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LEGISLATION

Compensation for Victims of Crimes

The steadily increasing number of crimes in the United States and other Western countries brings about not only the destruction of property and the expenditure of money and effort to apprehend and punish the criminals, but also physical injury to thousands of innocent victims.¹ Although our society has established elaborate safeguards for the rights of the accused criminal, the injured victim is left to shoulder the responsibility of paying his own medical bills and providing for his own living expenses while he is unable to work.² Because of the extremely high cost of medical and hospital care, even a well insured victim may have to pay thousands of dollars out of his own pocket.³ Moreover, people whose economic situations force them to live in high-crime neighborhoods are more likely to become victims of criminal attacks than those who are able to live in better districts. They are also less likely to carry sufficient medical insurance.

The indigent victim faced with a deluge of bills finds little comfort in knowing that his attacker has been captured and punished. Of course, he can bring a civil action against the criminal for damages, but this is an expensive and uncertain procedure since the criminal would often be insolvent. In some jurisdictions, a citizen may sue the state or city if it has been negligent in failing to protect him.⁴ Even in these jurisdictions, however, this remedy is of little practical value to the victim of a criminal attack because few attacks are the result of police negligence.⁵ Further, the burden of proving police negligence

1. Secretary for the Home Department, *Penal Practice in a Changing Society*, GMD. No. 645 (1959). A study of crime rates in Great Britain shows that even in recent years in which the crime rate as a whole decreased, the rate of crimes against the person was increasing.

2. 111 CONG. REC. 15018 (daily ed. July 6, 1965). (Address by Senator Yarborough).

3. 111 CONG. REC. 13533 (daily ed. June 17, 1965). (Address by Senator Yarborough).

4. See, e.g., N.Y. CT. CL. ACT § 8. "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals and corporations, provided the claimant complies with the limitations of this article."

5. For an interesting example of how difficult it is to recover for negligent failure of the police to protect a citizen, see *Schuster v. City of New York*, 207 Misc. 1102, 121 N.Y.S.2d 735 (Sup. Ct.), *aff'd*, 286 App. Div. 389, 143 N.Y.S.2d 778 (2d Dep't. 1953). In this case the citizen informed the police of the whereabouts of a dangerous criminal and helped them capture him. He received much publicity for this act and began to get threatening letters and calls. The police knew of these calls and promised to protect him, assuring him that the calls were from cranks. The police failed to give any special protection and the citizen was murdered. His estate

may well create a formidable obstacle. Thus, the victim cannot usually get compensation either from the criminal or from the government. He must pay his own bills if he is able, or he must depend on charity. These considerations demonstrate that there is no adequate common law remedy available to many victims and that remedial legislation is needed to solve the problem.

EXISTING LEGISLATION

The idea of compensating the victim of a crime for his injuries is not a new one. Long ago Jeremy Bentham expressed his conviction that "satisfaction" should be given to the victim out of the offender's property, but "if the offender is without property . . . it ought to be furnished out of the public treasury, because it is an object of public good and the security of all is interested in it."⁶ Even in ancient statutes there are precedents for holding the state liable to victims of specific crimes. In England, the Riot Act provided for compensation for the owners of property which was damaged by failure of the authorities to suppress a riot. English criminal courts are empowered by the Criminal Law Act of 1826 to order payment from public funds to the relatives of a person killed in attempting to effect an arrest. Unfortunately, this statute does not authorize compensation for injuries, no matter how severe.⁷ In Ireland, the Grand Jury Act of 1836 granted compensation to those who were murdered or maimed while bringing disturbers of the peace to justice. This included witnesses, magistrates, and policemen. Because of the Irish Rebellion the compensation scheme was broadened by the Criminal Injuries Act of 1919 to include any malicious injury, and to include all citizens who were injured by an unlawful association or assembly and all officials injured while performing their duty. Recently, this statute was modified so that most personal injuries are now excluded from the compensation plan.⁸

sued the city under N.Y. Cr. Cl. Act § 8, see note 4 *supra*, but it was held that the city was not liable for its failure to exercise a governmental function, such as providing fire and police protection. Finally, after many years and much expense to the estate, it was held that a municipality is liable under the statute for its negligence in regard to preserving the public peace, even though such a duty is a governmental function. *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). In this case there was a very clear showing of police negligence, but recovery was still arduous for the citizen. In most cases there is no such evidence of police negligence.

6. Fry, *Compensation for Victims of Criminal Violence—A Round Table*, 8 J. Pub. L. 191-92 (1959).

7. Williams, *Compensation for Victims of Criminal Violence—A Round Table*, *supra* note 6, at 194.

8. Montrose, *Compensation for Victims of Criminal Violence—A Round Table*, *supra* note 6, at 198.

At present, general compensation plans for the victims of crimes are in effect in Great Britain, New Zealand, and California. None of these plans has been in operation long enough to allow a proper evaluation of its effectiveness. This summer Senator Ralph Yarborough of Texas introduced a bill⁹ in the United States Senate, which would allow compensation to the victims of certain crimes committed in areas where the federal government exercises general police power. A comparison of the plans reveals many similarities, but there are several important distinctions. Senate Bill 2155 justifies compensation on the ground that the government has breached a duty owed to the victim by not protecting him.¹⁰ The English plan expressly denies any such duty, and regards the compensation as a gratuity based on the state's sympathy for the victim.¹¹ New Zealand takes an intermediate approach—that the state should acknowledge responsibility for compensating the victims of crimes, not as an admission of failure to maintain law and order, but as a duty of the community toward its members.¹² All the plans provide some means of ascertaining what crimes are compensable. The English plan does this by allowing the courts to define the term "crime of violence," while the other plans contain a specific list of the crimes for which compensation is to be paid. The amount of compensation is determined either by a specific schedule, as in New Zealand,¹³ or by a court or special tribunal.¹⁴

9. S. 2155, 89th Cong., 1st Sess. (1965) [hereinafter cited as S. 2155].

10. Address by Senator Yarborough, Texas Association of Plaintiff's Attorneys Convention, July 2, 1964. Senator Yarborough stated, "I would not regard such payments as charity. . . . The government owes a higher duty to protect its citizens from criminal conduct, in a dual way, both in prevention of general criminal activity in our society and in specific protection of its citizens against individual injury." 110 CONG. REC. 15840 (daily ed. July 21, 1964). Former Supreme Court Justice Goldberg has made the statement, "The victim of a robbery or an assault has been denied the 'protection' of the law in a very real sense, and society should assume some responsibility for making him whole." Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 224 (1964).

11. Home Office, *Compensation for Victims of Crimes of Violence*, CMD. No. 2323 (1964); Working Party Report, *Compensation for Victims of Crimes of Violence*, CMD. No. 1406 (1961).

12. N.Y. Times, Sept. 22, 1963, p. 26, col. 1.

13. The New Zealand plan pays (1) expenses resulting from the victim's death, (2) earning capacity, maximum of \$29.00 a week plus an additional \$2.80 for the wife and \$1.40 for each dependent child (payments may continue for a maximum of six years), (3) loss to dependents from the victim's death, a maximum of about \$25 a week for six years, (4) loss from injury and reasonable expenses up to \$2,800, (5) pain and suffering up to \$1,400. U.S. News & World Report, April 6, 1964, p. 12.

14. Damages under S. 2155 include: (1) expenses actually and reasonably incurred as a result of the personal injury or death of the victim, (2) loss of earning power as a result of total or partial incapacity of such victim, (3) pecuniary loss to the dependents of the deceased victim, and (4) any other pecuniary loss resulting from the personal injury or death of the victim which the Commission determines to be reasonable. No award shall exceed \$25,000. S. 2155 §§ 303-04.

All of the plans contain methods for distinguishing between bona fide claims and fraudulent claims. Typical safeguards against fraudulent claims include a requirement that the crime be promptly reported to the police, provision for investigation of the claim, cross-examination of the claimant and witnesses, and special penalties for knowingly making a false claim. In all the plans, the tribunal which awards the compensation is given wide discretion to reject the claims of victims who have been responsible to some degree for their injuries.

SUGGESTIONS FOR REMEDIAL LEGISLATION

The major disagreement among those who feel that the victims of crimes should receive compensation concerns how such compensation is to be justified. Senator Yarborough and those who feel that the state has breached a duty by not protecting a citizen from criminals point out that the state forbids its citizens to avenge themselves, it encourages them to go about the streets unarmed and unprotected, and it usually imprisons the criminal, thus severely limiting his capacity to satisfy any judgment which the victim might obtain against him. By these actions the state has assumed a duty and should be liable for a breach of that duty.¹⁵ Opponents of this view contend that such a principle is not only unsound, but also dangerous. It is unsound because the state has not assumed the impossible task of guaranteeing every citizen absolute protection from criminal attack. Granted that the state has a duty to maintain law and order, there is a vast difference between suppressing civil disorders and entirely eliminating individual criminal activity. The principle is dangerous because it could easily be extended to make the state liable for property taken or destroyed by criminals as well as for injuries caused by them.¹⁶ The state's duty to preserve law and order would seem to be breached just as much by failure to prevent crimes against property as by failure to prevent crimes against the person. It is submitted that neither the duty concept nor the gratuity concept, standing alone, furnishes an adequate ground for compensation of criminally inflicted injuries. As pointed out above, the duty concept fails to explain why personal injuries should be compensated while property damage should not. If the gratuity reasoning is followed, it is difficult to see why a person should be compensated when injured by a criminal, but should not be compensated when he receives an equally severe injury from a falling tree limb. The solution to the problem of justifying compensation for criminally inflicted injuries while denying it for injuries from other sources and for criminal

15. 112 L.J. 830 (1962). See also note 10 *supra*.

16. Working Party Report, *supra* note 11, at 7.

property damage lies in combining the concepts of duty and gratuity. Because of its duty to maintain law and order, it is arguable that the state has some obligation to the victim of a crime, but that it has no obligation to the victim of a falling tree. However, this obligation is not such that it will be enforced when standing alone. Only when the item of sympathy or public interest is added to the state's obligation are the proponents of granting compensation able to justify such a scheme.

A compensatory statute should provide a method for determining what crimes should be covered. As previously noted, this can be accomplished by simply using the term "crime of violence" and letting the courts interpret it as they see fit, or by specifically listing the crimes to be covered. It has been suggested that listing the crimes has the advantages of intelligibility, avoidance of interpretive litigation, and easy amendment.¹⁷ However, these advantages are probably illusory, since even with a list litigation will arise over the meanings of the included crimes, and amending the statute may prove to be no easy task. A better method is to have the compensation awarded by a special tribunal empowered to publish a list of specific "crimes of violence."¹⁸ In this way the agency immediately concerned could amend the list easily and yet provide a maximum of certainty and intelligibility. Compensation should be awarded for injuries resulting from any crime in which there is a substantial possibility of serious injury to the victim. This would include injuries caused by arson, robbery, and other serious crimes which, though directed mainly against property, pose a serious threat of personal injury.¹⁹ Minor violations of statutes and all motor vehicle offences except those in which the vehicle is used as a weapon should be excluded from coverage under the plan.²⁰

The statute must provide a means to determine exactly what items of injury are to be compensated and how much compensation is to be awarded for each item. Victims should be fully compensated for their medical and hospital expenses, including treatment to correct mental or emotional problems caused by the crime. These expenses are a direct money loss to the victim and may easily be

17. Griew, 1962 CRIM. L. REV. (Eng.) 801-02.

18. Senator Yarborough's bill specifically lists the following crimes for which compensation would be paid: (1) assault with intent to kill, rob, rape, or poison; (2) assault with intent to commit mayhem; (3) assault with a dangerous weapon; (4) mayhem; (5) malicious disfiguring; (6) threats to do bodily harm; (7) lewd, indecent, or obscene acts; (8) indecent act with children; (9) kidnapping; (10) murder; (11) manslaughter, voluntary; (12) attempted murder; (13) rape; and (14) attempted rape. S. 2155 § 302.

19. Property offences are not included in S. 2155, but might be impliedly included in § 302 (1) or (3). The English plan includes arson and armed robbery.

20. Home Office, *supra* note 11, at 6; Working Party Report, *supra* note 11, at 8.

proved. Another element for which the victim should be compensated is loss of earning capacity.²¹ In the case of a permanent injury, compensation for both past and future loss of earning capacity should be awarded. If the injury is only temporary, perhaps the past loss should be compensated in a lump-sum award with weekly payments which would continue as long as the disability persisted. This method of payment, however, might be less desirable than simply estimating the loss of future earning capacity because of the burdensome administrative machinery which the periodic payments would require. It is suggested that there should be a modest limit on the amount awarded for loss of earning capacity in a particular period, but there should be no limit on the number of periods for which this amount would be paid. This would guarantee that, while the victim might not be in as good a financial position after the attack as he was before, he would at least be able to provide necessities for himself and his family.²² No award should be made for mental anguish or for pain and suffering since the purpose of the award is not to make the victim whole, as a tort judgment would seek to do, but to compensate him for the lasting effects of the crime which may not be directly related to its unpleasantness or heinousness.²³ Of course, there should be no element of punitive damages, since such an award would not serve to punish or deter the criminal.

Other provisions of the statute should expressly exclude from compensation any person who has contributed to his own injury by in some way precipitating the crime. The criteria for exclusion under these provisions must necessarily be vague in order to give the compensating authority discretion in allowing and rejecting claims. In determining the degree to which the victim contributed to his own injury, the tribunal must be guided primarily by its own sense of justice. Certainly, an injured participant in a gang war should not be compensated, but what about a person who foolishly wanders alone into a known criminal hangout? Perhaps the tribunal should be allowed to scale down the compensation as the degree of victim responsibility for the injury increases.²⁴ Many of the present statutes

21. Earning capacity as used in the statute should be defined as the periodic amount which the victim was receiving immediately prior to the attack either as wages, unemployment compensation, or welfare. In the case of a victim who had no income immediately prior to the attack because of illness or injury, his earning capacity should be the amount he could reasonably have been expected to earn after recovering from the illness or injury had it not been for the criminal attack.

22. Of course, in an action against the criminal, the victim's recovery would not be limited by an arbitrary maximum, but it is not intended that this statute should make the state stand in the shoes of the criminal or respond in damages to the same extent that the criminal would if he were sued.

23. Working Party Report, *supra* note 11, at 15.

24. *Id.* at 12. Determining the degree of victim responsibility is especially difficult

provide that no relative of the criminal shall receive any compensation. These provisions are designed to make certain that the criminal receives no benefit from his crime.²⁵ It is submitted, however, that this consideration should be subordinated to the central purpose of the plan, which is to compensate the injured victims of criminal attack. To make all relatives of the criminal ineligible for compensation may impose a great hardship on some innocent victims, such as the children whose mother has been hospitalized as a result of an attack by her husband.²⁶

Of course, the statute should provide as many safeguards as possible against fraudulent claims. Injuries should be compensated only if crimes are promptly reported to the police and all claims for compensation should be investigated promptly either by the police or by special officers of the compensation authority. As a condition for the award of compensation, the claimant should be required to submit to a medical examination so that the extent of his injuries can be accurately determined. Victims should be required to testify before the tribunal and both the victim and his witnesses should be cross-examined under oath. Those who make false claims should be punished either under the perjury laws or under some special section of the statute which would provide a suitable penalty for knowingly making a false claim. Critics argue that there is no practical way to eliminate the possibility of compensating a fraudulent claim and that for this reason the entire idea of compensating the victims of criminally inflicted injuries should be abandoned.²⁷ While the possibility of fraud cannot be entirely eliminated from a compensation plan any more than it can from any ordinary insurance claim, the benefits of such a plan seem to outweigh this disadvantage.²⁸

Neither the capture nor conviction of the criminal should be necessary in order for compensation to be awarded, but a conviction of the person accused of the crime should be conclusive evidence that a crime was committed. The tribunal would still have to determine

in sex crimes. For a detailed discussion see Weihofen, *Compensation for Victims of Criminal Violence—A Round Table*, *supra* note 6, at 209.

25. Home Office, *supra* note 11, at 6. S. 2155 provides that no compensation shall be paid if the victim (1) is a relative of the offender; or (2) was at the time of the personal injury or death living with the offender as his wife or her husband or as a member of the offender's household. S. 2155 § 304.

26. Working Party Report, *supra* note 11, at 12. It's admittedly very difficult to draw the boundary between a deserving and undeserving relative. To accomplish this the statute would have to give the tribunal broad discretion. To insure that the offender receives no benefit perhaps the award could be paid into court or to someone appointed by the tribunal for the benefit of the innocent victims.

27. Inbau, *Compensation for Victims of Criminal Violence—A Round Table*, *supra* note 6, at 202.

28. See Griew, *supra* note 17.

the amount of the victim's damages and whether he contributed to his injury. Neither the acquittal of the person charged with the crime nor a verdict in his favor in a civil action brought by the victim should prejudice the victim's claim for compensation, unless the defendant in the prior action was shown to have committed these acts, but established a good defense to the criminal or civil proceeding. This should be *res judicata* and the tribunal should not consider the victim's claim.²⁹ The standard of proof required of the victim by the tribunal should be the same as that in an ordinary civil action.³⁰

It is not intended that the victim should be allowed to collect a judgment from the criminal and also recover from the state under the compensation plan. Of course, if the criminal is solvent, the victim may prefer to collect a judgment from him, since it would probably exceed what he would receive under the compensation plan. Satisfying a judgment against the criminal should bar a subsequent claim by the victim against the state, but merely obtaining a judgment should not have this effect. The statute should provide that if the victim recovers from the compensation authority and later, before the statute of limitations bars his action, desires to collect from the criminal, he may do so, but he must reimburse the state for the amount which it awarded him plus interest. If the victim elects not to attempt to collect from the criminal within a certain period of time after the award by the state, the state shall be subrogated to the victim's claim against the criminal to the extent of the award which it made to the victim plus interest thereon. The statute of limitations should not run against the state after the time that it makes an award to the victim. Thus, if the state made an award to the victim before his claim was barred, the state's action against the criminal would never be barred by the statute of limitations. This is necessary if the state is to realize any recovery on its claims against the criminal, since he will usually be in prison for several years after the crime and cannot earn any money with which to pay a judgment against him. It has been suggested that the criminal should be required to make restitution to the extent of his ability to do so, either

29. This would not only save the tribunal the time which it would otherwise expend hearing frivolous claims, but would also prevent embarrassing conflicts between the outcomes of the two actions. One problem that might arise is that, since the victim has no control over the prosecution of the criminal action, a plea of guilty to a crime which would not ordinarily be compensable might be accepted by the prosecutor instead of risking an acquittal of the accused on a more serious compensable offence. Since this often happens when evidence against the accused is somewhat shaky, the statute should make clear that it will not prejudice the victim's claim.

30. Miller, *Compensation for Victims of Criminal Violence—A Round Table*, *supra* note 6, at 209.

to the state or to the victim, as a condition for the granting of any type of leniency by the state.³¹ The problem of whether to consider other payments which the victim is receiving from the state for some other reason or from his own private insurance policies in determining the amount of his award is similar to that faced by the early workmen's compensation statutes. Whether these payments are considered or not will probably have no significant effect on the eventual economic result, since most insurance policies would provide that the insurance payments would be reduced if the victim receives compensation from the government. However, care should be taken in drafting the statute so that payments to the victim from disability insurance will not reduce the amount he receives as compensation for his medical expenses.³²

After final determination of a claim by the administrative tribunal, there should be a provision for judicial review.³³ The scope of the review would be very narrow, since all factual determinations of the tribunal would be conclusive if supported by sufficient evidence. Only questions of law, sufficiency of evidence, and abuse of discretion would be reviewable. The fact that allowing review would mean more work for the already overworked judiciary should not pressure the legislature into setting up administrative machinery without the necessary checks, especially since the scope of review will be so narrow that only a few cases will be appealed.

Certainly, this is not a complete discussion of all the problems involved in devising a plan to compensate the victims of criminally inflicted injuries. Other systems for accomplishing this same purpose have much merit. Admittedly, many problems will remain until greater experience with the existing plans points the way to their solution. It is clear, however, that open-minded discussion of the various systems which could be employed to aid the victims of crimes would be very beneficial. Certainly, the legislative solution should be given careful consideration.

31. *Id.* at 246.

32. S. 2155 provides that the Commission shall deduct from the award any payments to the victim or dependents from the offender or on behalf of the offender, or from the United States, a state or any of its subdivisions, for personal injury or death compensable under S. 2155. S. 2155 § 305. There is no objection to this provision as long as the deductions are confined to payments from or on behalf of the criminal, and payments by a government *for the injuries or death of the victim*. However, an article in the Corpus Christi Caller-Times indicated that hospitalization or disability insurance benefits received by the victim would be deducted, although it is not clear whether the bill actually contains this provision. Senator Yarborough referred to this article as an "excellent article describing the bill." *Supra* note 2.

33. It is interesting to note that neither S. 2155 nor the English plan allows judicial review of the findings of the compensation authority. Neither plan gives a specific reason for not allowing review.