensive than will be the utilization of an existing board. It is because this fact seems so self-evident that the author has undertaken to ascertain its validity. In Table 1 administrative costs and the total monies paid by various Canadian Boards[85] in each year since 1970 have been detailed. The awards made in Ontario, British Columbia and Alberta show little variation over the years, after the initial year of the programme with its attendant startup costs has been passed in British Columbia and Alberta. Saskatchewan shows an unusual decrease in

[83]Morris and Hawkins, *The Honest Politicians Guide to Crime Control* (Chicago: U. of Chicago Press, 1970), at 44-5.

[84]In 1971 awards in respect of pecuniary loss averaged $676.00 in Alberta and $807.00 in Ontario. Since Ontario also made awards in respect of non-pecuniary damage, the average award in Ontario was $1,892.00. This is almost three times the average award made in Alberta in that year. It is evident that the failure to award compensation for non-pecuniary loss in Alberta has significantly decreased the average award. Sources: *Ontario Third Report, Alberta Annual Report (1971).*

[85]Only the compensation schemes in four provinces have been considered because the public accounts do not break down the schemes' budgets into administrative expenses and monies disbursed to claimants in the other jurisdictions. In New Brunswick, the Yukon Territories, and the Northwest Territories the schemes are administered by the courts and so can tell us nothing when comparing the relative costs of schemes.

Table 1. Costs of administering Criminal Injuries Compensation Schemes in four Canadian provinces during the 1970's.

Province	Year	Administration Cost ($)	Total Paid ($)	Administration Costs as a Percentage of Monies Paid
Ontario[86]	1970-71	—	—	—
	1971-72	100,637	399,811	25
	1972-73	193,144	615,413	32
	1973-74	205,317	730,401	28
	1974-75	259,073	726,880	36
	1975-76	306,090	899,785	34
	1976-77	394,496	1,410,812	28
	1977-78	427,533	1,629,896	26
	TOTAL	1,886,290	6,412,998	29
British Columbia[87]	1970-71	—	—	—
	1971-72	—	—	—
	1972-73	—	—	—
	1973-74	62,333	193,896	32
	1974-75	116,921	585,939	20
	1975-76	143,095	858,246	17
	1976-77	251,997	1,241,282	20
	1977-78	269,942	1,230,681	22
	TOTAL	844,288	4,110;044	20.5

[86]Since the publication of its *Fifth Annual Report* the Ontario Board has not shown the cost of administering its scheme. This has forced us to go to the Public Accounts of Ontario to obtain such data. It was only in the fiscal year 1971-1972 that those Public Accounts began to show the money disbursed by the Criminal Injuries Compensation Board for administrative expenses. So the table for Ontario only starts in that year. The *Ontario Second Report* gives data for 1970, but that data is for the calendar rather than the fiscal year, and it would be misleading to insert such data in a table all of whose other entries refer to the fiscal year.

Sources: Volume 1, *Public Accounts of Ontario*, 1977-78 at 227, 1976-77 at 213, 1975-76 at 209, 1974-75 at 187, 1973-74 at 174, 1972-73 at 147, 1971-72 at 185.

[87]The Public Accounts of British Columbia do not detail the administrative expenses of the Criminal Injuries Compensation Board. The data has been taken from the Board's Annual Reports. Such data will not be precisely comparable with that from the other jurisdictions, for the Board's reports speak of monies awarded while the Public Accounts speak of monies paid. "Monies paid" will include periodic payments in respect of awards made in previous years as well as monies awarded towards the end of the previous year which the claimant did not pick up in the year of the award. On the other hand, it will not include monies awarded in this year which the claimant has not yet received. These may balance out, as in 1976-1977 when the *Ontario Board's Eighth Report* showed a total of $1,423,640.00 paid to claimants, whereas the provincial auditors' Public Accounts showed a total of $1,410,812.00. This discrepancy of less than 1% cannot affect the figures. On the other hand, in 1977-78 the *Ontario Board's Ninth Report* showed a total of $1,310,699.00 awarded, whereas the Public Accounts show a total of $1,629,896.00 paid. This discrepancy is over 25% and would affect the figures. However, we have no figures to use for British Columbia other than those given by the Board in its reports.

Sources: *British Columbia Sixth Annual Report* at 7, *Fifth Report* at 7, *Fourth Report* at 9, *Third Report* at 6 and *Second Report* at 6. The *First Report* represented only a portion of 1972, only 31 awards in all, and so we do not include the costs of administration or cost of introductory advertising detailed on page 13 of the Board's *First Annual Report*. For this reason the table starts with the year 1972. For British Columbia the year refers to the calendar year, and so for example 1973-1974 refers to the year 1973.

Table 1. (continued).

Province	Year	Administration Cost ($)	Total Paid ($)	Administration Costs as a Percentage of Monies Paid
Alberta[88]	1970-71	—	—	—
	1971-72	—	—	—
	1972-73	35,552	109,203	32
	1973-74	17,968	124,905	14
	1974-75	24,989	158,693	15
	1975-76	34,994	239,270	15
	1976-77	—	—	—
	1977-78	—	—	—
	TOTAL	113,483	632,071	18
Saskatchewan[89]	1970-71	24,984	32,546	77
	1971-72	24,071	50,216	48
	1972-73	26,044	57,529	45
	1973-74	19,329	181,408	11
	1974-75	18,010	139,290	13
	1975-76	17,054	122,956	14
	1976-77	19,924	166,464	12
	1977-78	37,616	175,843	21
	TOTAL	187,032	926,252	20

administrative cost, relative to monies awarded, starting in the fiscal year 1973/74 due both to a 200 percent increase in the monies awarded and to a 25 percent drop in the administrative costs. One can only speculate as to what new policies were implemented in that year to bring this about.

Over the years tabulated it will be seen that on the average British Columbia expended 20.5¢ on administration for every dollar that it awarded, Alberta expended 18¢, Saskatchewan expended 20¢, and Ontario expended 29¢. In British Columbia the Criminal Injuries Compensation Scheme is administered by the Workers' Compensation Board; in the other three jurisdictions an independent Board administers the scheme. If one were to compare British Columbia with only Ontario one would conclude that it is more costly to create an independent board than it is to utilize a pre-existing board. But when

[88]The Public Accounts of Alberta show no expenditures for the Criminal Injuries Compensation Board before the year 1972-73, and do not detail its administrative expenses after the year 1975-76. Therefore, data has been included for only four years.

Sources: *Public Accounts of Alberta,* Volume 1, 1972-1973 at 131, 1973-1974 at 83, 1974-1975 at 105, and 1975-1976 at 106.

[89]Sources: *Public Accounts of Saskatchewan,* 1970-71 at 62, 1971-72 at 61, 1972-73 at 48, 1973-74 at F61, 1974-75 at F60, 1975-76 at F39, 1976-77 at F36, and 1977-78, Volume 2 at 36.

one compares the figure for British Columbia with those of Alberta and Saskatchewan it becomes clear that such a conclusion would be erroneous, based as it would be upon the high cost of the Ontario scheme. The differences between Alberta and Saskatchewan on the one hand, and British Columbia on the other, are so small that one cannot with certainty attribute them to the fact that the British Columbia scheme is administered by a pre-existing board.

As we have seen, British Columbia does award compensation under the various non-pecuniary heads. This destroys the validity of the second sub-argument which presupposes that if a Criminal Injuries Compensation Scheme is to be administered by a Workers' Compensation Board then that scheme must permit compensation only in respect of heads under which compensation could be awarded to an injured workman.

It is unclear, then, if the utilization of a pre-existing board has any real effect on the cost of the scheme. If there is any such effect, it is so small as to afford no convincing reason for denying awards to a great many victims. Furthermore, even if the Workers' Compensation Board is utilized, that Board will experience no problems in awarding compensation to victims under the heads of non-pecuniary loss. The pragmatic arguments based on the necessity of utilizing a pre-existing board are not well founded.

The argument that the admission of compensation for non-pecuniary loss will lead to fraudulent and inflated claims is based on sheer speculation. None of the Canadian jurisdictions which allow compensation under non-pecuniary heads seems to experience difficulty with fraudulent claimants. Fraudulent claimants seem to be defeated by the requirement, such as that found in Manitoba,[90] that "the Board shall not make an order for compensation . . . where the crime of violence giving rise to the claim was not reported within a reasonable time after the happening thereof to the proper law enforcement officers . . .". As the board in England noted:[91]

> The requirements . . . that compensation will not be payable unless the Board is satisfied that the circumstances of the injury have been the subject of criminal proceedings or were reported to the police without delay, normally provide a safeguard against fraudulent claims.

Fraudulent claims appear to present no real problems whether or not the board allows compensation for non-pecuniary damage, and any argument for refusing such compensation which is based upon fear of fraudulent claims is unfounded.

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[90]*Supra*, footnote 25, at s. 6(2)(*b*).

[91]*Supra*, footnote 63, at 8.

The only remaining pragmatic argument is based on the difficulty of quantifying pain and suffering and then translating it into dollars and cents. Such difficulties have been experienced by the courts themselves, but "it has been held in numerous cases that uncertainty in the quantification of damage does not prevent an assessment, provided that some broad estimate can be made . . .".[92] It seems reasonable to assume that damage which is not too uncertain for the courts to assess would prove equally susceptible to assessment by a board.

Of course, this uncertainty does suggest that the board might not be consistent, and might award quite different sums in respect of pain and suffering to seemingly indistinguishable claimants. Again, this fear appears to be unfounded. An analysis of awards made in British Columbia for victims of purse snatching incidents[93] shows that they follow a fairly consistent pattern and do not appear to vary markedly. At any rate it seems strange to charge a board with the disbursement of public funds and with the investigation of claims, and yet doubt its capacity to assess those damages which the law itself has assessed for centuries. This is all the more odd when one notes that the administrators of the board invariably include at least one lawyer.[94]

Any valid argument against the award of compensation for non-pecuniary loss must be found among the theoretical objections. The primary theoretical objection has been stated by the Attorneys-General of both Manitoba and Quebec to be that victims of crime *should* receive no more compensation than victims of industrial accidents.[95]

There are, however, several characteristics shared by victims of violent crime that are not share by victims of industrial accidents, and those characteristics show that the former may be more deserving of compensation for pain and suffering than are the latter. For the purposes of this argument the thesis that victims of industrial accidents should not receive compensation for their pain and suffering is accepted, although this thesis itself seems indefensible save from a financial view point.

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[92]Munkman, *Damages for Personal Injury and Death*, (1973), at 9. The author there cites some of the "numerous cases".

[93]There were sixteen such incidents in the *British Columbia Third Report* for 1974.

[94]In the seven provinces whose schemes are administered by a board, the board is required to include at least one lawyer in Alberta (Alberta Act, s. 3(3)) and Manitoba (Manitoba Act, s. 2(3)). In 1977-78 the Chairman of the Alberta Board was E. Watkins, Q.C. In its *Ninth Report* the Ontario Board contained two members of seven who were listed as Q.C.'s. The executive secretary of the Alberta Board when it was first established was Florence Brent, M.D., LL.B. The Chairman of the Saskatchewan Board in 1969 was James Eremko, Q.C. and is currently a practising lawyer. It would seem that the governments have chosen, for better or for worse, to include lawyers on their Criminal Injuries Compensation Boards.

[95]*Supra*, footnotes 28 and 40.

The very young and the very old are found among the victims of crime more than they are found among the victims of industrial accidents. Figure 1 details the ages of those 190 victims of crime, other than peace officers injured in the course of their duties, whose awards

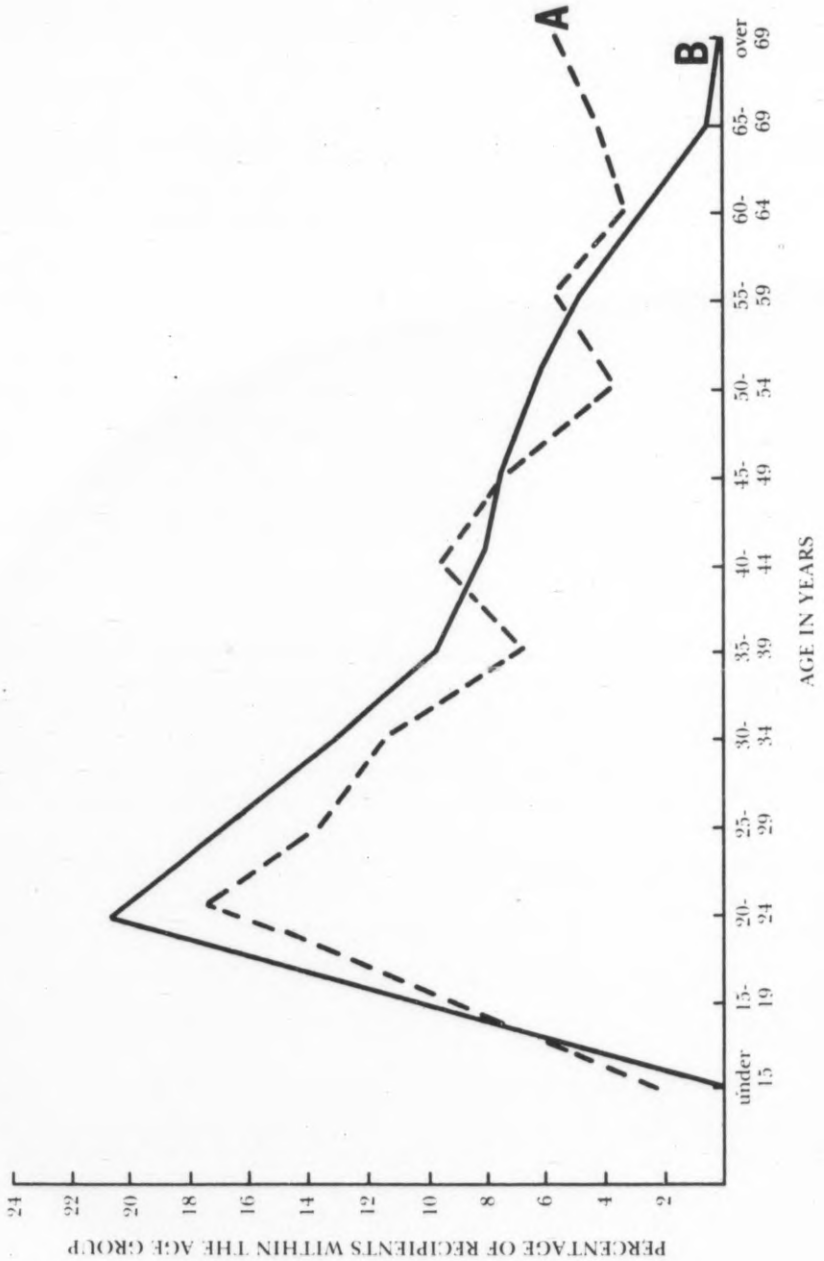

Figure 1. The percentage of persons receiving compensation for the first time, according to their age, from (A) Ontario Criminal Injuries Compensation Board, in 1977-78 (excluding peace officers) and (B) Workers' Compensation Board of British Columbia, in 1978.

were summarized and whose ages were given in the *Ninth Report of the Ontario Criminal Injuries Compensation Board,* and the ages of the 66,233 recipients of Workmen's Compensation benefits who have received Workmen's Compensation payments in British Columbia in 1978.[96] In order to compare the two graphs the absolute number of claimants in each age category has not been considered. Rather only the fraction of claimants in that age category expressed as a percentage of the total number of claimants before the board in that year has been considered. The Figure makes it quite clear that the very young and the very old receive more benefits from Criminal Injuries Compensation schemes than they do from Workers' Compensation schemes. This suggests that such persons are the victims of crimes more frequently than they are the victims of industrial accidents.

Society may withhold its sympathy from the victim of an industrial accident to the extent of refusing him compensation for pain and suffering, for we envision such a victim as one well able to suffer the slings and arrows of outrageous fortune. But it is only natural to think that the pain and suffering resulting from the psychological trauma experienced by a person who is the victim of a violent attack will be stronger in the case of the very young and the very old, two groups which are strongly represented among the victims of violent crime.

The nature of the victim is not the only manner in which claims before Workers' Compensation Boards differ from claims for Criminal Injuries Compensation Boards. The effect on the victim's psyche from the manner in which the injury occurred will also show a difference. Accidents are a part of daily life, and most persons are at least psychologically prepared to experience them. This is especially so in the case of victims of industrial accidents who are frequently injured while working near machinery which, as they know in advance, presents a threat. But who is psychologically prepared to be the victim of a violent attack? The typical claimant before the board is an average citizen unexpectedly assaulted while walking peacefully down the street. The very suddenness of the assault is bound to leave an impression on his mind long afterward. Indeed, the reports of the various Criminal Injuries Compensation Boards frequently make reference to the anxiety experienced by the victim thereafter[97] and to the victim's inability to face society or to walk the streets after the assault.[98] Few workmen injured during the course of their employment will experience such anxiety or paranoia.

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[96]*Sixty-Second Annual Report,* for the year ended December 31, 1978, of the Workers' Compensation Board of British Columbia, Table D at 86.

[97]See, for example, *British Columbia Third Report* award no. 24273, at 11; *Fourth Report,* award no. 21775, at 20; *Sixth Report,* award no. 56576, at 13; *Ontario Ninth Report,* award o. 200-3421, at 39; *Ontario Eighth Report,* award no. 200-2268, at 53.

[98]See, for example, *Ontario Eighth Report,* award no. 200-1940, at 51.

Finally, one must ask why society compensates victims of crimes. If such schemes are enacted to soothe the public or the victim[99] then how can one justify withholding compensation for pain and suffering? Take the case of a school girl, covered by provincial health care, who is raped. As a school girl she is probably not working and will not lose any wages, and as an injured person she will probably not incur any significant medical expenses. To deny her compensation for pain and suffering is to allow her nothing. This can hardly be said to manifest society's concern for its members, or to help restore those ties which bind society together and which were weakened by the assault. As one author noted long ago:[100]

> In some crimes, particularly forceable rape, kidnapping and some robberies, the unliquidated claim for compensation for pain and suffering is all that the victim generally has. Thus, it would appear to mark the victim and play havoc with consistency to urge the compensation of a forceable rape victim . . . and in the next breath to reject her claim for pain and suffering.

SUMMARY

A refusal to award compensation for non-pecuniary damage is sometimes justified on pragmatic and sometimes on philosophical grounds. Neither of these grounds appears to be as valid as is frequently believed. One is forced to the conclusion that there is no acceptable rationale for refusing compensation under heads of non-pecuniary damage, heads which society has, through the courts, been willing for centuries to compensate. The continued general refusal to permit recovery under the head of non-pecuniary damage leads to the inexorable conclusion that such schemes offer incomplete compensation.

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[99]See, for example, *Compensation for Victims of Crimes of Violence*, Home Office, (1964), cmnd. 2323 at para. 2; Harland, "Compensating the Victims of Crime", (1978) 14 *Crim. Law Bull*, 203 at 223-224; Law Reform Commission of Canada, Working Paper no. 5, *Restitution and Compensation*, (1974), at 17.

[100]Starrs, "A Modest Proposal to Ensure Justice of Victims of Crimes", (1965) 50 *Minn. L.R.* 285, at 306.