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PENNIES FROM HEAVEN: THE ONTARIO CRIMINAL INJURIES COMPENSATION BOARD

Stuart Bailey*

INTRODUCTION

The *Compensation for Victims of Crime Act*¹ of Ontario sets up a way for the government to compensate persons who suffer losses as a result of crime.² This is a desirable objective, but deciding which victims are deserving of compensation and how much money should be awarded to them is not a simple task. The *Ontario Act* accordingly provides that a board be created to make these difficult decisions and it has been doing so for over eighteen years.³

The purpose of this paper is to analyze the Criminal Injuries Compensation Board of Ontario. What kind of statutory guidelines does this administrative tribunal follow when it makes decisions? Does it make

* Copyright © 1989 Stuart Bailey, B.A., LL.B., LL.M. - Member of Bars of Ontario and Saskatchewan - Lawyer/Director of Nipissing Community Legal Clinic North Bay, Ontario.

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1. R.S.O. 1980, c. 82, as am. S.O. 1986, c. 37 and c. 64 [hereinafter *Ontario Act*].
2. The Criminal Code has been amended recently in heed of increasing calls for victims' rights. Neither these amendments nor the new study of victimology will be addressed in this article. Among the articles which may be of relevance in this area are D. Knetch, "Concerns of Canada's Victims' Rights Movement" (1985) 8 Can. Community L. J. 83; M. Baril, "Canada's First Legislation on Justice for Victims of Crime" (1987) 4 Justice Rep. 8; D. Davies, "Victims in the Criminal Justice Process: Providing a Balance in The Administration of Justice" (1985) 2 Justice Rep 38; M. Karlsen, "Federal Compensation Schemes" (1988) 4 Admin. L.J. 18; G. Ruygrole, "Reflections of a Victim." (1987) 4 Justice Rep. 7; and I. Waller, "Victims v. Regina v. Wrongdoer: Justice" (1985) 8 Can. Community L.J. 1.
3. The *Compensation for Victims of Crime Act* came into force on September 1, 1971. It superseded the *Law Enforcement Compensation Act*, R.S.O. 1970, c. 237.

law? Is it prone to any kind of review by the courts? I shall address these questions in turn and come to a conclusion.

BACKGROUND

Saskatchewan was the first province in Canada to pass criminal injuries compensation legislation. Most other provinces in Canada now have similar legislative schemes.⁴ In Ontario, the *Compensation for Victims of Crime Act* was passed in 1971.

The Saskatchewan and Ontario statutes are modeled on the first such act in the world, the New Zealand *Criminal Injuries Compensation Act*,⁵ which came into force in 1964. In Ontario, there is an important additional feature to the scheme. Not only may losses be recoverable for injuries or death sustained as a result of crime,⁶ but they may also be recoverable for injuries or death sustained performing or attempting to perform a citizen's arrest,⁷ or helping the police in their duties.⁸

In most Canadian criminal injuries compensation schemes entitlement to compensation decisions are made by administrative tribunals. *The New Brunswick Act*⁹ provides for the appointment of a judge from the Court of Queen's Bench¹⁰ to decide criminal injuries cases. Decisions

4. The following criminal injuries compensation Statutes will be examined in this paper insofar as they illuminate the Ontario Statute.

Alberta *Criminal Injuries Compensation Act*, R.S.A. 1980, c. C-33 [hereinafter *Alberta Act*].

British Columbia *Criminal Injuries Compensation Act*, R.S.B.C. 1979, c. 83 [hereinafter *British Columbia Act*].

Manitoba *Criminal Injuries Compensation Act*, C.C.S.M., c. C-305 [hereinafter *Manitoba Act*].

Newfoundland *Criminal Injuries Compensation Act*, R.S.N. 1970, c. 68.

Nova Scotia *Compensation for Victims of Crime Act*, S.N.S. 1975, c. 68 [hereinafter *Nova Scotia Act*].

Ontario *supra*, note 1.

Saskatchewan *Crime Victims Compensation Act*, R.S.S. 1978, c. C-47 [hereinafter *Saskatchewan Act*].

5. *Criminal Injuries Compensation Act*, New Zealand Statutes 1963, No. 134.

6. Ontario Act, *supra*, note 1, s. 5 (a).

7. *Ibid.*, note 1, s. 5 (b).

8. *Ibid.*

9. *Compensation for Victims of Crime Act*, R.S.N.B. 1973, c. C-14 [hereinafter *New Brunswick Act*].

of this judge may be appealed under the provisions of the *Judicature Act*¹¹ of New Brunswick just as if the judge were sitting in open court.¹² In the Northwest Territories applications for criminal injuries compensation are heard by judges as well.¹³

Before the *Ontario Act* is examined, some questions need to be answered. What is the social purpose of criminal injuries compensation? What role should it play? Opinions on these issues are divided and run all the way from idealistic to downright cynical. However, it is possible to classify most ideas concerning criminal injuries compensation under two heads: the insurance explanation and the moral worthiness explanation. Keep in mind that neither of these explanations can completely explain any scheme. Members of both schools of explanation start from the assertion that the situation before criminal injury compensation schemes was unsatisfactory.¹⁴ Assailants are often difficult to identify and find, and even when this is done, a civil remedy is useless if the defendant has no money. The restitution orders that courts may make are not a satisfactory remedy, for the same reason. As well, in order for a criminal court to make a restitution order it must first convict, and it may fail to do so for reasons which seem to have little to do with justice for the victims of crime.¹⁵

10. *Ibid.*, s. 5 (1).

11. R.S.N.B. 1973, c. J-2.

12. *New Brunswick Act*, *supra*, note 9, s. 14.

13. See *Compensation for Victims of Crime Act*, S.Y.T. 1975 (1st), c. 10.1, as am. S.Y.T. 1976 (1st), c. 5; 1980 (2nd), c. 3; 1981 (1st), c. 10, s. 1; 1983, c. 15; 1985, c. 3.

14. A.M. Linden, "Restitution, Compensation for Victims of Crime and Canadian Criminal Law" in Law Reform Commission of Canada *Community Participation in Sentencing* (Ottawa: Minister of Supply and Services, 1976) 7 [hereinafter *Linden*].

15. *Crime Victims—A Theoretical Assessment of Criminal Injuries Compensation in Canada* (Working Paper No. 6) (Ottawa: Policy Programs and Evaluation, Research and Statistics Section, Policy Planning and Development Branch, Department of Justice, March 1983) at 11-13 [hereinafter *Crime Violence*]; and see P. Burns, *Criminal Injuries Compensation: Social Remedy or Political Palliative for Victims of Crime* (Vancouver: Butterworths, 1980) at 19-30 [hereinafter *Burns*].

There are two ways of explaining criminal injuries compensation: by analogy to insurance or according to the principles of moral blame.¹⁶

A) THE INSURANCE EXPLANATION

Proponents of the insurance school of criminal injuries compensation point to New Zealand. They argue that the legislature of that country properly viewed the losses suffered by innocent victims of crime as being the inevitable consequence of life in modern society.¹⁷

Insurance spreads losses, which is a far more intelligent way of dealing with them than through the courts, in situations where the attachment of blame or fault has no value. It is acknowledged by members of this school that there is no good theoretical reason for excluding compensation for lost or damaged property, but that cost dictates that compensation not be extended to cover these areas.¹⁸

It is claimed by proponents of the insurance school that since in New Zealand criminal injuries compensation is part of a broader scheme designed to remove compensation issues from the courts, criminal injuries compensation schemes in Canada ought to be seen as part of a similar movement. The analogy to insurance cannot fully explain criminal injuries compensation, however; there are better reasons why people injured while carrying out citizens' arrests or helping the police should be compensated. As well, the character of the applicant makes too much difference in the result for just loss distribution to be happening, as I will show later.

In the system of private insurance contracts, that is contracts between an insurer and an insured, certain conduct on the part of the insured can result in denial of coverage by the insurer in the event of a loss. The nature of such conduct may either be specified by the insurer and

16. Another author replaces the analogy to insurance with a benefit to the state rationale, adds legal duty to the citizen as an explanation (but not a very convincing one) and replaces moral blame of the victim with moral duty of the state. R. Murphy, "Compensation for Victims of Crime: Trends and Outlooks" (1984) 8 Dalhousie L.J. 530 at 534-536 [hereinafter *Murphy*]. See also Dickson, who gives as rationales for criminal injuries compensation a state duty to prevent crime, a state duty to help those in financial need and insurance see B. Dickson, "The Forgotten Party-The Victim of Crime" (1984) 18 U.B.C. L.Rev. at 329 [hereinafter *Dickson*].

17. *Report of the Canadian Federal Provincial Task Force on Justice for Victims of Crime* (Ottawa: Minister of Supply and Services, 1983) at 98 and Linden, *supra*, note 14 at 25.

18. Dickson, *supra*, note 16 at 329.

form part of the insurance contract, or be put there as a standard term because of statute. A term in a property owner's insurance contract denying coverage for tort claims arising out of bodily injury deliberately caused by the insured is an example of the first. A term in an automobile insurance contract as a result of which coverage for bodily injuries is denied to an insured later convicted of impaired driving is an example of the second.

To the extent that an insurance based scheme of compensation for the victims of crime denies entitlement to compensation for the same reasons that one based on fault or worthiness would, the distinction between the two systems of explanation that proponents of each try to make breaks down. However, it should be made clear that insurance schemes of the sort to which criminal injury compensation schemes may productively be compared are unlike those created by private automobile and property owners' insurance contracts. The better comparison is to workers' compensation schemes, which are an example of the kind of global compensation scheme that exists in New Zealand.¹⁹ Except in extreme cases, the tests of the law of tort are abandoned as leading to unjust results. For example, under the Ontario *Workers Compensation Act*, compensation may only be denied where "an injury is attributable solely to the serious and wilful misconduct of the worker" and then only if it doesn't result in "death or serious disablement."²⁰ Therefore, proponents of the insurance scheme do not rely on entitlement arguments based on fault or worthiness.

Insurance-based explanations for compensation are similar to explanations based on fault or worthiness in the area of causation, but neither kind of explanation is very powerful in this area. Causation is stated by the editors of *Cases on the Canadian Law of Insurance* to be one of the law's thornier patches,²¹ which is an understatement. It is relevant to the law of private insurance contracts because a loss must be caused by a risk insured against and not excluded by the contract of insurance in order for a payment to be made by the insurer under the insurance contract. Cases involving such contracts take a court into problems which surround the metaphysics of causation.

19. See Burns, *supra* note 15 at 131 for an explanation of the New Zealand scheme.

20. *Workers' Compensation Act*, R.S.O. 1980, c. 539, s. 3(7).

21. M. Baer & J. Rendall, eds., *Cases on the Canadian Law of Insurance*, 3d ed. (Toronto: Carswell Legal Publications, 1983) at 601.

These problems require considerable sophistication to solve. One event may not be caused by a second in the sense that the first event was going to happen anyway, independently of the second, at some time or another. Or, to take another example, a completely unexpected and remote result may only follow a certain act, and not be caused by it.

As a practical matter a private insurer may attempt to deny coverage on the basis of arguments based upon interpretation of contractual terms, or some theory of causation different from that advanced by the insured. This may occur if the insurer can thereby avoid paying a large sum of money to the insured. It is important to see that situations such as the above differ from those where a criminal injuries compensation board is unable to find causation.

As I have shown, courts which scrutinize the denial of coverage by private insurers often have to consider arguments of considerable subtlety in the areas of contract interpretation and the metaphysics of causation. This does not appear to be the case in situations involving the Saskatchewan Board, at least. I shall show in this article that criminal injuries compensation boards often reduce or deny compensation on the ground of causation.

An examination of the decisions by boards show that a finding that the applicant caused his or her own injury can only be understood if causation is used in a very blunt sense. Perhaps this is because it is difficult to make arguments of subtlety on the basis of statutory terms which require only that death or injury be the result of a crime. The concept of causation as it is used in the context of private insurance may be very different from causation as the term is used in criminal injuries compensation.

As was earlier implied, it ought to be the aim of criminal injuries compensation schemes to include losses, not to seek to exclude coverage so as to make a profit. This takes us to the second main explanation for criminal injuries compensation schemes.

B) THE MORAL WORTHINESS EXPLANATION

Worthiness plays an important role in the second explanatory scheme for criminal injuries compensation schemes. Compensation is not a right; like charity it may be given to those who deserve it. Society is not attempting to put the innocent victim of crime back in the same position that he or she was in before the crime took place, rather it is expressing its sympathy in a monetary fashion to such victims.

Later in this article I will develop why I think that the concept of moral worthiness provides a good way of understanding the decisions of the Criminal Injuries Compensation Board of Ontario, Saskatchewan or any other province. In doing so I will not be particularly original. Most authors have concluded that the insurance explanation of criminal injuries compensation schemes is not a completely satisfactory one,²² and that moral judgments have a good deal to do with the Board's decision-making.

Canadian criminal injuries compensation schemes have been the subject of several excellent journal articles and one book²³ whereas only authors of articles have examined the legislation of Ontario.²⁴ Accordingly, it will not be examined independently of the Statutes in other Canadian provinces. Besides, a comparison of these statutes to the one in Ontario provides a deeper insight into the rules and principles which the Ontario Board follows when it makes decisions.

In the pages which follow, I will show how the other provincial legislatures have developed aspects of criminal injuries compensation which flesh out the bones of the Ontario statute. I will explore how the Ontario Board has adopted many of the ideas made explicit in these other schemes.

STATUTORY GUIDELINES

All the boards in Canada are given a wide latitude to determine the kinds of situations in which compensation will be awarded although some of the statutes provide more guidance than others.²⁵ In Ontario

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22. Burns, *supra*, note 15 at 140; *Crime Victims*, *supra*, note 15, at 31-32; and H. Spiegel, "Practice and Procedure Before the Criminal Injuries Compensation Board of Ontario" in F. Muskoff, ed., *Administrative Tribunals—A Practice Handbook for Legal Council* (Aurora: Canada Law Book, 1989) 265 at 285 [hereinafter *Spiegel*]. Mr. Spiegel's article is balanced, well thought out, and very practical.
23. Dickson, *supra*, note 16; Murphy, *supra*, note 16; Burns, *supra*, note 15; and Carter, *infra*, note 61.
24. See M. Faieta, "The Ontario Criminal Injuries Compensation Board Applications for Victims of Spousal Assault," (1989) *Advocates' Society J.* 9 [hereinafter *Faieta*]; A. Grossman, "Compensation to Victims of Violent Crimes," (1983), *Law Society Special Lectures: Torts in the 80's* (Toronto: DeBoo, 1983) 369, [hereinafter *Grossman*]; D. Lissaman, "The Criminal Injuries Compensation Board," (1983) 2:5 *Advocates' Society J.* 29 [hereinafter *Lissaman*]; D.R. Miers, "The Ontario Injuries Compensation Scheme" (1974) 24 *U.T.L.J.* 347 [hereinafter *Miers*]; and Spiegel, *supra*, note 22. Mr. Grossman was Chairperson of the Ontario Board. Mr. Lissaman, Mr. Speigel and Mr. Faieta have sat on the Board.

the Board is given the power to exercise discretion in accordance with the Act with respect to entitlement decisions,²⁶ and in Saskatchewan the Board is given absolute discretion.²⁷ However, the appearance of the term discretion is not a necessary one, for in all statutes the language used in connection with the making of entitlement decisions is permissive rather than mandatory.

A) RELEVANT FACTORS

All boards are directed to consider relevant factors, which makes discretion an inevitable part of board decision-making. With one exception, these relevant factors are always stated to include behaviour which directly or indirectly contributed to the death or injury of the applicant for compensation, although the wording differs from statute to statute.²⁸ In Ontario, the relevant provisions is section 17(2) of the legislation.²⁹ Court cases in which the decisions of criminal injuries compensation boards have been either changed or upheld as a result of judicial review or an appeal provide some guidance as to what is meant by behaviour which directly or indirectly contributed to the death or injury of the applicant. For example, in *Jewers v. Criminal Injuries Compensation Board*³⁰ a Nova Scotia decision, the applicant for compensation had assaulted another person, but had received an absolute discharge. When she was subsequently stabbed by the mother of the other person, her compensation award was reduced by 40 percent.

In *Kendi v. Commissioner of Northwest Territories*³¹ Justice De Weerd of the Northwest Territories Supreme Court reduced the applicant's compensation award by 25 percent. She had been badly injured in a motor vehicle accident, but had not been wearing a seatbelt at the time. Also, she accepted a ride with the driver of the vehicle, although she knew he had been drinking and taking drugs. Finally, in *Poholko v. Criminal Injuries Compensation Board*,³² a Nova Scotia decision, it

25. Dickson, *supra*, note 16 at 328-331, and Murphy, *supra*, note 16 at 542-544.

26. *Ontario Act, supra*, note 1, s. 5.

27. *Saskatchewan Act, supra*, note 4, s. 10 (1).

28. In Quebec, compensation will not be granted if the applicant has by his or her gross fault contributed to his or her injury. Burns, *supra*, note 15 at 352.

29. *Ontario Act, supra*, note 1.

30. (1987), 44 D.L.R. (4th) 189 (N.S.S.C. A.D.),

31. (1985), 1 W.W.R. 284 (N.W.T. S.C.).

was held that a prostitute who willingly went with a client, and was subsequently kidnapped and assaulted, did not directly cause these injuries by her conduct. More will be said of this case later, when the topic of moral blameworthiness is discussed, but suffice it to state here that the victims award was reduced by 50 per cent.

In some cases it may be asserted that "the claimant is the author of his own misfortune," and compensation is denied. This handy label can be used to mean that the board in question is not faced with an innocent victim, but rather a culpable one. Such use by a board is unwise, for it implies that the board has employed an all or nothing analysis, rather than a two step one of the sort to be discussed later.³³

In *Re: Manarey and Commissioner of the Northwest Territories*,³⁴ another decision of a Northwest Territories judge, the applicant for criminal injuries compensation was severely injured when he was kicked in the head. As a result of the blows he suffered a moderately severe diffuse brain dysfunction with resulting poor physical co-ordination.³⁵ The applicant had been assaulted after asking an intoxicated suitor of his daughter to leave his apartment; he had been drinking too. Given the seriousness of the beating, the judge found that the claimant had not been the "author of his own misfortune" by striking the first blow in his argument with his daughter's suitor.³⁶ The injuries sustained by the applicant for compensation in *Manson*³⁷ were less severe. The applicant had been attempting to break up a fight between two players in a craps game, one of whom was armed and intoxicated, when he was shot. He was not found to be entitled to compensation for his bullet wound.

Dalton v. Criminal Injuries Compensation Board was a judicial review of an Ontario decision. The use of the term "author of her own misfortune" does not find much support in this decision, which will be

32. (1983), 58 N.S.R. (2d) 15 (N.S.S.C. A.D.) [hereinafter *Poholko*].

33. Neither the "author of his own misfortune" nor the "culpability" test were used by the Divisional Court of Ontario in *William Douglas Manson v. Criminal Injuries Compensation Board* (9 January 1989), DC 634/87 (Ont. Div. Ct.) [unreported] [hereinafter *Manson*].

34. (1983), 150 D.L.R.(3d) 358 (N.W.T. S.C.) [hereinafter *Manarey*].

35. *Ibid.* at 360.

36. *Ibid.* at 361.

37. *Supra*, note 32.

analyzed in the following paragraphs.³⁸ Such reasoning will not, it is safe to say, find the favour of the Court. However, in *Lischka v. Criminal Injuries Compensation Board*,³⁹ the Ontario Board was supported in its denial of compensation to an applicant who had struck a bouncer in a bar after he had been cut off. The bouncer had damaged his jaw and teeth in return, which the court opined the applicant ought to have foreseen as a probable consequence of such behaviour.⁴⁰

In some provinces other than Ontario, the legislatures have been more explicit, and what may constitute relevant disentitling factors are spelled out. These may include that the claimant has refused to testify at a hearing of the board,⁴¹ or to submit to a medical examination,⁴² or has failed to provide adequate documentation to the board,⁴³ or to co-operate with the police in relation to the investigation of the alleged crime or the prosecution of the alleged offender.⁴⁴

A feature common to all criminal injury compensation schemes being studied here are provisions designed, apparently, to encourage people to further the ends of justice by either stopping suspected offenders or helping the police to arrest them.⁴⁵ The awarding of compensation for injuries or death sustained as a result of this laudable activity is made possible by sections in the various acts⁴⁶ although awards under this head are extremely rare in Ontario.⁴⁷ It follows that compensation cannot be awarded under these or any other sections if the party

38. (1982), 36 O.R. (2d) 394 (Ont. H.C.J.) [hereinafter *Dalton*].

39. (1982), 37 O.R. (2d) 134 (Ont. H.C.J.) [hereinafter *Lischka*].

40. *Ibid.* at 136.

41. *Alberta Act, supra*, note 4, s. 8(2)(d), and *Nova Scotia Act, supra*, note 4, s. 25(2)(b).

42. *Alberta Act, supra*, note 4, s. 8(2)(c) and *Nova Scotia Act, supra*, note 4, s. 25(2)(a).

43. *Alberta Act, ibid.*, s. 8(2)(a).

44. *Alberta Act, ibid.*, s. 8(2)(b). See also *New Brunswick Act, supra*, note 9.

45. Spiegel, *supra*, note 22 at 372.

46. *Ontario Act, supra*, note 1, s. 5(b), (c). For a case in which one such section was considered see *Re: Willier and Crimes Compensation Board* (1977), 75 D.L.R. 217 (Alta. C.A.).

claiming compensation as a victim of crime was also a party to the crime. The party claiming compensation must be an innocent victim.

This idea, which is similar to the equitable maxim that he who comes to Equity must do so with clean hands, does not find explicit expression in the *Ontario Act*. The Statutes of other provinces provide some interesting approaches to this problem. One expressly denies compensation for injuries arising out of a crime to parties to that crime;⁴⁸ another denies it to those who colluded with the person committing the crime or participated in it.⁴⁹

The chairperson of the Ontario Board states in his analysis of section 17 of the *Ontario Act* that

“obviously the legislature included these subsections to ensure that the disbursement of public funds is restricted to proper and deserving cases.”⁵⁰

Under an admirably forthright section of the *Manitoba Act* the Criminal Injuries Compensation Board of that province is directed to take into account the character of the applicant and of the victim.⁵¹ This section supports the moral worthiness interpretation of criminal injuries compensation schemes.

Once again, court cases in which the decisions of criminal injuries compensation boards have been either changed or upheld as a result of judicial review provide some guidance as to how courts will react to disentitlement on grounds of moral blameworthiness. In *Dalton*⁵² the claimant for criminal injuries compensation was pushed out of a moving van by two men who had picked her up. The court stated: “Mrs. Dalton was said to be a friendly person,” but did not find this alone sufficient to allow the Criminal Injuries Compensation Board of Ontario to disallow her claim. However, the court which reviewed an earlier Board decision in *Re: Sheehan and Criminal Injury Compensa-*

47. See Lissaman, *supra*, note 24 at 30. This was advanced as a ground for making an award in *Manson*, but rejected by the Divisional Court. *Manson*, *supra*, note 33 at 11.48. *British Columbia Act*, *supra*, note 4, s. 5(b).

49. *Manitoba Act*, *supra*, note 4, s. 6(2)c.

50. Grossman, *supra*, note 24 at 372 and *Ontario Act*, *supra*, note 1.

51. *Manitoba Act*, *supra*, note 4, s. 11(1)a.

52. *Supra*, note 38.

tion Board⁵³ had supported a decision to deny entitlement on the basis of who the applicant was. The applicant was a penitentiary inmate, where he would not have found himself but for his previous conduct.

It should be noted that the Ontario legislation has been amended since the decision in *Sheehan*⁵⁴ was handed down. In 1986 the Ontario Board was given an alternative to granting compensation or denying it completely; it was allowed to order a reduced amount of compensation to a victim of crime by an amendment to section 17 of the *Ontario Act*.⁵⁵ *Sheehan* may no longer represent the law in Ontario.⁵⁶

It is clear that prostitutes are not *prima facie* disentitled to criminal injuries compensation benefits, by virtue of who they are or what they happen to be doing. This was the finding of the Nova Scotia Supreme Court in *Poholko v. Criminal Injuries Compensation Board*.⁵⁷ Indeed, the court went so far as to adopt the reasoning of the dissenting member of the Board when he wrote:

“The Board has a responsibility to compensate victims of crime regardless of the opinion held as to the moral nature of the practices and conduct of the victim.”⁵⁸

Unfortunately, the Saskatchewan Court of Appeal has strongly opined in favour of moral purity in matters involving entitlement to criminal injuries compensation by supporting the denial of entitlement to a person who had been stabbed in the back while drinking while under age in a bar. More will be said of *Foy v. Crimes Compensation Board*⁵⁹ later. Suffice it to say that where an applicant stands in the socio-economic scale may dictate entitlement to criminal injuries compensation. “Deserving” people, to quote the Saskatchewan Court of Appeal in the *Foy* case, may not drink in certain bars.

The harsh effects of the moral purity or innocent victim rule have been noted by several authors. Many legal clinic clients who are ap-

53. (1974), 5 O.R. (2d) 781, 52 D.L.R. (3d) 728 20, C.C.C. (2d) 167 (Ont. C.A.) [hereinafter *Sheehan*].

54. *Supra*, note 53.

55. *Supra*, note 1.

56. *Supra*, note 53.

57. *Supra*, note 32.

58. *Ibid.* at 20.

59. (1985), 44 Sask. R. 109 (Sask. C.A.) [hereinafter *Foy*].

plying for compensation lead "less than angelic lives"⁶⁰ and tend not to be presidents of the Rotary Club.⁶¹ All such applicants do not have much money.⁶² Yet the effect of how criminal injuries compensation boards decide cases,⁶³ and how these cases are viewed by the courts⁶⁴ may result in such requirements being imposed. Once again, to quote Murphy,

"... Compensation Boards... often reduce awards at the slightest hint of victim fault or wrongdoing. The danger in this is that the victim may be penalized merely for being in the wrong place at the wrong time with characteristics (wealth, youth, old age, defencelessness, female, a minority) that attract a potential criminal."⁶⁵

Roger Carter reflected this reality when he commented on the situation in Saskatchewan subsequent to *Foy*,⁶⁶ by stating that

"However, as the law presently stands, before Miss Foy is again stabbed in the back she would be well advised to take out membership in The Girl Guides."⁶⁷

It is absolutely crucial to determine when the innocent victim test should be applied. According to some judges and legal commentators who have analysed criminal injuries compensation legislation, a two-step procedure is involved. First, a determination must be made that the applicant for compensation was injured or killed as a result of a crime. Second, the innocent victim rule is invoked to determine whether this compensation ought to be reduced.⁶⁸ Other judges and legal commentators have not determined that a two-step procedure is dictated by criminal injuries compensation legislation and have ap-

60. See Murphy, *supra*, note 16 at 533.

61. See R. Carter, "Only the Good Deserve Compensation—A comment on *R. Ex Rel Foy v The Crimes Compensation Board of Saskatchewan*" (1986-87) 51 *Sask. L. Rev.* 63 at 65 [hereinafter Carter].

62. See Grossman, *supra*, note 24 at 369.

63. See the section of this article titled "Does the Board Make Law?", *infra*, p. 134.

64. See the section of this article titled "Is the Board subject to Judicial Review?", *infra*, p. 158.

65. Murphy, *supra*, note 16 at 533.

66. *Supra*, note 59.

67. Carter, *supra*, note 61 at 172.

68. This was the approach of the Nova Scotia Supreme Court, Appeal Division in *Poholko*, *supra*, note 32 at 17. See also Carter, *supra*, note 61 at 71 for a well-

plied the innocent victim test right off.⁶⁹ This point is of sufficient importance to be returned to later in this article.⁷⁰ Suffice it to state here that in Ontario the two-step procedure appears to have been imposed⁷¹ in some situations involving the police by the legislature when it amended section 17(2) of the *Ontario Act* in 1986 to allow the making of a reduced order for compensation.

In *Dalton*⁷² the reviewing court considered the effect of *Sheehan*.⁷³ It was called to make such a consideration by section 17(1) of the *Ontario Act*⁷⁴ which requires the Board to consider all the relevant circumstances, including the behaviour of the victim that contributed to the injury, in determining whether to order compensation or to make a reduced award. The court stated:

"In order to properly invoke this section, the Board *must* weigh all the relevant circumstances, it *must* consider whether any conduct of the victim directly or indirectly contributed to his injury, and it *must* then decide whether to grant compensation, deny compensation, or whether it will allow a reduced award."⁷⁵

The applicability at the above analysis is supported by several decisions of judges sitting as tribunals at first instance in the Northwest Territories. In particular, Morrow J., who initially decided *Drybones*,⁷⁶ wrote helpful decisions in *Re Garet and Criminal Injuries Compensation Ordinance*⁷⁷ and *Re McDonald*,⁷⁸ in which *Re Garet* was followed. He stated in *Re Garet* that, in a criminal injuries compensation case,

69. This is the approach of the Saskatchewan Court of Appeal which overrules the Saskatchewan Court of Queen's Bench on this point. See the rather brief reasons for judgment in *Foy supra*, note 59. See also Grossman, *supra*, note 24 at 373.

70. See the section of this paper entitled "Is the Board subject to Judicial Review?", *infra*, p. 158.

71. Ontario Act, *supra*, note 1. The Board now has two choices. The first is whether or not to deny compensation completely. The second is whether or not, if grounds exist, to grant full or partial compensation.

72. *Supra*, note 38.

73. *Supra*, note 53.

74. *Supra*, note 1.

75. *Dalton supra*, note 38 at 397.

76. (1970), 9 D.L.R. (3d) 473 (S.C.C.)

77. (1975), 29 C.R.N.S. 391 (N.W.T. S.C.) [hereinafter *Garet*].

78. (1975), 64 D.L.R. (3d) 757 (N.W.T. S.C.) [hereinafter *McDonald*].

"... the victim's behaviour is to be taken into consideration in the same way as contributory negligence would be applied in the normal damage action."⁷⁹

Finally, the decision in *Kendi v Commissioner of Northwest Territories*⁸⁰ is interesting because it expressly rejects an "all or nothing" view of the consequences of the claimant's conduct.

The Saskatchewan Board is given statutory authority to take into account the financial needs of the victim or of the dependents of the victim.⁸¹ It is the only Board in Canada expressly given permission to do so. The first chairperson of the Saskatchewan Board, James Eremko, is of the opinion that the Board is not thereby empowered to increase an award for pain and suffering.⁸² It has been argued that inclusion of this factor makes the statute ambiguous and constitutes a legislative default,⁸³ but Peter Burns states that the financial need of the applicant for compensation plays no significant role.⁸⁴

B) CRIME REQUIREMENTS

In some situations statute law dictates that compensation for victims of crime is simply unavailable. This limitation relates to the kinds of offences for which compensation may be awarded. All of the acts except Ontario's contain schedules of offences; a victim of a crime not listed in these schedules need not waste his or her time applying for compensation. Most of the offences listed in the schedule to the various acts seem to involve some form of deliberate physical force, or threat of it, by manifestly irresponsible behaviour.⁸⁵ The occurrence of

79. Garet, *supra*, note 77 at 399; and McDonald, *supra*, note 78.

80. (1985) 1 W.W.R. 284 (N.W.T. S.C.).

81. *Saskatchewan Act*, *supra*, note 4, s. 11(b).

82. J. Eremko, "Compensation for Victims of Crime in Saskatchewan" (1969) 19 U. T. L. J. 263 at 269 [hereinafter *Eremko*].

83. D. Kirkham, "Compensation for the Victims of Crime" (A paper prepared for the Institute of Law Research and Reform of the Province of Alberta, 9 September 1968) 52 [unpublished] [hereinafter *Kirkham*].

84. Burns, *supra*, note 15 at 134.

85. Spiegel, *supra*, note 22 at 271.

offences for which compensation is claimed need only be proved on the balance of probabilities, not beyond a reasonable doubt.⁸⁶

It is clear that legislatures have empowered criminal injuries compensation boards to avoid some of the difficulties and technicalities of the common law, as was implied in the second section of this article. The maximum awards section of the *Ontario Act* states that the Board may deem more than one act to be an occurrence where the acts have a common relationship in time and place,⁸⁷ thus avoiding some problems with the common law of causation.

All of the boards are given considerable latitude in their determination of whether a crime has taken place for the purposes of compensation.⁸⁸ For example, every statute allows the board in question to deem that, if a death or loss occurs, the person causing it had the intent necessary for a conviction.⁸⁹ It has been held that the Ontario Board has the jurisdiction to conduct a hearing even though the alleged offender has neither been prosecuted for, nor acquitted of the offence giving rise to the injury or death.⁹⁰ In Ontario the payment of compensation is expressly not made conditional on whether or not there has been a conviction.⁹¹ In Manitoba there may have been no conviction because the charge was withdrawn or dismissed, but the Manitoba Board is expressly given authority to deal with applications

86. Grossman, *supra*, note 24 at 374, Lissaman, *supra*, note 24 at 31, Spiegel, *supra*, note 22 at 272 and *Re Castel and Criminal Injuries Compensation Board* (1978), 89 D.L.R. (3d) 67 (Man. C.A.); also see *Re: Morris et al and Attorney-General for New Brunswick* (1975), 63 D.L.R. 337 (N.B. C.A.).

87. *Supra*, note 1, s. 19(4).

88. In Spiegel's opinion the legislature of Ontario deliberately granted such latitude by not requiring the setting out of a schedule of specific *Criminal Code* offences which are compensable. Spiegel, *supra*, note 22 at 271-272.

89. Burns points out that this makes sense because the lack of capacity of an insane person who causes injury or death by committing a crime. He goes on to state, however, that there are problems when these deeming provisions are applied to situations involving children, or people in automatous states. Burns, *supra*, note 15 at 38.

90. *Re Skerget and Criminal Injuries Compensation Board* (1977), 16 O.R. (2d) 447 at 448 (Ont. H.C.J.).

91. *Ontario Act, supra*, note 1, s. 16(1).

for compensation anyway.⁹² In one Nova Scotia case it was held that a criminal acquittal is not conclusive for the purposes of a compensation application.⁹³

C) WHAT COMPENSATION MAY BE AWARDED FOR

Claims for only certain kinds of damages may be successfully made to criminal injury compensation boards. The Ontario Board has power to award compensation for pain and suffering to innocent victims of crime,⁹⁴ as do some other Boards, but the Boards of Manitoba, Alberta, British Columbia and Quebec do not. The parents of a deceased victim of crime in Nova Scotia were found not to be entitled to compensation for the grief and sorrow they suffered and the trauma and shock which followed the news of the murder.⁹⁵ The Ontario Board has found that it can award compensation for nervous shock but cannot award compensation for mourning and sorrow.⁹⁶ Drawing the line between these may amount to an exercise in metaphysics.

In Ontario there is no express authority for the award of compensation for loss or damage to property.⁹⁷ However, the Board does have jurisdiction to award compensation for expenses already incurred as a result of the victim's injury or death, or those expenses which, in the Board's opinion it is reasonable to incur.⁹⁸ Medical bills and funeral expenses would fall into this category. Peter Burns points out that every board in Canada has this second power.⁹⁹ In Ontario, eyeglasses, dental bridges or hairpieces directly damaged or destroyed as a

92. *Manitoba Act, supra*, note 4, s. 6(15).

93. *Flynn and Criminal Injuries Compensation Board* (1988), 49 D.L.R. (4th) 619 (N.S.S.C. A.D.) overruling *Saulnier v. Criminal Injuries Compensation Board* (1984), 62 N.S.R. (2d) 266.

94. *Ontario Act, supra*, note 1, s. 7(1)(d).

95. *Dixon v. Criminal Injuries Compensation Board* (1985), 79 N.S.R. (2d) 85 (N.S.S.C. A.D.).

96. Files numbered 200-157 and 100-84 referred to in Grossman, *supra*, note 24 at 381-382. See also Spiegel, *supra*, note 22 at 275.

97. Nor is there such authority in the legislation of any other province. This is because compensation for these losses would cost too much, according to Dickson. Dickson, *supra*, note 16 at 328-331.

98. *Ontario Act, supra*, note 1, s. 7(1)(f).

99. Burns, *supra*, note 15 at 25.

result of crime are seen as extensions of the person and therefore as allowable expenses.¹⁰⁰ The situation in Canada with respect to expenses to be incurred is quite complicated, and little benefit would result from summarizing it here.¹⁰¹

A Board may refuse to make, or reduce, an award of compensation if the applicant has failed to promptly report to the police the act or omission resulting in the injury in Ontario or failed to reasonably cooperate with them.¹⁰² *The Ontario Act* also contains a provision dictating that an application for compensation must be made within one year after the injury or death.¹⁰³ All of the statutes contain such limitation periods, unlike workers' compensation schemes.

A rule against double recovery also finds expression in the *Ontario Act*.¹⁰⁴ A past chairperson of the Ontario Board has stated rather starchy that the Board does not duplicate payments of any kind, but since 1986 the Board has been forbidden from counting welfare assistance and family benefits payments.¹⁰⁵ A person who has already received compensation for an injury or loss will not be compensated again by a criminal injuries compensation board,¹⁰⁶ and benefits may not be stacked with those from other social welfare schemes.¹⁰⁷

As an illustration of this rule, several statutes, other than Ontario's, prohibit the payment of an award to a member of a police force who has been injured while in the course of duty if that person is already receiving compensation for these injuries from the police purse.¹⁰⁸ To quote Chief Justice Dickson, criminal injuries compensation is

100. Spiegel, *supra*, note 22 at 273.

101. See Manarey, *supra*, note 34.

102. *Ontario Act*, *supra*, note 1, s. 17(2).

103. *Ibid.*, 1, s. 6; also see *Re Darling and The Criminal Injuries Compensation Board* (1976), 11 O.R. (2d) 766 (Ont. H.C.J.) [hereinafter *Darling*].

104. *Supra*, note 1, s. 17(3); see *Re Fregeau and Crimes Injuries Compensation Board* (1973), 2 O.R. 182 at 184. (Ont. H.C.J.) [hereinafter *Fregeau*].

105. Grossman, *supra*, note 24 at 372; see *Ontario Act*, *supra*, note 1, s. 17(3).

106. For a good summary of the situation in Ontario, see Spiegel, *supra*, note 22 at 279.

107. see, however, *Re Koyina* (1986), 6 W.W.R. 205 (N.W.T. S.C.).

108. See *Nova Scotia Act*, *supra*, note 4, s. 6(2).

designed to be the last insurer: other sources of compensation reduce awards.¹⁰⁹

Criminal injuries compensation boards are always subrogated to applicants when the parties responsible for causing the death or injury are sued,¹¹⁰ although one court has defined the party responsible rather narrowly.¹¹¹ The Manitoba Board is even empowered to require the repayment of compensation if the recipient of it fails to bring an action against the person who caused the loss or death in question.¹¹² It is more common for the claimant to be required to co-operate with the board if it does so,¹¹³ but not to have to sue the offender him or herself.¹¹⁴

The *Ontario Act* does not require a victim of crime who receives compensation to sue, but section 25(4)¹¹⁵ requires a person to whom compensation has been paid to notify the Board of the institution of an action for damages. The Board may be entitled to recover some of the money it has paid out if the action is successful.¹¹⁶

It has been implied throughout this summary that all statutes allow compensation payments to be made to the dependents of deceased victims of crime. As might be expected, the definition of dependent varies from statute to statute. In Ontario the definition of dependant is quite broad.¹¹⁷

It is usual for there to be limits on the monetary value of compensation that can be awarded, both for lump sum and periodic pay-

109. Dickson, *supra*, note 16 at 330.

110. For example, *Ontario Act, supra*, note 1, s. 26(2), (2a).

111. see *Saskatchewan (Attorney General) v. Muirhead* (1987), 59 Sask. R. 8 (Sask. Q.B.).

112. *Manitoba Act, supra*, note 4, s. 18.

113. As is the case in Ontario, *Ontario Act, supra*, note 1, s. 26(5).

114. *Ibid.*, s. 17(2); see also *Alberta Act, supra*, note 4, s. 14 (c)(1).

115. *Ontario Act, supra*, note 1.

116. see *Berlingieri v. De Santis* (1980), 31 O.R. (2d) 1 (Ont. C.A.) and *Criminal Injuries Compensation Board v. Ditroi* (1975), 8 O.R. (2d) 133 (Ont. C.A.).

117. *Ontario Act, supra*, note 1, s. 1 (1)(c), see Spiegel, *supra*, note 22 at 281.

ments.¹¹⁸ These limits, which were greatly increased in 1986, are set out in section 19 of the *Ontario Act*.

- 1) The amount awarded by the Board to be paid in respect of the injury or death of one victim shall not exceed, (a) in the case of lump sum payments, \$25,000; and (b) in the case of periodic payments, \$1,000 per month, and where both lump sum and periodic payments are awarded, the lump sum shall not exceed half of the maximum therefor prescribed in clause (a).
- 2) The total amount awarded by the Board to be paid to all applicants in respect of any one occurrence shall not exceed, (a) in the case of lump sum payments, a total of \$150,000; and (b) in the case of periodic payments, a total of \$250,000.¹¹⁹

They do not apply when a person is victimized as a voluntary act of good citizenship.¹²⁰ No less a person than the Chief Justice of the Supreme Court of Canada has opined that such statutory limits on compensation can be harsh on individual victims.¹²¹

D) THE MAKING OF ENTITLEMENT DECISIONS

In all of the Acts studied here provision is made for the making of entitlement decisions by boards. In Ontario, a decision may be made by a Board composed only of one person¹²² and on the basis of documentary evidence only,¹²³ but an applicant has a right to a *viva voce hearing*.¹²⁴ *At this hearing an applicant has the right to cross examine any police force members who testify against him or her, but not the sources relied upon by those members.*¹²⁵ *Great weight must be placed upon the testimony of police officers,*¹²⁶ even if it is hearsay.¹²⁷ *Viva voce hearings*

118. See Spiegel, *supra*, note 22 at 276.

119. *Supra*, note 1.

120. *Ontario Act, supra*, note 1, s. 19(5); see also Grossman, *supra*, note 24 at 381.

121. Dickson, *supra*, note 16 at 330.

122. *Ontario Act, supra*, note 1, s. 8(b).

123. Grossman, *supra*, note 24, at 376 referring to the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, s. 4.

124. *Ontario Act, supra*, note 1, ss. 9-10.

125. Lischka, *supra*, note 39.

126. *Batic v. Criminal Injuries Compensation Board* (1987), 1 O.A.C. 68 (Ont. Div. Ct.) [hereinafter *Batic*].

127. Lischka, *supra*, note 39 at 135.

are always held in rape and child abuse cases in Ontario.¹²⁸ In British Columbia, Manitoba and Quebec decisions are made by workers compensation boards, and not necessarily by way of a *viva voce* hearing.¹²⁹ One member of a Board is allowed to hold an entitlement hearing in several jurisdictions, including Ontario, but a quorum of the Board has to be present to review an entitlement decision.¹³⁰ Hearings are usually open to the public in Ontario.¹³¹ The rules of procedure to be followed by the Ontario Board are set out in the *Statutory Powers Procedure Act*.¹³² No Board practice rules have been filed under the *Ontario Act*, which seems typical¹³³ and there are very few cases in which how such hearings ought to be run are considered.¹³⁴

In Manitoba and Alberta there is a requirement that one member of the Board have legal training,¹³⁵ but there is no such requirement in Ontario or Saskatchewan. None of the members of the Ontario Criminal Injuries Compensation Board were practising lawyers in 1988.¹³⁶ In *Lischka*¹³⁷ the Ontario High Court of Justice stated

"The Board is made up of persons who are not legally trained and I think it is unfair to the members of that Board and to the spirit of this legislation to subject their reasons for judgment to the nice scrutiny to which reasons for judgments of judges are properly subjected."

At least one member of the Board is a lawyer in Saskatchewan.¹³⁸

128. Lissaman, *supra*, note 24 at 31.

129. Grossman, *supra*, note 24 at 375.

130. *Ontario Act*, *supra*, note 1, ss. 8-10.

131. *Ibid.*, s. 12.

132. *Supra*, note 123.

133. My library search for such regulations made under the various statutes was fruitless. *Ontario Act*, *supra*, note 1.

134. One case is *Jewers v. Criminal Injuries Compensation Board* (1987) 44 D.L.R. (4th) 188. (N.S.S.C. A.D.). See, however, Spiegel's excellent article. Spiegel, *supra*, note 22.

135. *Alberta Act*, *supra*, note 4, s. 20(3) and *Manitoba Act*, *supra*, note 4, s. 2(3).

136. Spiegel, *supra*, note 22 at 270.

137. *Lischka*, *supra*, note 39 at 135.

138. The first chairperson of the Board, William Eremko, was a lawyer as is the present chairperson, Morris Chemesky, Q.C.

E) THE POSSIBILITY OF JUDICIAL REVIEW

I have examined some of the statutory guidelines applicable to the Criminal Injuries Compensation Board of Ontario, using the criminal injuries compensation statutes of other provinces as reference points for the further development of these guidelines. This brings me to the last subject of this brief comparative analysis, and one of the most important ones for the purpose of this article, judicial review. To what extent do the various statutes allow it to take place?

The legislature which passed Ontario's *Compensation for Victims of Crime Act* apparently tried to create a scheme relatively immune from judicial interference. The only grounds for review of a Board decision in Ontario,¹³⁹ British Columbia,¹⁴⁰ and Nova Scotia¹⁴¹ are questions of law. Both questions of law and questions of jurisdiction are made proper subjects of judicial review by the sections in the criminal injuries compensation statutes of Alberta¹⁴² and Manitoba.¹⁴³

In Saskatchewan, judicial review of a Board decision is made difficult. Section 33(1) of the *Saskatchewan Act*¹⁴⁴ states that, with one exception that is of no consequence to us here,

... there shall be no appeal from an order or decision of the board under this Act and its proceedings, orders and decisions shall not be reviewable by any court of law or by certiorari, mandamus, prohibition, injunction, or other prohibition.

Only Newfoundland has a similar privative clause.¹⁴⁵ In Quebec applications for judicial review are rare, and they are treated as if they originated from decisions of that province's workers compensation board.¹⁴⁶

139. *Ontario Act, supra*, note 1, s. 23.

140. *British Columbia Act, supra*, note 4, s. 18(1).

141. *Nova Scotia Act, supra*, note 4, s. 24.

142. *Alberta Act, supra*, note 4, s. 18(1).

143. *Manitoba Act, supra*, note 4, s. 21(1).

144. *Supra*, note 4.

145. *Newfoundland Act, supra*, note 4, s. 36(1).

146. Burns, *supra*, note 15 at 387.

DOES THE BOARD MAKE LAW?

In this part of the article I shall examine some of the entitlement decisions made by the Saskatchewan Criminal Injuries Compensation Board. It will be assumed that the Saskatchewan decisions are similar to those made in Ontario. I shall utilize some of the summaries of decisions contained in a draft of the Saskatchewan Board's 1984 Annual Report,¹⁴⁷ will begin by examining the ninety-one decisions which the Board has issued in the period from the beginning of 1984 to the middle of September 1984.

This examination will be conducted with two questions in mind. First, does the Board decide like cases in the same way? Second, has the Board developed the exercise of its discretion into any fixed rules or principles?

An examination of Saskatchewan decisions rather than Ontario ones has several advantages for my purposes. The most important is manageability, as in any given year many more Criminal Injuries Compensation Board decisions are made in Ontario than in Saskatchewan.¹⁴⁸ Also, the full Saskatchewan decisions were available to me.

Studying these decisions has more academic value than examining the summaries of them which are produced by the Saskatchewan Board.¹⁴⁹ Spiegel, who used to sit on the Board, does not find the particulars of decisions contained in the Board's Annual Reports to be of

147. It covers decisions made during the period from April 1, 1983 to March 31, 1984: *Criminal Injuries Compensation Act of Saskatchewan Fiscal Year End Report April 1, 1983-March 31, 1984*, (Saskatchewan, Department of Justice, 1984) [hereinafter *Report*].

148. The Ontario Board made 970 awards from April 1, 1983 to March 31, 1984. This compares with 91 cases in the period being examined. See *The Fifteenth Report of the Ontario Criminal Injuries Compensation Board for the fiscal year April 1, 1983 to March 31, 1984* (Toronto: Criminal Injuries Compensation Board, 1984) 1 at 12.

149. The Ontario Board is obligated to summarize and publish its decisions periodically (Ontario Act, *supra*, note 1, s. 4). The Saskatchewan Board also does so in its annual reports. The way that decisions are organized and summarized in these reports makes extracting the meaning difficult. Discovering governing principles, except that the people in the cheap seats do not get a very expensive version of the justice show, is rather like trying to learn the Civil Code of California by watching a month of Judge Wapner on *People's Court* (Rochester, Channel 13-R, 5:30 p.m., Max Edwards Productions, Lorimar Pictures) [hereinafter *People's Court*.] There are plans to revamp the Annual Reports of the Ontario Criminal Injuries Compensation Board.

much value in assisting counsel as to the quantum of awards.¹⁵⁰ Miers has examined the decisions of the Ontario Board, but some time ago,¹⁵¹ and Faieta has looked at those which involve spousal assault.¹⁵² Finally, a brief survey of the summarized decisions and contained in the Board's annual reports¹⁵³ has been made by another author. Murphy states that the Ontario Board has reduced or denied claims for compensation because of the illegal, immoral or imprudent behaviour of the claimant, as defined by the Board members themselves.¹⁵⁴ He lists as open ended the category of instances where this has occurred. The reasons for doing so include

“failing to report to the police within a reasonable time, participation in criminal conduct, membership in the underworld, homosexuality, drunkenness, family disputes, immoral conduct, imprudent behaviour.”¹⁵⁵

This view of how the Ontario Board has decided cases is shared by Spiegel,¹⁵⁶ but he is somewhat more optimistic concerning what the future will bring. He is of the opinion that the Board's many new members may well take a more liberal or forgiving view of human nature in how they apply this section 170.¹⁵⁷ It seems only fair to give the Ontario Board a chance in the light of other indications in this direction.

Roger Carter's rather tart comment that no distinct body of jurisprudence has developed around the decisions of the Saskatchewan Criminal Injuries Compensation Board must always be kept in mind.¹⁵⁸ In a sense such decisions may always be derivative as the lay members of the Board struggle to reflect what is going on in

150. Spiegel, *supra*, note 22 at 282.

151. Miers, *supra*, note 24.

152. Faieta, *supra*, note 24.

153. Murphy, *supra*, note 16 at 544.

154. *Ibid.* at 544-545.

155. *Ibid.* at 545.

156. See Spiegel, *supra*, note 22 at 286.

157. *Ibid.* at 289.

158. Carter, *supra*, note 61 at 170.

the law of tort. The situation in Ontario is similar as was indicated by Galligan in *Lischka*¹⁵⁹ when he stated:

"I think it should be kept in mind that these cases are not ones in which the court is assessing various degrees of civil liability for certain damages. The Board by its statute is obliged to consider, having regard to all of the circumstances, whether it is an appropriate case for somebody who is injured to be compensated out of public funds."

Also, speed of decision-making may be more important to the drafters of Ontario's criminal injuries compensation legislation than purity of legal doctrine. Certain compromises are necessary if four applications for compensation are to be heard every hearing day,¹⁶⁰ or if only an hour is allocated to a hearing.¹⁶¹ One is reminded again of *People's Court*.¹⁶²

Some flavor of the jurisprudence which has developed under the Ontario statute is given in the following quotation from Grossman, a past chair of the Board

"Drunks are easy marks for muggers" and 'we take the view that it is asking for trouble to stagger through the streets at night "under the influence." If the applicant engaged voluntarily in a free fight we may even reject the claim. Where the applicant began on equal terms and one participant pulled a knife, a reduced award could be made."¹⁶³

It is interesting to note the importance of alcohol and fighting in this account; the two go together in some taverns.

With this in mind it is time to return to an analysis of the decisions of the Saskatchewan Criminal Injuries Compensation Board.

159. *Lischka*, *supra*, note 39 at 136.

160. Grossman, *supra*, note 24 at 380.

161. As happens when the case is not disputed. See Lissaman, *supra*, note 24 at 31. Sometimes, if a case is disputed, an entire day will be set aside.

162. *People's Court*, *supra*, note 149. A case takes 15 minutes in this court, although some editing is done.

163. Grossman, *supra*, note 24 at 375.

A) ARE LIKE CASES DECIDED IN THE SAME WAY?

At first glance, Board compensation awards for pain and suffering in Saskatchewan seem easily classifiable according to the offences leading to the various types of physical injury for which a loss is claimed. Awards for pain and suffering were chosen because they are supported by more facts in the decisions of the Saskatchewan Board than, for example, claims for expenses.¹⁶⁴ They are also more interesting to study.

If the cases which do not involve some disorienting factor on the part of the applicant are organized under the heading of a particular kind of physical injury, such as a broken arm, then it would seem quite easy to determine whether the Board decides like cases in the same way. However, the facts conspire to make such a simple comparison difficult, as it is relatively unusual for an applicant to be suffering from just one injury. Also, care must be taken to select decisions in which the applicant was seen to be entirely free from blame.

What used to be called rape¹⁶⁵ provides a good vehicle for overcoming these two obstacles to comparison of decisions. If the victim was very young and a relative stranger to her assailant, then the Board's entitlement decision cannot be thought to be influenced by any concept of blame. Furthermore, since according to the law of tort physical injury is not a prerequisite for a damage award, similar offences can be compared without having to worry about how they resulted in different physical injuries. This may be possible if the act was not accompanied by much physical violence. Of course, this approach may assume away the problem, because it assumes that the emotional damage caused by such an act is the same whoever the victim.¹⁶⁶

The question of appropriate compensation for victims of sexual assault was considered in six of the ninety-one cases in the period being

164. Cases summarized in the Board's draft 1984-1985 annual report contain no explanation of what compensation was awarded for, other than pain and suffering: *Report, supra*, note 147.

165. It is now aggravated sexual assault. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 273.

166. Emotional damage of this sort would be largely uncompensated were it is not for criminal injuries compensation schemes. This is recognized by several authors. See, for example, Dickson, *supra*, note 16 at 331 and Grossman, *supra*, note 24 at 381-382.

examined. In case 1193 the Board reduced its award because of her association with strangers, so it will not be considered here. In three out of the five remaining decisions all of the conditions set out in the above paragraph were met. The fifteen-year-old girl who was sexually assaulted by her employer in case 1125 was awarded \$2,750 for pain and suffering. The seventeen-year-old who was sexually assaulted by her cousin in case 1137 was awarded \$4,300, whereas the twelve year old who was assaulted sexually by her friend's father in case 1176 was awarded \$2,900. Physical violence was not reported to be present in any of these cases, although threats or intimidation were involved in all of them. The very terse reasons for decision given by the Board indicate that, in two cases, psychiatric help was sought by the victims; that they all suffered severe emotional trauma is obvious.

If the fact that the person in case 1137 had to have a therapeutic abortion, which procedure could have involved even more emotional difficulties is taken into account, perhaps we can say that the Board does decide like cases in the same way. Certainly there is not much difference between \$2,750 and \$2,900. However, as is the case with courts, the Board can only be taken to set down a range within which the damages awarded in similar cases will fall. This point is illustrated by the two Board decisions which follow.

In case 1119 an eighty-seven year old woman was attacked by a man who tried to rape her. In the struggle which ensued five of her ribs were fractured and she was badly bruised. The Board stated that this woman was in hospital for eighteen days as a result of the attack and suffered severe emotional trauma. It gave her \$2,750 for pain and suffering. Yet in case 1193, the one mentioned earlier in which the award was decreased because of the applicant's conduct, \$3,200 was awarded for pain and suffering after the decrease. Here the applicant's only physical injuries were scrapes and abrasions to her back, legs and buttocks.

The Saskatchewan Board decisions in the relevant period contain four examples of people who were assaulted by being hit in the face. In all of these cases provocation appears to have been lacking. It is difficult to make a comparison of awards for pain and suffering in these cases without knowing how serious and disfiguring these injuries were, and nothing short of pictures would provide this sort of information, but a comparison of awards will be made anyway. Certainly the draft annual report is very terse in respect to the description of injuries which it gives.

In all of the cases being examined the injuries sustained went beyond bruises, but there were no bones broken, with the exception of teeth in two cases. The lacerations sustained by the victim were probably the most severe in case 977, where the award was \$1,750. The face, temple, and the right side of the applicant's neck were cut as a result of being struck with a beer bottle. The same weapon was used in case 992, but apparently with much less damaging results. The applicant was awarded damages of \$800; she suffered lacerations to her lips, bruises to her mouth, and two fractured teeth. In case 980 the applicant sustained bruises and lacerations to his face and chipped an incisor; the Board gave him \$750. Finally, an identical amount was given to the applicant in case 985 who was being compensated for lacerations to his lips and severe bruising to his gums.

Subject to the reservations expressed earlier, at least three of these awards for head injuries seem to be quite consistent with each other. Perhaps they all are. It appears that the Board has some kind of internal schedule dictating how much money it will award for certain injuries. In some workers compensation schemes this schedule finds explicit expression. Such a schedule exists, of course, under the Ontario legislation,¹⁶⁷ although its abolition is now being seriously proposed. Abolishing this way of thinking will be more difficult.

That the Saskatchewan Board does take precedent into account in the sense of paying some attention to damage awards made by courts is suggested by the presence of an apparently up-to-date *Goldsmith's Damages For Personal Injury and Death in Canada 1982-1983*.¹⁶⁸ in the Saskatoon office of the Criminal Injuries Compensation Board. There exists a sophisticated statistical breakdown of the awards of the Ontario Board made in 1980, organized by type of injury. So the Board does attempt to decide like cases in the same way, and an examination of its decisions indicates the achievement of some degree of success. Grossman indicates that the Ontario Board attempts to do the same through the development and maintenance of an internally available "meat chart."¹⁶⁹ Lissaman, who sat on the Ontario Board for a num-

167. Workers' Compensation Act, R.S.O. 1980, c. 539, s. 45(3) states that: "The Board may compile a rating schedule of percentages of impairment...that may be used as a guide in determining the compensation payable in permanent disability cases."

168. R.C. Stonehouse, ed. (Toronto: Carswell, 1983).

169. Grossman, *supra*, note 24 at 381.

ber of years, states that the Board's awards are perhaps forty percent of court awards in similar cases.¹⁷⁰

B) HAS THE BOARD DEVELOPED THE EXERCISE OF ITS DISCRETION INTO ANY FIXED RULES OR PRINCIPLES?

The more difficult to answer of the two questions posed at the beginning of this section is the second one. Has the Saskatchewan Board developed the exercise of its discretion into any fixed rules or principles? Discovering them may help to explain what the Board does in a way which even careful scrutiny of its empowering statute does not. It is with this question in mind that I once again turn to the decisions of the Saskatchewan Board.¹⁷¹

In 1984 the Saskatchewan Board denied compensation completely in only about twenty percent of the cases which came before it, and awarded only a fraction of the compensation that would otherwise be available in about a further ten percent of the cases it heard.¹⁷² These figures went down to nine and one percent respectively in the Board's 1987 fiscal year.¹⁷³ In Ontario four percent of all applications heard in the Board's 1984 fiscal year were heard but denied.¹⁷⁴ There is no applications reduced category in the statistical summary contained in the Ontario Board's 1984 Annual Fiscal Year-End Report.¹⁷⁵

The above may be a misleading picture of the percentage of applications which the Board disallows in or in part, because some people are probably discouraged from even applying for compensation by Board

170. Lissaman, *supra*, note 24 at 30.

171. Contrary to what Grossman implies, the brief summaries of the decisions of the Ontario Board are not very helpful in this regard. See Grossman, *supra*, note 24 at 380.

172. These calculations were performed with figures provided by an examination of the 91 decisions the Saskatchewan Board handed down during the period from the beginning of 1984 to the middle of September 1984. The Board denied compensation totally in 19 cases, and partially in a further 10. Unfortunately, the Board's 1984 draft annual report did not permit the extraction of this kind of information. See *Report, supra*, note 147.

173. *Criminal Injuries Compensation Act of Saskatchewan Fiscal Year End Report April 1, 1987 to March 1, 1988* (Saskatchewan, Department of Justice, 1988) at 6.

174. The Fifteenth Annual Report of the Ontario Criminal Injuries Compensation Board, *supra*, note 148.

175. *Ibid.*

employees, but it is the best picture available. Two principles emerge when this picture is examined.

(i) *The Tavern Principle*

My examination of the cases where the Board denied compensation completely shows that the most common reasons given for doing so were intoxication of the claimant, that the claimant provoked or initiated the injury complained of, or that there was insufficient evidence that the claimant was the victim of a crime. It is not useful to see these as self-contained alternative categories, for when the board gives the second as a reason for its refusal to award compensation, often the third seems equally applicable. It may be unclear to the Board whether or not a crime occurred, let alone whether or not the applicant committed it. The majority of the denied claims involve situations where the applicant was intoxicated and either provoked or caused the injury which he or she sustained, or was unable to show otherwise. In short, to make a connection with the worthiness rationale for criminal injuries compensation schemes, the victim was to blame for his or her misfortune.

This leads me to pose the "tavern principle" of entitlement to compensation. I call it that because the principle seems to find strongest application to applications for compensation arising out of altercations in taverns.¹⁷⁶ It is

people will not be awarded compensation for injuries sustained when intoxicated, which injuries are alleged to be the result of crime, because it will be too unclear to the Board how the injuries were caused, and it will be too difficult for the claimant to show that his or her conduct didn't cause the injuries.¹⁷⁷

This principle is not expressed in any of the statutes which were examined in the third part of this article, although it may be implicit to some of them.

The Board gives other reasons for denying benefits, but they appear less frequently. The most common of these arise from the failure of an applicant to co-operate with either the medical authorities or the

176. For an Ontario case in which this principle could have been applied with the same result as was arrived at by the court to which the appeal in question was taken, see *Lischka, supra*, note 39.

177. The decisions made according to this principle are somewhat similar to the ones listed under "Denial of Awards" by Spiegel in his review of the Ontario Board's jurisprudence. Spiegel, *supra*, note 22 at 285.

police. Failure to co-operate with medical authorities will be examined first.

Case 1084 contains the idea that an applicant's failure to follow medical advice after an injury indicates that the injury complained of cannot have been very serious in the sense of being painful. Case 1096 involves a person whose injuries may have been aggravated by her lack of concern; they were not entirely caused by crime. Perhaps both cases are explained by a variant of the worthiness rule: people who don't look after themselves don't deserve as much compensation. Partial rather than total denial of compensation is involved here, but the reasoning behind the entitlement decision is no doubt the same in both cases.

I have shown that the criminal injury compensation statutes of Alberta¹⁷⁸ and Nova Scotia¹⁷⁹ expressly make the failure to submit to a medical examination a reason for the denial of benefits, and that this is not the case in either Saskatchewan or Ontario. However, in both of these provinces this sort of behaviour can certainly be taken account of as behaviour directly or indirectly contributing to the death or injury of the victim.¹⁸⁰

Failure to co-operate with the police is a reason for denial of benefits which takes in a lot of ground. It has earlier been shown that the *Saskatchewan Act* gives the board clear authority to deny compensation where the victim has failed to report the act or omission resulting in death or injury to the police within a reasonable time.¹⁸¹ *The Ontario Act* requires such a report to be made promptly.¹⁸² The Saskatchewan Board denied compensation for this reason in case 1092; there was also some doubt that an offence had been committed.

The Saskatchewan Board tends to discount the possibility of retaliation as a result of an applicant for compensation laying charges against his or her assailant. It was earlier noted that failure to assist in

178. *Alberta Act, supra*, note 4, s. 8(2)(c).

179. *Nova Scotia Act, supra*, note 4, s. 25(2)(a).

180. In Saskatchewan, of course, such discretion is absolute. *Saskatchewan Act, supra*, note 4, s. 10(1) and *Ontario Act, supra*, note 1, s. 17(1).

181. *Supra*, note 4, s. 12(1)b.

182. *Supra*, note 1 s. 17(2).

the prosecution of alleged offenders is explicitly allowed as a reason for denial of benefits only in Alberta.¹⁸³ An example of a Board decision placing little weight on an applicant's fear of retaliation is provided by illustration number two of the "examples of disallowed or reduced claims" given in the Saskatchewan Board's draft 1984 report. The applicant in this case received twenty percent less than he would have otherwise because of his failure to assist the police in the laying of charges. He had been attending a party when he was assaulted in a washroom; presumably he knew who his assailant was, but didn't want to tell the police. The Board obviously feels that persons who do not assist the police are not as deserving as those who do.

The idea here is that assisting people who do not assist the police would not serve public policy. However, if the danger of reprisal is a large one, such a condition may result in justice not being done, as it may place the needs of the justice system before the needs of the individual claimant. People may be discouraged from applying for criminal injuries compensation as a result. A similar situation existed recently in Ontario where a woman was found to be in contempt of court and jailed for refusing to testify at her common law spouse's trial for assault. The assault charge, of course, had been laid because the woman alleged she had been beaten up; now she was afraid that she was going to get beaten up again by her common law spouse if she testified against him.

(ii) *The Imprudent Person Principle*

This leads to a second category of decisions, those where the Saskatchewan Board reduced the compensation awarded to the victim, but still gave him or her something. In almost every one of these cases the Board seems to be condemning the applicant's bad judgment. Alcohol was sometimes involved, but not to as great an extent as in the first category of decisions.¹⁸⁴ Already mentioned was case 1193 in which the Board reduced its compensation award to the victim of a sexual assault because she was using illegal drugs at the time of the assault. This was only one of the reasons given for the Board's reduction, of course, but it does illustrate the importance of drugs in this line of cases.

183. *Alberta Act, supra*, note 4, 2. 8(2)(b).

184. These decisions are similar to the Ontario ones listed under "Reduction of Awards" by Spiegel in his review of the Ontario Board's jurisprudence. Spiegel, *supra*, note 22 at 286.

In case 1112 the applicant voluntarily agreed to fight, and was injured as a result. His compensation award was reduced by fifty percent. This happened also in case 1142 when another applicant provoked his particular assailant by wrongfully accusing him of stealing a woman's purse. Finally, in case 1175 the board chopped in half the award which would have otherwise come to a Mr. Klenk because he "... initiated the altercation and refused to conduct himself in an appropriate manner." The principle here appears to be that people who start fights will at most receive half of what they would if they had been victims of unprovoked assaults. Like all principles, this one has exceptions. It is interesting to note the large role assigned to provocation here. The second relationship I found can be expressed rather clumsily as the imprudent person principle. It is that:

people who expose themselves to significant risks and are injured as a result will be deprived of full recovery by reason of their faulty judgment, although they will probably be awarded over half of their assessed damages.

For example, the applicant in case 1110 was beaten up by her drunken boyfriend. The board reduced her award by twenty percent because she continued to live with him even though she knew him to be violent when intoxicated. A person who tried to disarm his brother and was shot in the leg as a result had his award reduced by thirty percent because "... did not exercise good judgment and deliberately put himself in hazardous circumstances" in case 1192. Case 1005 involved an application for compensation made after an assault by two males; the applicant suffered a broken jaw for using his hands in a suggestive manner.

The reasoning in the above cases seems to be a derivation from the rules of contributory negligence. These rules have been stated to be of importance by the chairman of the Saskatchewan Criminal Injuries Compensation Board.¹⁸⁵

In this context it is interesting to note that the effect of provocation is much greater in criminal injuries compensation schemes than it is either in the criminal or the civil courts.¹⁸⁶ In criminal law provocation may be relevant to a judge's sentencing decision after a finding of

185. L. Savage, "Negligence to be emphasized by board" *The Commentator*, (Sunday 16 January 1983 [hereinafter *Savage*]).

186. Burns, 186. *Saskatchewan Act, supra*, note 4, s. 10(1)*supra*, note 15 at 362.

guilt, or it may play the even more limited role of reducing a murder conviction to one for manslaughter. In tort law the successful pleading of provocation may only reduce damages.

The role of causation in a criminal injuries compensation scheme has been commented on in the second section of this article. From the Saskatchewan Board's point of view an individual may cause his or her injuries merely by being in a particularly seedy bar while intoxicated. As mentioned earlier, this is using causation in a rather blunt sense.

In a related category are awards which were reduced because applicants failed to co-operate with medical authorities (case 1196) or failed to co-operate with the police by reporting an offence promptly or within a reasonable time (case 1092). The reasoning involved here has been discussed earlier. Although the reduction of compensation under the first head may be justified by the logic of contributory negligence, the Saskatchewan Board is only given express statutory authority to deny the awarding of compensation completely under the second head. However, as has been noted several times, in Saskatchewan the Board has been granted absolute discretion by the legislature in the making of entitlement decisions.¹⁸⁷ In Ontario, of course, the Board's discretion is not absolute, but must be exercised in accordance with the Act.¹⁸⁸

The Saskatchewan Board does sometimes award compensation for loss or damage to property, although the property is always of little value, being clothing or the like. It has been noted that the Board has no jurisdiction to do so in either Ontario or Saskatchewan. However, it does not seem objectionable for the Board to state that it is compensating victims for expenses they have already incurred¹⁸⁹ in light of the small amounts of money involved, and the theoretical problems involved with excluding compensation for property damages.¹⁹⁰

The Board may also refuse to award any compensation for reasons which have nothing to do with the worthiness of the victim. This happens where the applicant has already received full compensation (in

187. *Ontario Act, supra*, note 1, s. 5.

188. *Saskatchewan Act, supra*, note 4, s. 13(a) and *Ontario Act, supra*, note 1, s. 7(1)(a).

189. *Alberta Act, supra*, note 4, s. 8(2)(b).

190. See the section of this article entitled "Background", *supra*, p. 113.

the Board's eyes) from another source. This occurred in case 1082, which involved an application for compensation in the context of a death brought about by the death of the victim's son in a car accident. I have shown that victims can be defined as dependents under the *Saskatchewan Act*,¹⁹¹ as they can in Ontario as well, given that a death has occurred as a result of the crime.¹⁹² Although it is not explicitly stated in the case 1082, an award was probably not made because damages had already been paid under an automobile insurance policy.

Dependents may be viewed as unworthy because of the actions of the person who they claim. This is possible even if this person died as a result of being a victim of a crime. It was developed in part three of this article how that such an apparently harsh rule may be explained as an extension of the principle that a person may not benefit from his or her wrongful act. Only in British Columbia¹⁹³ is there express statutory for such an extension, as was previously mentioned. There are some examples of this principle in the Saskatchewan Board's draft 1984 annual report. A father was denied compensation for the death of his son in case 982 because the board found that the son was the perpetrator of the hostage taking incident in which he died. Compensation was also denied to the sister of a deceased person in case 1029. The role of the deceased in his death must have been a large one, for his assailant was acquitted of murder on the ground of self-defence.

It is interesting to note that the Saskatchewan Board does not appear to have made many awards to people who were injured while making citizen's arrests.¹⁹⁴ It did make payment to an individual in case 1000 who was injured when trying to stop several males from assaulting two teenagers. However, it also reduced compensation to an individual who had been assaulted after having witnessed the assault of another person, and as a result of going over and asking a group of people what was going on. The decision in case 1024 does not seem to encourage people to assist in the enforcement of the law, assuming that this person was going to make a citizen's arrest.

191. *Supra*, note 4, ss. 2(c), 10(1)(f).

192. *Ontario Act, supra*, note 1, ss. 1(1)(c), 5(f).

193. *British Columbia Act, supra*, note 4, s. 5(b).

194. This is true of the period from April 1, 1983 to the middle of September 1984. See *Report, supra*, note 147.

The Board did make at least two awards in the period covered by its 1984 Annual Report to policemen injured while in the course of duty.¹⁹⁵ It does not appear that the policeman in either case 1048 or case 979 were arresting or attempting to arrest anybody at the time their injuries were caused, although this may have occurred immediately after their injuries were sustained.

Finally, an examination of the Saskatchewan Board's decisions shows that conviction of the person who caused the injury or death complained of is not a condition which must be satisfied before compensation is awarded. As mentioned in the Statutory Guidelines section of this article, this idea is made express in the Ontario legislation,¹⁹⁶ it has been adopted by the Saskatchewan board in numerous cases, despite a lack of explicit statutory authority to do so. This occurs most commonly where the alleged offender has not yet been apprehended, (case 975) or has not yet been dealt with by criminal court, (case 979). Of course, in Saskatchewan hearings of the Board must be held in camera if the person who caused the loss complained of has not been convicted, or even charged.¹⁹⁷

The Saskatchewan Board sometimes substitutes its judgment for that of a criminal court, though the degree of proof involved is different. Proof of a compensable event need only be on a balance of probabilities.¹⁹⁸ In case 1100 a charge of rape against an accused had been dismissed, and presumably no other charges against him had been laid. However, the Board was satisfied that there had been an assault, and granted compensation. It has been shown earlier that an award can be made even where the person injured refuses to lay charges.¹⁹⁹ In case 1125 and case 1106 the Board granted compensation even though the person accused of causing the applicant's loss had died before he or she could be dealt with by the criminal courts. Finally, in case 1067 compensation was granted although a stay of proceedings

195. As has been previously noted, such awards are exceedingly rare in Ontario. Lissaman, *supra*, note 24 at 30.

196. *Ontario Act, supra*, note 1, s. 16(1). See also Skerget, *supra*, note 90.

197. *Saskatchewan Act, supra*, note 4, s. 16(a-c). See also *Ontario Act, supra*, note 1, s. 12.

198. This is also the case in Ontario. Lissaman, *supra*, note 24 at 31.

199. This was illustrated by the case which involved threats of retaliation. See Does the Board Make Law & The Tavern Principle in this article, just after footnote 182.

prevented the further criminal prosecution of the person alleged to have caused the injuries in that case. So the Saskatchewan Board is moving towards the situation of the Board in Manitoba, the empowering statute of which allows compensation to be awarded even if the criminal charge connected with the loss suffered has been withdrawn or dismissed.

JURISPRUDENCE AND CRIMINAL INJURIES COMPENSATION

The picture which emerges from an examination of the decisions of the Saskatchewan Criminal Injuries Compensation Board is an interesting one from a jurisprudential point of view. The Board does appear to decide like cases in a similar way. Most awards of the Board in similar situations fall within certain ranges. Particular principles and rules appear with regularity in the Board's decisions. For the purposes of this article, it is assumed that an examination of the Ontario Board's decisions would result in the revelation of much the same patterns. For a consideration of what patterns in decision-making deserve the adjective legal and therefore whether or not law is being made, I must turn to jurisprudence. In doing so I will take ideas from systems of jurisprudence developed by three people: Hart, Dworkin and MacCormick.²⁰⁰ Before doing so it must be emphasized that these systems are only separate in the minds of their respective creators. MacCormick owes much to Hart as well as to Dworkin, for example.

It may be unfair to expect such systems to be of much assistance. Issues involved the reasoning of those with powers of decision granted under particular statutory schemes have not received much attention from jurists. Dworkin is typical in this respect; he confines himself to situations where judges make decisions of jurisprudential import. This leaves a large gap in the jurisprudence of administrative tribunals, as Kenneth Culp Davis²⁰¹ points out.

Before starting to determine whether or not the Saskatchewan Criminal Injuries Compensation Board makes law it is useful to point

200. H.L.S. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) [hereinafter *Hart*]. Ronald Dworkin, *Taking Rights Seriously* (Bath: Gerald Duckworth & Co. Ltd., 1977) [hereinafter *Dworkin*]. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978) c. 9 [hereinafter *MacCormick*].

201. see Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, (Baton Rouge: Louisiana State University Press, 1969) [hereinafter *Davis*].

out that nearly all systems of reasoning contain some notion of precedent. This concept is not the property of jurisprudential thinkers; as what has happened before is always relevant to what will happen next, unless the world is a random place.

MacCormick would probably agree with Dworkin that a concept basic to law is "the fairness of treating like cases alike."²⁰²

So would most clients of legal clinics who know someone else who has received a benefit that they are after. It follows that cases should not be decided in an arbitrary fashion, as legal reasoning in this context involves "the rational development of general policies or principles."²⁰³ Although Dworkin recognizes the importance of precedent when questions of principle are involved, he does not make a place for it when issues of policy are being decided. His difficult definition of policy involves the attainment of social or collective goals, such as economic efficiency, by the payment of money to one party or another.²⁰⁴ According to Dworkin, even judges shouldn't have to decide similar cases in the same way when policies are involved, although Dworkin may be using the word policy in a unique sense.

It has earlier been shown that the Ontario legislature views a tribunal rather than a court as the appropriate place for decisions concerning criminal injuries compensation to be made. Perhaps the role of precedent ought not to be as great in proceedings involving a statutory power of decision as it is when judges are involved. The legislature appears to have chosen to solve problems of entitlement to criminal injuries compensation in a quick and inexpensive way.²⁰⁵ However, from what has been written earlier, it follows that precedent should at least be relevant to situations like those considered by the Ontario Criminal Injuries Compensation Board. Precedent can be seen as a way of making sense of decisions because it does boil down to an assertion that decisions should be made in a rational way.

202. Dworkin, *supra*, note 200 at 113.

203. J. Claydon & J. Galloway, *Law and Legality: Materials on Legal Decision Making* (Toronto: Butterworths, 1980) at 12-17.

204. Dworkin, *supra*, note 200 at 22.

205. Grossman, *supra*, note 24 at 380.

Dworkin gives the concept of rights a central place in his system of jurisprudence.²⁰⁶ His purpose in developing the concept appears to be to limit the power of judges to make law on their own, although legislatures can take away rights. Dworkin has been criticised for failing to state exactly what rights are;²⁰⁷ his definition of them seems to emphasize the substantive rather than the procedural. Rights from either point of view do not abound when the position of an applicant before either the Saskatchewan or Ontario Criminal Injuries Compensation Boards.

A reading of the Ontario legislation reveals that two rights may exist in the context of criminal injuries compensation; a right to apply for compensation, and the right to have a hearing at which entitlement to compensation is determined. I could find no Saskatchewan court cases in which the existence of these two rights was considered but two Ontario court decisions have been reported. In passing it should be noted that the first chairman of the Saskatchewan Board is of the opinion that an applicant for compensation is entitled to be heard.²⁰⁸

In *Sheehan*²⁰⁹ the Ontario Court of Appeal stated that

"The applicant has, under this legislation, no right to compensation, his right being limited to making an application therefor to the Board."²¹⁰

This is somewhat narrower than a right to be heard, but at least constitutes an explicit recognition of a right to apply for compensation. However, that a right to a hearing exists in certain circumstances can be drawn from the decision of the Ontario Divisional Court in *Darling*.²¹¹

In *Darling*, an application for compensation had been submitted to the Board after the time set out for doing so under the Ontario statute had expired. This was because the lawyer who was supposed to be helping

206. His book is, after all, titled "Taking Rights Seriously." See Dworkin, *supra*, note 200.

207. One of his critics in this regard is MacCormick, see MacCormick, *supra*, note 200.

208. Eremko, *supra*, note 82 at 265.

209. *Supra*, note 53. This is still the case. See Manson, *supra*, note 33 at 8.

210. Sheehan, *supra*, note 53 at 769.

211. *Supra*, note 103.

Mr. Darling failed to do so. However, when someone at the Ontario Board sent a letter to Mr. Darling indicating that his application would not be considered because it came too late, an application form for compensation was inadvertently enclosed with the letter. The Court found that since the Board had invited Mr. Darling to apply for compensation by sending him an application form it could not deny Mr. Darling a hearing, and directed it to hold one.

It is unclear whether or not the court would have been so helpful had the Board not sent out the application form to Mr. Darling. However, it did hold that a hearing was required "... if the Board invited an application"²¹² which conclusion it reached by analyzing the wording of the Ontario Statute. Sections 5 and 6 of the *Ontario Act*²¹³ combine to invite applications for compensation from victims of crime within a period of one year from the time the loss was sustained. Section 9(1) of the *Ontario Act*²¹⁴ requires the Board to set a time and a date for the hearing of an application upon the receipt of an application for compensation.

The above cases may make it too easy to dismiss a Dworkinian system of jurisprudence. Perhaps the Board recognizes, in effect, that people in certain situations have rights to compensation, because it always awards compensation to them. Perhaps it would be possible to examine the decisions of the Criminal Injuries Compensation Boards of Ontario or Saskatchewan and to see such a right developing. However, such an approach would not be supported by any of the authors who have written in this area, nor by any of the few judgments which consider this issue. Also, rights are of little use to applicants unless they are made explicit. This point will be developed further when the thinking of Kenneth Culp Davis is discussed.

Two barriers stand in the way of a useful application of Dworkinian jurisprudence to the decisions of either the Saskatchewan or the Ontario Criminal Injuries Compensation Board. The first involves the traditional emphasis on problems involving judges and courts. The second relates to the difficulty of applying a system in which rights have primacy to a situation in which potential recipients only have a right to apply for compensation, and then to be heard only if they have done so soon enough.

212. Darling, *supra*, note 103 at 769.

213. *Supra*, note 1.

214. *Ibid.*

Other systems of jurisprudence do not accord rights such a central place. In fact, Hart develops a system in which the concept does not appear. This is a result of his membership in the positivistic school of legal thinking, members of which separate the descriptive from the prescriptive in their analysis of law.

Hart, like Dworkin, may be criticized for concentrating on the decisions of judges to the exclusion of everyone else, but he does make a place for discretion in his jurisprudence. Law is "open textured" according to Hart, which is to say that certain areas of uncertainty are left open.²¹⁵ What is more, it would not be desirable for a legislature to pass laws of complete certainty because "we are men, not gods."²¹⁶ Legislatures cannot predict all of the fact situations to which a particular law might apply, nor are they completely certain of their objectives in passing laws. Judges must therefore choose between competing legal interests when they decide difficult cases. In doing so, Hart opines, they must balance the need for the law to be certain with the need for it to be sufficiently flexible to accommodate new developments.

Perhaps, on the other hand, the Saskatchewan and Ontario legislatures deliberately set the Board free to establish a completely separate body of victim of crime compensation law, because it would have been undesirable or impossible to tell the board what to do in all situations which now face it.

Unfortunately, Hart's analysis fails to be useful in at least one important respect. It seems rather unrealistic. For example, is deciding how much money to award someone who has been assaulted a decision which requires a consideration of competing legal interests? Also, it does not seem that the legislatures of either Saskatchewan or Ontario intended to throw out all of the law relating to compensation for injuries when they passed their criminal injuries compensation Acts. In an earlier section of this article the background to the *Saskatchewan Act* and decisions made under it were examined. It was concluded that criminal injuries compensation in Saskatchewan can best be understood as a welfare scheme. If a person assaulted in the previous example was blind drunk in a bar at the time, worthiness would be the dominant factor in the Board's compensation decision.

215. Hart, *supra*, note 200 at 124.

216. *Ibid.* at 125.

The concept of worthiness does not explain how criminal injuries compensation boards decide difficult or new cases, perhaps because it doesn't realistically attempt to answer the question of how the board ought to reason. For example, in Saskatchewan Criminal Injuries Compensation Board case 1030 the applicant was fishing from a canoe when he was shot by someone who mistook him for a moose. Should compensation be payable?

Perhaps a more complete theory lies in a positivistic system of jurisprudence which places importance on the law as it ought to be. MacCormick has developed a system of jurisprudence which can be so described. He credits Dworkin for pointing out that positivists like Hart concentrate too much on one type of legal standards, but insists that as long as a conceptual distinction is kept between the "... description of the legal system as it is and a normative education of the law as it is so described,"²¹⁷ legal principles can be used as concepts in jurisprudence. MacCormick suggests that courts take into account legal principles when they take into account community consensus on social values.

MacCormick agrees with Dworkin that judges do not have a strong discretion. However, unlike Dworkin, MacCormick does see areas which require some quite independent legal thought. He acknowledges the presence of an "inexhaustively residual area of pure practical agreement"²¹⁸ where there is no right answer, and holds that judges must rely on their discretion to make decisions which fall within this area. MacCormick's analysis develops into something considerably more complex than does the Hartian conception of "open texture," although both jurists state that judges must use their discretion in this context. MacCormick states that judges make such decisions by framing possible judgments suggested by principle, and then using a limited discretion to choose the appropriate one. The consequences of each possible judgment must be considered, and the decision chosen must be consistent with previous decisions as well as being a coherent expression of the relevant principle. This complex theory of precedent and discretion describes an incremental process, as judges are "... cribbed, cabined and confined in the exercise of the great powers they hold."²¹⁹

217. MacCormick, *supra*, note 200 at 240.

218. *Ibid.*

219. *Ibid.* at 251.

Like Hartian jurisprudence, this system works fairly well when applied to an understanding of how the Board decides simple cases. It is better than a Hartian system when more difficult decisions are sought to be understood, for it can explain how social values are brought into play. If specified with sufficient rigour, and separated from a description of the law, these values can assist analysis.

Earlier in this section the case of the man in the canoe being mistaken for a moose and shot by a hunter was discussed. Compensation was denied by the Saskatchewan Board in case 1030. The person who shot the victim in that case was convicted of using a firearm in a dangerous manner. The only criminal offences involving firearms for which the Board is expressly allowed to give compensation are listed in the schedule to the *Saskatchewan Act*. Of course, no such schedule forms part of the legislative scheme in Ontario. It is stated in the Board's decision that the application was denied because "the applicant was not a victim of a crime contemplated by the Act", which must mean that the Board felt a criminal negligence conviction was necessary. However, had the Board felt that a community consensus on social values required the payment of compensation, it could have been awarded on the basis of an act of criminal negligence taking place. It has earlier been shown that neither the Saskatchewan nor the Ontario Boards feel themselves bound by criminal court judgments. Compensation has been awarded in Saskatchewan in the absence of a conviction, and even without a charge for an offence listed in the schedule for the Act being laid. It could be argued that the most important elements of a criminally negligent act existed here. Perhaps the hunter had been charged with criminal negligence originally, but for some technical reason this charge may have been dropped and the new charge contrary to provincial statute laid.²²⁰

The above case is relatively simple, however. There are others which pose more complicated issues. Before moving on in search of a system of jurisprudence better suited to an understanding of how the Saskatchewan and Ontario Criminal Injuries Compensation Board grapples with them, a further point about MacCormick's system of jurisprudence should be made. Like those propounded by Hart and

220. In case 1100 the Saskatchewan Board was satisfied that all the necessary elements for assault were present, even though the accused had been neither charged with this offence nor convicted of it: *Report, supra*, note 147.

Dworkin, it was designed to apply to judges, not to people exercising a statutory power of decision. This emphasis denies it much power in coming to grips with that central element in administrative decision-making, discretion.

Discretion has been the subject of much unflattering jurisprudential analysis. As Dworkin has pointed out, the concept can only be understood in the context in which it appears.²²¹ I would go further, and suggest that a theory of jurisprudence appropriate to administrative law, and therefore to criminal injuries compensation Boards, should allow discretion to play an important and beneficial role. Any scheme vesting the power to make decisions in administrative tribunals must do so. Kenneth Culp Davis,²²² a legal theorist who is at home in the world of administrative law, points out that the problem is not with discretion but with excessive discretion. As he points out "Discretion is a tool only when properly used; like an axe it can be a weapon for mayhem or murder."²²³

Davis suggests a system of jurisprudence which seems to fit persons exercising statutory powers of decision better than do any of the systems discussed earlier, perhaps because he has set his mind to the problems of jurisprudence in the context of administrative law. This system places great importance on fairness, even when entitlement to gratuities is being determined, as may be in the case with compensation for the victims of crime. Davis states that

"... the special need is to eliminate unnecessary discretionary power, and to discover more ways to confirm, to structure, and to check discretionary power."²²⁴

One way that fairness can be achieved, Davis suggests, is by stopping persons with broad discretionary powers from making arbitrary decisions. In the context of American public housing, Davis notes that Congress gave local public housing agencies the maximum amount of responsibility for the administration of public housing, but apparently did not create the right to decent housing. Furthermore, regulations made in the Chicago area to establish admissions policy

221. Dworkin, *supra*, note 200 at 31.

222. *Supra*, note 201.

223. *Ibid.* at 25.

224. *Ibid.* at 42.

use the concept of undesirability without defining it.²²⁵ This is a disqualifying term quite similar to the unworthiness concept used by the Saskatchewan and Ontario Criminal Injuries Compensation Boards. By holding that the Chicago Housing Authority could not act arbitrarily, the Court of Appeal for the District of Columbia removed the Authority's unnecessary discretionary power. The lack of substantive rights on the part of the applicants did not allow them to be treated unfairly.

Davis describes the growth of consistency in the exercise of discretion by administrative tribunals. He writes that by "nibbling away" at a problem and by finding solutions to each "bite" of it, a creative administrative tribunal sometimes opens the way for perspective thinking, and comprehensive solutions to the whole problem emerge.²²⁶ This, he points out, is the creation of common law.²²⁷ When a board has to write its decision down, Davis opines, the needed confinements of discretionary power through standards, principles and rules will develop gradually, by themselves.²²⁸ Boards will find it more efficient to refer to this body of decisions rather than to rethink a question each time it comes up.²²⁹

I have earlier shown that the reasoning of the Saskatchewan and Ontario Criminal Injuries Compensation Boards is influenced by precedent. The analysis of Kenneth Culp Davis appears to fit this process better than that of any of the jurists earlier heard from, perhaps because of the role assigned to discretion by Davis.

Yet the Saskatchewan and Ontario Criminal Injuries Compensation Boards are coy. Nowhere in their decisions do these Boards indicate that they are relying on precedent. One member of the Saskatchewan Board has stated, rather unhelpfully, that each case is decided "on its own merits."²³⁰ This is the equivalent of the former chairman of the

225. Davis *supra*, note 201 at 78.

226. *Ibid.* at 21.

227. *Ibid.*

228. *Ibid.* at 59.

229. *Ibid.* at 108.

230. This comment was either made by Denis Windels, a vice chairperson of the Board, in 1983, or Morris Chernesky, Q.C. the current chairperson. Savage, *supra*, note 185.

Ontario Board stating "Every case, of course, must be determined having regard to its own particular circumstances."²³¹

How else should they be decided? The first chairman of the Saskatchewan Board went so far as to indicate that even a full transcript of the evidence placed before the Board "... would afford little assistance in determining at a later date, the underlying reasons and factors which motivated the Board."²³² So the Saskatchewan Board is, by its own account anyway, a black box. The advantages of this to the Board are obvious, as they are to any provincial government that does not want to be forced to give money to people through a Criminal Injuries Compensation Board.

There may be at least one respectable reason for the board's attitude to precedent. Seeing how this may be so requires a further examination of the purposes of precedent. The most important of these has already been shown to be ensuring that decisions are made in a rational fashion. There are other reasons for requiring adherence to precedent, however.

Dworkin advances two reasons for holding judicial creativity in disfavour. Judges should not be able to legislate, not having been elected, nor should they be allowed to apply new law retroactively. The hostile attitude of jurists to judges who feel free to make inconsistent and incoherent case law has already been mentioned. Judges, at least, are only supposed to be creative in certain ways.

Supporters of the educational theory of precedent theorize that people's actions are guided by what courts decide. The teaching purpose of precedent has been pointed out by Hart, who has written that precedent is "the communication or teaching of standards of conduct by example."²³³ Clearly, if new law is applied retroactively by decision makers, then this purpose is thwarted. However, the applicability of this idea breaks down when a concrete example in the context of criminal injuries compensation is sought, except if there is a real possibility of subrogation. It has earlier been shown that this is rare, given the assets and incomes of most of the people who make others the victims of crime.

231. Grossman, *supra*, note 24 at 375.

232. Eremko, *supra*, note 82 at 273.

233. Hart, *supra*, note 200 at 375.

It is obvious that people will always try to avoid being injured or killed as a result of crime. This is true regardless of whether or not compensation will be awarded by a criminal injuries compensation board.²³⁴ Also, people are unlikely to expose themselves to risk by assisting a police officer in the arrest of an offender or by doing so themselves just because of the existence of a compensation scheme. Precedent has no teaching role here, although the educational purpose of precedent is relevant to many other areas of human endeavour. A person might think twice about driving home in an intoxicated condition, for example, given how severely courts have started to fine impaired drivers,²³⁵ and how large personal injury awards have become relatively recently.²³⁶

Although the picture created by a jurisprudential analysis of the Saskatchewan Criminal Injuries Compensation Board is far from clear, such an analysis makes it possible to understand better what exactly the Board is doing. The Board apparently doesn't feel under an obligation to be understood by anyone, but this may be largely a defensive posture. The success of this attempt to avoid interference, or what is perceived as such, is the subject of the next section of this paper.

IS THE BOARD SUBJECT TO JUDICIAL REVIEW?

Judicial review has successfully been applied for on several occasions in the context of the Ontario Criminal Injuries Compensation Board.²³⁷ Cases in which Ontario Board decisions have been appealed must also be considered.²³⁸ Most compensation board decisions in Canada are made in Ontario, but there are some relevant reported cases involving appeals and judicial review from other provinces as

234. Kirkham, *supra*, note 83 at 8.

235. Fines for contravening what used to be ss. 234 or 236 [now ss. 250 and 252] of the *Criminal Code* R.S.C. 1970 c. C-34 have increased in the past from an average of \$200 to an average of \$500 in Ottawa, Ontario.

236. The million dollar mark in damages awards thought to have been set by the Supreme Court of Canada has recently been surpassed by Ontario Courts.

237. Dalton, *supra*, note 52; Darling, *supra*, note 211; and Fregeau, *supra*, note 104.

238. See Batic, *supra*, note 126 and Manson, *supra*, note 33.

well.²³⁹ It will be recalled that the Ontario privative clause is very strict. An appeal is only explicitly made possible on questions of law in Ontario.²⁴⁰ Before such a step is considered, the internal decision review process which the Ontario statute allows ought to be exhausted and an application to vary the order in question ought to be considered.²⁴¹

Procedural justice may be the most that an applicant appearing before the Ontario Board can expect. It was seen earlier that in Ontario persons who make an application for compensation within the proper time period are entitled to a hearing. A failure on the Board's part to grant a hearing will lead to judicial review, in spite of the privative clause.

Challenges to a Board's decision on the basis that the decision was not arrived at in a way authorized by law would probably also be successful. For example, a decision made only on the basis of documentary evidence by the Ontario Board would probably be overturned if a hearing had been requested by the applicant.²⁴²

Under the *Saskatchewan Act*²⁴³ a quorum of the Board is necessary to make an entitlement decision. A single member of the Saskatchewan Board who made an entitlement decision would be acting without

239. *Budd v. Minister of Justice* (1978), 23 N.B.R. (2d) 421 (N.B.S.C. A.D.), *Brittany v. Province of New Brunswick* (1976), 13 N.B.R. 507 (N.B.S.C. A.D.), *Re Castel and Criminal Injuries Compensation Board* (1978), 89 D.L.R. (3d) 72 (Man. C.A.), *Re Flynn and Criminal Injuries Compensation Board* (1988), 49 D.L.R. (4th) 619 (N.S.S.C. A.D.), *McKinnon v. Province of New Brunswick* (1979), 25 N.B.R. (2d) 421 (N.B.S.C. A.D.), *Poholko v. Criminal Injuries Compensation Board*, (1983), 58 N.S.R. (2d) 15 (N.S.S.C. A.D.), *Sivret v. Minister of Justice* (1984), 54 N.B.R. (2d) 327 (N.B.S.C. A.D.), and *Re Willier and Crimes Compensation Board* (1977), 75 D.L.R. 728 (Alta. C.A.), *Re Minister of Justice for New Brunswick and Lewis* (1975), 57 D.L.R. (3d) 638 (N.B.S.C. A.D.), *Re Morris and Attorney-General for New Brunswick* (1975), 63 D.L.R. (3d) 337 (N.B.S.C. A.D.).

240. *Ontario Act*, *supra*, note 1, s. 23.

241. *Ibid.* ss. 10(1), 25. According to Grossman, the effect of the variation provision contained in Section 25 is that a file is never closed at the Board. Grossman, *supra*, note 24 at 379. A similar review is available in British Columbia. *British Columbia Act*, *supra*, note 4, s. 22.

242. The attack would be based on sections 9 & 10 of the Ontario statute. *Ontario Act*, *supra*, note 1.

243. *Supra*, note 4, s. 5(1).

jurisdiction in the opinion of the first chairman of the Saskatchewan Board.²⁴⁴

In *Dalton*,²⁴⁵ which was decided subsequently to *Sheehan*,²⁴⁶ the court considered further what is meant by acting capriciously or arbitrarily in the context of criminal injuries compensation. The claimant in that case was not obviously deserving, at least according to the tavern principle developed earlier in this paper. She and another female had accepted first drinks and then a drive home from two men they had met in a hotel. On what she thought was her way home the claimant had been pushed out of a rapidly moving van for rejecting sexual advances. She was severely injured. What did being arbitrary mean here? It meant, in the court's opinion, failing to consider the severity of Mrs. Dalton's injuries in determining

"whether it would exercise its discretion to deny the application completely or whether it would merely rely on her conduct to cut the award by a suitable percent."²⁴⁷

This decision is interesting for two reasons. First, it contains an express approval of the Criminal Injuries Compensation Board applying some sort of calculus of contributory negligence. If Mrs. Dalton had injured herself only slightly, then a reduction or even denial of compensation would have been appropriate. But Mrs. Dalton was not injured slightly; she spent four months in the hospital and suffered extensive and lasting injuries. She was permanently rendered incapable of walking properly. The second reason the decision is interesting is of greater importance. It is that the calculus of contributory negligence developed by the Board should not be applied in cases involving serious injuries. To apply such a calculus amounts to an error of law.

However, even arguments based on procedural justice may be of limited use when applying for judicial review of, or appealing, criminal injuries compensation Board decisions. It has earlier been argued that the criminal injuries compensation scheme of Ontario is

244. Eremko, *supra*, note 82 at 271.

245. *Supra*, note 38.

246. *Supra*, note 53.

247. Dalton, *supra*, note 38 at 398.

based on a conception of worthiness.²⁴⁸ Perhaps there is a corresponding desire among judges not to be bothered by disappointed applicants for compensation who are not seen as being particularly worthy. Drunken patrons of "notorious" bars who assault bouncers and then come to the Board for compensation when the bouncers hit back,²⁴⁹ or victims of armed and intoxicated players in crap games who are hurt while attempting to help others to collect their debts²⁵⁰ fall into such a category. Even in situations where the court may sympathize with the applicant it may refuse to find a way to overrule a denial of criminal injuries compensation.²⁵¹

A court faced with an obviously deserving applicant may be willing to intervene, as the Ontario Divisional Court did in *Darling*²⁵² when an application to apply for compensation was inadvertently sent out by the Board after the time for making such applications had expired. The same court earlier set aside a decision of the Criminal Injuries Compensation Board in *Fregeau*.²⁵³ Here a fireman injured in a fire was denied compensation because no insurance fraud conviction arising out of the fire had been secured. The court found that the two were unrelated and that the Board had failed to advert to the issue before it. This was an error of law. Not all situations are have excited the courts' sympathies in the same way. This was illustrated in *Sheehan*,²⁵⁴ where the same court refused to review a compensation Board decision denying an application for compensation made by prisoners injured in the Kingston Penitentiary riots of 1971.

One of the rather tenuous grounds for the Ontario Board's denial of compensation in *Sheehan* was that the applicant was injured in prison, and he would not have found himself there had it not been for his own criminal activity. The Board was either using an extremely remote

248. See the section of this article entitled "Does the Board make Law?", *infra*, p. 134

249. See Lischka, *supra*, note 39.

250. See Manson, *supra*, note 33.

251. For a Saskatchewan case in which this occurred see *McParlin v. Crimes Compensation Board (Sask.)* (1987), 37 Sask. Repts. 3 (Sask. Q.B.).

252. *Supra*, note 103.

253. *Supra*, note 104.

theory of causation, as the overruled Nova Scotia Criminal Injuries Compensation Board did in *Poholko*²⁵⁵ or applying the principle which denies recovery for a wrongful act in an equally loose way. The court did not leave a way open for the overturning of a compensation board decision in the future; this would be possible if the board "didn't act in good faith"²⁵⁶ or "acted arbitrarily or capriciously"²⁵⁷ and "failed to observe the principles of natural justice."²⁵⁸

Of course, much of administrative law is a search for the meaning behind words like the ones written above. It has been argued that a duty to exercise fairly discretion given by statute is an essential component of administrative law, and that an untrammelled or unfettered exercise of discretion conflicts with this essential component.²⁵⁹

Canadian law is starting to acquire some conception of due process since interpretations of the *Charter*²⁶⁰ often depend heavily on American case law. This development bodes well for those who seek judicial review of compensation for victims of crime board decisions. Whether more frequent review of what such boards do will make them decide better is, once again, an issue beyond the scope of this article. In the meantime, however, a court review of any decision made by the Criminal Injuries Compensation Board of Ontario is a rather speculative endeavour, but the jurisprudence does provide some encouragement.

The Criminal Injuries Compensation Board cannot ignore its empowering Act and decide cases on the basis of whim; it cannot be arbitrary. No administrative tribunal can;²⁶¹ the only refuge from this

255. *Poholko*, *supra*, note 32.

256. Sheehan, *supra*, note 53 at 734. Sheehan was quoted with approval in Manson, *supra*, note 33 at 8.

257. Sheehan, *ibid.*, at 732.

258. *Ibid.*

259. see Carter, *supra*, note 61 at 68. This point is also made in *Poholko*, *supra*, note 32 at 17.

260. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

261. See A. Roman, "Legal Constraints on Regulatory Tribunals: Vires, Natural Justice and Fairness" (1983) 9 *Queen's L. J.* 35 at 58.

argument is to claim that the Board is a kind of Santa Claus, and makes *ex gratia* payments on behalf of the state.²⁶²

The Ontario Criminal Injuries Compensation Board must also provide reasons for its decisions. These reasons must be clear, but a failure to make them so on the part of the Board will only result in the Board being penalized for costs when its decisions are appealed.²⁶³

The most fruitful method of attacking of a Board decision was mentioned in the Statutory Guidelines section of this article. It draws strength from the previously mentioned idea that untrammelled and unchanneled discretion is contrary to the principles of administrative law²⁶⁴ but is qualified by the reluctance of courts to interfere with decisions of the specialized administrative tribunal like the Ontario Board.²⁶⁵

The two-stage method of determining entitlement to criminal injuries compensation which was mentioned earlier demands that the Board first consider whether the applicant was injured or killed in an event causally related to a criminal act. Only when the amount of that order is considered, in the second stage, can the conduct of the applicant be considered. If the Board fails to engage in this two-stage process, it has made an error of law.²⁶⁶ In Ontario, of course, Board decisions which contain errors of law may be reviewed.²⁶⁷ So may the decisions of any administrative tribunal anywhere in Canada, Carter argues, in light of the Supreme Court of Canada decision in *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*,²⁶⁸ privative clauses notwithstanding.

262. As is the case in Great Britain, see Murphy, *supra*, note 23 at 546. Faieta is of the opinion that awards in Ontario are made on an *ex gratia* basis. Faieta, *supra*, note 24 at 9.

263. See Batic, *supra*, note 126 at 68.

264. See Dalton, *supra*, note 38 at 396 and Pohlko, *supra*, note 32 at 18.

265. See Spiegel, *supra*, note 22 at 296.

266. The analysis here is taken directly from Carter. See Carter, *supra*, note 61 at 171. It also flows from Pohlko, *supra*, note 32 at 18, Dalton, *supra*, note 38 at 397 and is impliedly approved by Manson, *supra*, note 33.

267. *Ontario Act*, *supra*, note 1, s. 23.

268. [1979] 2 S.C.R. 227 (S.C.C.) cited in Carter, *supra*, note 61 at 167.

CONCLUSION

This paper started with a review of the background against which Ontario's *Compensation for Victims of Crime Act* must be seen. Compensation schemes in other provinces of Canada were then compared with the one in Ontario, which helped to explain the factors taken into account by the Ontario Board when it makes decisions. Jurisprudence was used to analyze some of the decisions made by the Saskatchewan Board, which operates under similar legislation, and it was concluded that law is being made. However, since the purpose of the board may be similar to that of a welfare agency, the system created may be without an effective means of judicial review. I concluded by noting that the future might bring one.