CHAPTER - III

THE CONCEPT

OF

COMPENSATION
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3.1 INTRODUCTION

The concept of compensation and damages occupy an important place in the programme of justice to victims. Though these terms are sometimes used interchangeably, the words compensation and damages have subtle distinction in their application.

Compensation is anything given to make things equivalent, a thing given to make amends for loss, recompense, remuneration or pay. It is counter-balancing of the victim's suffering and loss that result from victimization.

The state has a humanitarian responsibility to assist crime victims. The aid is given because of the social conscience as a symbolic act of mercy, charity and compassion but not as part of any legal obligation i.e., victims have no right to compensation as such. While "Damages" connote the measure of loss caused to the victims in monetary terms, the word "Compensation" indicates the form and occasion to pay damages.

3.2. COMPENSATION AND RESTITUTION - CIVIL AND CRIMINAL LAW

i. Restitution

The term "restitution" in the criminal justice system means payment by an offender to the victim for the harm caused by the offender's wrongful acts. Courts have the authority to order
convicted offenders to pay restitution to victims as part of their sentences. Courts are required to order restitution to victims in cases involving certain types of crimes, typically violent offenses, but sometimes other serious offenses as well.

Restitution can cover any out-of-pocket losses directly relating to the crime, including:

- medical expenses,
- therapy costs,
- prescription charges,
- counseling costs,
- lost wages,
- expenses related to participating in the criminal justice process (such as travel costs, child care expenses, etc.),
- lost or damaged property,
- insurance deductibles,
- crime-scene clean up, or any other expense that resulted directly from the crime.

Restitution will not cover such things as pain and suffering or emotional distress, only damages that are easy to prove—things for which a victim might have a bill or a receipt.

**ii. The difference between restitution and compensation:**

'Restitution;' refers to the responsibility with the offenders bear to their victims whereas 'compensation' refers to the financial obligations of government agencies to reimburse suffering citizens, or of third parties like insurance companies to indemnity their
customers. Restitution and compensation are alternative methods of repayment of losses. However, such definitions of restitution and compensation arise from the source of the obligations towards the victim and seen from the victim's point of view, the term 'victim compensation as such would encompass both restitutive as well as compensatory modes of repayment.

Restitution is used interchangeably with compensation. However, it is the reparation of the victims suffering and loss, restoring the victim to his place in the community. It is a token of the responsibility of the criminal; it is restorative in character and stands for correctional goal. Hence, Restitution calls for a decision by a court and payment or work by the victimiser. Hence, restitution to victims is considered a major element of punishment besides the protection of law and order and the reformation and rehabilitation of the criminal.

While restitution is court-ordered payment from a convicted offender, crime victim compensation will be government program that pays many of the out-of-pocket expenses of victims of violent crime even when there is no arrest or prosecution. Ordinarily, to be eligible for compensation the victim is required to report the offense within a certain amount of time, cooperate in the investigation and prosecution, and file an application within a set time. The expenses covered by compensation vary and are usually set by state law. All compensation programs cover medical expenses, most cover counseling, and very few cover any property loss.
In comparison, restitution can only be ordered in cases where someone has been convicted. However, restitution can be ordered in almost any case (although courts may be required to order it only for certain offenses), and can be ordered for a wider variety of losses, including property loss.

A victim cannot collect both compensation and restitution for the same losses. Where compensation has already paid for some of the victim's losses, a court may order the offender to reimburse the state compensation program and order the offender to pay the victim for losses that weren't covered by compensation.

iii. The difference between restitution and civil damages

Restitution, as noted above, is ordered by a criminal court after the offender has been found guilty. Civil damages are ordered when someone has won a lawsuit in civil court. Victims of crime can obtain both restitution and civil damages. A victim can sue an offender even when the offender has been ordered to pay restitution. Civil damages can include losses not covered by restitution, such as payment for pain and suffering, payment for intentional infliction of emotional distress, and even punitive damages—damages imposed just to punish the defendant. However, as in cases where the victim receives crime victim compensation and court-ordered restitution, victims cannot collect twice for the same loss. Usually a civil judgment is decreased by the amount of restitution that the victim has already received for a loss.
Victims can do two things to increase the likelihood that restitution will be ordered in their case: gather information about their financial loss, and request that restitution be ordered. To increase the chances that restitution will be ordered, victims should make sure their victim impact statement includes a summary of the out-of-pocket expenses resulting from the crime.

Victims should also tell prosecutors early in the process that restitution is important to them, so that prosecutors can be prepared to request restitution as part of any plea agreement, sentence, or condition of probation. If victims have the opportunity to address the court at the time of framing charges or at sentencing, they should specifically describe the financial impact of the crime and, if permitted in that state, request restitution.

iv. Courts may order full or partial restitution

When courts order restitution, they look not only at the victim's losses but also at the offender's ability to pay. In some states, the court may reduce the total amount of restitution ordered if the offender is unlikely to be able to pay that amount. In other states, courts will order the offender to pay for the full amount of the loss, but then set a payment schedule based on the offender's finances, which may only be a minimal amount per month.

v. Collecting restitution

Collection of restitution is often limited by the offender's ability to pay. As a result, many victims wait years before they receive any restitution, and they may never receive the full amount of restitution ordered. Collection also depends on enforcement of
the court's order of restitution, either by the criminal justice system or the victim. There are many laws and procedures used to make sure the offender pays as ordered.

For example, where payment of restitution is made a condition of probation or parole, the probation or parole officer must monitor whether payments are being made on time. The victim may help provide this information to the probation or parole officer. If the offender is about to be released from probation or parole, but has not paid restitution as ordered, this information must be conveyed to the court or parole board. Victims who have not received restitution as ordered should ask the probation or parole officer how this information will be provided to the court or parole board. In some states, probation or parole can be extended when the offender has willfully failed to pay restitution.

Restitution payments are typically collected out of the prison work programs. Some states collect restitution from state income tax refunds, prisoner accounts, lottery winnings, or damage awards from lawsuits against the prison.

Where the offender has not paid restitution as ordered-has "defaulted" in payment—restitution often can be collected by the same methods used to enforce other court judgments, such as attachments of assets or of wages. In some states, the victim is authorized to take these actions; in other states, enforcement is up to the prosecutor, the court, or another official.
Many states provide that restitution orders become civil judgments. This expands the ability of victims to collect restitution and also means the orders can stay in effect for many years, typically ten to twenty years. In many jurisdictions, civil judgments can be renewed, so they can stay in effect even longer. During that time, the offender's financial circumstances may change: he or she may have inherited property, won a legal judgment, or become employed. Depending on the state, the civil judgment may be enforceable immediately, or enforceable when the offender defaults on payment, or enforceable only after the criminal justice process is completed and the offender has been released from probation, prison, or parole. A victim may need to hire a lawyer to help enforce the civil judgment.

The consequences of crime frequently extend far beyond the criminal act. All too often victims are left with expenses for medical procedures, physical rehabilitation, counseling, and lost wages. Unlike the criminal justice process, the civil justice system does not attempt to determine an offender's guilt or innocence. Offenders are also not put in prison. Rather, civil courts attempt to ascertain whether an offender or a third-party is liable for the injuries sustained as a result of the crime. If defendants are found civilly liable, courts may order them to pay monetary damages to victims.

The civil legal system offers crime victims an opportunity to secure what they seek most, justice. Regardless of whether there was a successful criminal prosecution or any prosecution at all, victims can bring their claims before a court and ask to have the responsible parties held accountable. In the civil justice system,
offenders are held accountable, not to the state, but to the victims who suffered the direct impact of the crime. While money awarded in civil lawsuits can never fully compensate a victim for the trauma of victimization or the loss of a loved one, it can be a valuable resource to help crime victims rebuild their lives. Moreover, the exposure to civil liability is a powerful incentive for landlords, businessmen, and other proprietors to enact the security measures necessary to prevent future victimizations.

Victims can consider suing perpetrators or other responsible parties. Some examples of other parties who might share some responsibility for the crime include hotel owners who fail to provide security measures, shopping malls that fail to provide adequate security, parents who allow children access to firearms, and pub owners who serve alcohol to intoxicated persons.

vi. Dichotomy between the Civil and Criminal cases

The distinction between compensation and restitution must be kept in mind here. Both are intended to provide victims with some reparation for damages done. But, with restitution the offender is required to make the reparation whereas the compensation; there is a link between the offender and the victim. Rather, the state pays the compensation must like an insurance company paying a damage claim. The recent interest in restitution programmes as correctional measures has been concerned with restoring the linkage between the offender and the victim.

Restitution and compensation assumes a rehabilitative character to the extent of personalising the sentence and
facilitating the criminal's rehabilitation by keeping him in contact with the victim thus increasing his awareness of responsibility and remorse. The deterrence argument for restitution is based on a ‘crime tariff’ model that assumes that if the price of crime is high enough, potential offenders would be more reluctant to commit the crimes (but this hardly seems likely). Thus often restitution alone would not be appropriate, particularly if used as a means for bargaining because that would allow offenders to buy their way out of criminal liability and suffer too light a sanction. Because of the tension among the various objectives of criminal punishment, the judge has to determine which object—rehabilitation or deterrence can most effectively be achieved in each individual case, and he should either pursue that goal or balance the demands of each.

There exists a dichotomy between the Civil and Criminal cases concerning payment of compensation to the victims. While in the former case it is the responsibility of the individual to seek redressal, in the later case it is the responsibility of the State to pay compensation to the victims of Crime.

3.3 VICTIMS OF CRIME - CIVIL AND CRIMINAL JUSTICE SYSTEM

Crime victims seek civil justice by filing lawsuits against criminal perpetrators or other responsible parties in order to be compensated for the damages incurred as a result of the criminal act.

Although many crime victims and their families have some knowledge about the legal system, they are often unaware that

there are two systems of justice available in which to hold the offender accountable - the criminal justice system and the civil justice system.

i. The Criminal Justice System

The criminal justice process begins after a crime has been committed and reported to law enforcement. If an arrest has been made and charges have been filed, the accused offender may be prosecuted. In a criminal prosecution, the crime is considered "a crime against the state". The victim's role is primarily defined as a witness for the prosecution. Although in some jurisdictions the prosecuting lawyer may be very helpful to the victim and the victim's family, in the criminal justice system, the prosecuting attorney represents the interests of the state against the accused offender - not the victim.

The criminal justice process works to judge the guilt or innocence of accused offenders, and when found guilty, to punish and/or rehabilitate them.

The criminal courts can provide crime victims with a sense of justice and can sometimes provide victims compensation through restitution orders. Unfortunately, even when restitution is ordered, it is rarely enforced. This lack of enforcement combined with statutory restrictions on the type of damages that may be included in a restitution order, often results in restitution falling far short of meeting victims' needs. However, these programs are often subject to restrictions and limitations that may prevent crime victims from being fully compensated.
ii. The Civil Justice System

The civil justice system, unlike the criminal justice process, does not attempt to determine the innocence or guilt of an offender, nor incarcerate him. Rather, the civil courts attempt to ascertain whether an offender or a third-party is civilly liable for the injuries sustained as a result of the crime.

In civil cases the "crime" is referred to as a tort. For most criminal offenses there is a corresponding tort for which a crime victim may bring a civil suit.

Most often, a civil court's finding of liability means that the defendant must pay the victim, and/or the victim's family monetary damages. In this respect, the civil justice system can provide victims with more of the monetary resources needed to help rebuild their lives. Furthermore, the civil justice system often provides victims and their families with a sense of justice that the criminal courts cannot. Rather than holding a defendant accountable for his or her "crime against the state," the civil justice system holds a defendant who is found liable directly accountable to the victim for the harms he or she has suffered.

iii. Burden of Proof

In the civil justice system, liability must be proven by a preponderance of the evidence, which simply means that one side's evidence is more persuasive than the other. This standard is far less than the "proof beyond a reasonable doubt" required for a conviction in the criminal justice system. Therefore, it is sometimes
possible to find the defendant liable in a civil case even though a verdict of "not guilty" was rendered in the criminal case - or even if the offender was never prosecuted.

iv. Third-Party Liability

In some civil cases a "third-party" defendant may be held liable. Third-party defendants are not the persons who actually commit the acts, but instead are those parties who may have contributed to or facilitated them. A few examples of possible third-party defendants in a victim's case would include:

- Colleges and universities that fail to provide adequate security for students or fail to notify students of campus assaults, leaving students vulnerable to victimizations;
- Shopping malls that do not employ security patrols or other necessary measures despite likelihood or a history of criminal attacks on customers;

It should also be noted that successful civil lawsuits can have a significant deterrent effect. Actions against negligent third parties can promote enhanced safety practices and encourage the exercise of greater caution, thereby reducing the likelihood that others will become victims of crime.

v. Considerations for Pursuing Civil Cases

A significant difference between the criminal and civil court systems is that in a civil case, the victim - usually through the advocacy of a privately retained lawyer - controls essential decisions shaping the case. It is the victim who ultimately decides -
usually upon the advice of his or her lawyer - whether to sue, accept a settlement offer, or go to trial.

Through civil litigation, more and more victims are obtaining payment for medical expenses, psychological counseling, lost wages, earning ability, and property loss. In addition, they are more frequently recovering damages for "pain and suffering" - a remedy traditionally unavailable through restitution ordered by criminal courts.

However, a victim contemplating a civil lawsuit should bear in mind that obtaining a civil judgment is only half the battle. In many cases in which the victim wins a judgment, it may be difficult to collect the money awarded by the court. Victims, their lawyers, and advocates, recognize that justice demands that such judgments be satisfied. Unfortunately, many defendants do not pay these judgments, and this possibility should be considered seriously by the victim and his or her attorney prior to filing a civil lawsuit. However, there are sources of recovery that are not always obvious. There are numerous sources of assets with which perpetrators can satisfy civil judgments.

vi. Statutes of Limitation

There are time limits for filing civil suits set by statute. These statutes of limitation vary from state to state but usually are from one to three years. Any suit filed after the expiration of the statute of limitations is time-barred and cannot proceed.
Though there is a limited time in which to file a suit, once a judgment is obtained, it is valid for a minimum of 20 years and can often be extended. In other words, even if a perpetrator has no assets today, filing suit and securing a judgment may allow the victim to seize assets the perpetrator may obtain many years in the future.

The civil justice system offers victims of crime another opportunity to secure what they seek most - justice. Regardless of whether there was a successful criminal prosecution - or any prosecution at all - victims can bring their claims before the court and ask to have the responsible parties held accountable. In the civil justice system offenders are held accountable, not to the state, but rather to the victims who suffered the direct impact of the crime. While money awarded in civil lawsuits can never fully compensate a victim for the trauma of his or her victimization or the loss of a loved one, it can provide valuable resources for crime victims to help rebuild their lives. Furthermore, the exposure to civil liability is a powerful incentive for landlords, businessmen and other proprietors to enact the security measures necessary to prevent future victimizations.

vii. Compensatory Ideals In Criminal Law And Civil Law

The victim of an offence who has no other option but to swallow the onslaught of the offender (if he survives the crime) and has particularly no role to play in the trial procedure devised by the Criminal Procedure Code, 1973 except to become a witness because of the fiction that crimes are public wrongs, they are
committed against the state and not against the individual. The side effect of this fiction has caused unfathomable harm to the victims in general which includes the victim who succumbs to the crime, his dependents who are non-else than indirect or secondary victims.

The proper definition of the word “crime” is an offence for which law awards punishment. Holdsworth speaking of the distinction between torts and crime said:

The only certain lines of distinction are to be found in the nature of the remedy given and the nature of the procedure to enforce the remedy. If the remedy given is the compensation, damages or a penalty enforced by civil action, the wrong so redressed is a civil wrong. If the remedy given is punishment of the accused, which is enforced by a prosecution at the suit of the crown the wrong so redressed is a crime or criminal in its nature.\(^2\)

The mutual exclusiveness of the concepts of crime and torts divided our criminal law philosophically from compensatory ideas and its remains are found in our legal system by large scale disuse of Section 357 of the code which speaks of compensatory provisions in criminal trial, but in recent times victimology is gaining momentum and now it is gradually becoming clear that our criminal jurisprudence can no longer ignore the plight of the victims of criminal violence. The criminal law cannot be a silent spectator to the physical and mental pain caused to the victim by an unlawful act of a criminal. The punishment of the criminal may be an answer to the crime committed by him but it is definitely no answer

\(^2\) AG. Vs. Bradlaugh, 1885 14, Q.B.E., p. 667.
to the pain and suffering of the victim. Hence victimology speaks of 
restitution which means that the offender will repair the loss 
suffered by the victim by paying a sum of money or by service. Its 
benefits are bi-focal the offender is made more responsible for the 
crime and the victim receives attention and benefit directly from the 
offender.

3.4. BASIC PRINCIPLES OF COMPENSATION / DAMAGES
The primary object of an award of damages, and the 
fundamental principle or theory on which the award of damages is 
based is just compensation, or indemnity for the loss or injury 
sustained by the complainant, and no more. The damages which 
may be recovered are neither necessarily statutory nor dependent 
on statutory provisions, unless the provisions relied on deny or 
abridge the common law right of recovery. Where the injury is 
such, that it does not admit of definite pecuniary measurement, it is 
more appropriate to speak of reparation than of compensation, for, 
in certain cases, damages may be awarded, not only as a 
satisfaction to the injured person, but as a punishment to the 
wrongdoer. Besides the right of the injured party to compensation 
must be considered in connection with the right of the other party 
to pay only that which he should justly be compelled to pay, 
although the law does not seek to divide rather than to satisfy the 
loss, but aims at complete compensation for the injury sustained.

Three important principles governing the grant of damages are:

1. That the claimant should not himself be guilty of any 
negligence or other improper conduct, and should have
taken all the reasonable steps to minimize the loss to be suffered by him;

2. That the amount of damages to be awarded should never exceed the loss actually suffered by the claimant, or which he is likely to suffer, on account of the defendant's wrong, provided his acts are lawful, just, reasonable and not contrary to the law, rules or byelaws duly enacted, except in awards of exemplary damages; and

3. That the amount of damages may be cut down, if his own conduct:
   a. has constituted contributory negligence, or
   b. has rendered some of the damages too remote, or
   c. has constituted a failure to mitigate the damage which may be defined as a failure on his part to take reasonable steps either to reduce the original loss or to avert further loss.

i. Damages and Compensation in Tort:

Damages and compensation constitute an important remedy in tort law. The principles concerning the determination of damages and compensation in tort are well established. There are several dimensions to the issue of payment of damages and compensation in the law relating to torts. These include the measure of damages, quantum of damages, assessment of damages, intention of the wrongdoer, proximity of the cause etc. Some of these principles need a close study.
Under the Tort law, in order to claim compensation the tort must be of such a nature as will entitle the plaintiff to recover damages. Where, therefore, the case is of a nature which:

(a) does not give rise to a right to the plaintiff to recover damages, or to the existence of the liability of the defendant, as where the defendant has committed no wrong, whether a breach of contract or a tort, or

(b) does not occasion any loss or damage, or no cause of action accrues to the plaintiff, as when he himself is at fault or the damages are too remote, or he has failed to mitigate his damages.

Compensation cannot be granted:
Thus, the plaintiff cannot recover that part of the loss—
(a) which is due to his own contributory negligence; or
(b) of which the defendant's conduct is not the cause; or
(c) which is not within the scope of the protection of the particular contract or tort; or
(d) which he should have avoided or mitigated; or
(e) which is too uncertain; or
(f) which is past or prospective, that is, is too remote.

Damages play a dual role in tort, partly with the existence of a cause of action, and secondly with the measure of damages recoverable in the event of a good cause of action being shown. The rule of remoteness affects both these aspects of the subject.
ii. **Damage as an Element in Tort:**

Legal damage (damage in fact or one in the contemplation of law, as distinguished from actual damage) resulting from some injury to the right of another, or from breach of a duty owing to such other, is a necessary element of a cause of action in tort. Wrongs without damage, does not constitute a good cause of action. But, a direct invasion of a legal right or the breach of a legal duty imports damage. The law, in such cases, infers or presumes damage sufficient to support an action. In tort, the injury is regarded as the gist of the action, if the tort is of a kind in which damage is not an essential ingredient.

For the purpose of assessing damages, a tortfeasor takes his victim as he finds him. Where the type of injury which occurs is reasonably foreseeable, the defendant is liable for the damages claimed, although he could not reasonably have foreseen the ultimate consequences of the initial injury.³

iii. **Principle Underlying Tortuous Liability:**

The adjudication of claims founded on tort, calls for a constant adjustment of compelling interests. An adjustment has to be made between two basic interests of individuals—

1. the interest in security, and
2. the interest in freedom of action

The first requires that the person wronged should be compensated by the wrong-doer, regardless of the motives and purports of the latter. The second requires that the wrong-doer

³ Smity Vs Leech Brain & Co. Ltd. 1961, 3 All ER. p. 1159.
should be held responsible only, when his activity was intentionally wrongful, or indicated on undue lack of consideration for the interests of others.

Conduct becomes the basis of tort liability only—
(1) when the wrong-doer intends to invade the interests of others, or
(2) is negligent towards such interests, or
(3) when the conduct is extra-hazardous with respect to such interests, or
(4) for socio-economic reasons it is regarded as the basis of absolute liability

The reason, that any conduct is tortuous, if liability for it is confined to—
(a) harms actually resulting, that are of the general kind to be anticipated from the conduct, and
(b) situations, in which the person harmed is one of the general class threatened.

iv. Uncertainty or Difficulty in Quantifying Damages:

Mere uncertainty as to the amount of damages and the difficulty in quantifying damages in terms of money cannot preclude the right to recovery, where damage to the plaintiff results on account of the wrongful act of the defendant. In torts, which preclude the determination of the amount of damage with certainty,
the Court must draw a just and reasonable inference, although the
deduction is based only on approximation.4

(i) **Proof of Damage:** Proof of damage is not always necessary to
give a good cause of action, for the law presumes damage in the
following cases:

(a) actions for trespass to persons, goods or immovable property
including actions for conversion, even though the goods are re-
delivered before the action is brought.5

(b) actions for nuisance affecting rights of property such as rights
of riparian owners,6 rights of light,7 or rights of way8, in such cases,
it is necessary only to show that there has been an appreciable,9
infringement of the right and not that damage has been suffered;
but in an action for nuisance, where the claim is laid for loss of
amenity, as by noxious fumes and the like, it is necessary to show
substantial injury,10 such as sensible diminution of comfort,


10. Smit vs. Giddy, 1904 2 KB.
according to modern notions of ordinary comfort of existence,\textsuperscript{11} actions for libel\textsuperscript{12} in certain actions for breaches of duty by public officers,\textsuperscript{13} actions for interference with a legal right\textsuperscript{14}

(ii) Direct Cause:

A party guilty of a tortuous act or omission is liable for all the consequences which result directly therefrom, even though he could not reasonably have anticipated them. Liability, in such a case, was held to extend in Polemis case to entirely unforeseen or unforeseeable consequences. In Re Polenzi v. Furness, Withy & Co.\textsuperscript{15} the defendants had chartered a ship from the plaintiffs. While the ship was being discharged, there was petrol vapour in the hold owing to leakage in certain tins forming part of the cargo. The defendant's workmen, while shifting some of the tins, negligently let a plank fall into the hold, which caused the vapour to ignite, whereby the ship was totally destroyed by fire. It was held that the defendants could not escape from their liability to pay nearly 2,00,000 Pounds, the assessed value of the ship, on the ground of remoteness of damage. It may be observed that the finding of the arbitrator in this case was that the damage was beyond the range of foresee ability; the Court of Appeal refused to confine liability to

\textsuperscript{11} Walter vs. Selte, 1851 4 De g & S 315, 322; Venderpant vs. Mayfir Hotel, 1930 Ch. 138, 165, 66.

\textsuperscript{12} Hayward vs. Hayward, 1887 34 Ch. D, p, 198.

\textsuperscript{13} See Ashby v. White, 1703 2 Lord Raym, p. 938.

\textsuperscript{14} Nicholls v. Ely Beet Sugar Factory Ltd., 1931 2 Ch. 84, 380. See Constantine v. Imperial Hotel, 1944 KB 693. (action against an in-keeper for refusing to receive lodge a \textit{bonafide} traveller without lawful justification or excuse).

\textsuperscript{15} 1921.3 KB. 560.
the 'reasonable and probable' results of the negligent conduct and extended it to all 'direct' consequences.

v. Recovery of Damages in Torts:

The recovery of damages in tort is not limited to the loss of something which he is entitled by law to enjoy. If the defendant's act is wrongful, it is enough that the benefit of which the plaintiff is deprived is one of which he was in actual enjoyment, though he may have had no right to enjoy it, for mere possession is a good title as against a wrongdoer. Thus, the plaintiff may recover in slander for the loss of the hospitality of friends,16 or for the loss of customers,17 or of the voluntary contributes of a congregation,18 though he had no right, as against the friends, customers or congregation, as the case may be, to have of them, he is protected in the enjoyment of them as against a wrongdoer. And instances may be multiplied. But, if the benefit lost to the plaintiff by the defendant's wrongful act existed, at the date of the wrongful act, in expectation only, and not in possession or reversion, the plaintiff cannot recover in respect of it. So, in Hutchins v. Hutchins,19 though there was a substantial loss directly flowing from the defendant's wrongful act (his fraudulent misrepresentation to the testator to induce him to revoke a will he had made in plaintiff's favour) yet, as the plaintiff had no right to have the will unrevoked,

18. Hartley vs.. Heming 1799, 8 TR. p. 130.
19. 1845, 7 Hill Y.Y., p. 104.
and had no possessors’ interest in the subject-matter of it, it was held that the damage was not recoverable.

vi. Assessment of Damages:

In assessing damages, as in personal injury cases, each case has to be decided on its own merits, guided by previous awards in comparable cases. If the damage suffered is capable of being calculated in terms of money (though very little can be said with certainty as to such damages), the amount of compensation awarded must be fair and reasonable.

Damages in actions for personal injuries can be recovered under the following heads:

(a) loss of time during the cure,
(b) expenses incurred in respect of it,
(c) pain and suffering undergone by the plaintiff, and
(d) permanent injury, when it causes a disability and consequent pecuniary loss.

Though, the above heads are the generally identified ones, the judicial decisions indicate that perfect compensation is hardly possible and may be unjust. The plaintiff who suffered a wrong, though has done a no wrong, justice demands that he must get full fair compensation for what he has suffered. The relevant considerations in deciding a fair compensation are the intensity of the injury suffered by the plaintiff, the means of the defendant etc. Thus, ultimately the sum awarded as compensation should put the

injured party, so far as money can put him in the same position as if he had not been wronged.\textsuperscript{21}

If the damage suffered is capable of being calculated in terms of money, the injured party is entitled to full compensation for the pecuniary injury suffered. But no principle can be laid down in the case of heads of damages which cannot be calculated in terms of money, such as pain and suffering, or loss of limb, loss of life, etc. These do not admit of arithmetical calculation and can only be assessed in the light of the previous awards made by the Courts in comparable cases.\textsuperscript{22} Each case has to be decided on its own merits\textsuperscript{23} in the above-noted Madras case, the leg of the plaintiff was severed before the knee by a rash and negligently driven bus. The trial Court awarded Rs.10,000 as damages and this was held by the High Court as a correct compensation, who referred to Muireddy v. Bell,\textsuperscript{24} Bradley v. Baldwin Ltd.,\textsuperscript{25} Lee v. Manchester,\textsuperscript{26} Sherman v. Foillard,\textsuperscript{27} Reference was also made to

\begin{footnotesize}
\begin{enumerate}


\item 1953, 2 All ER. 215, 218.

\item 1952, CA, p. 32.

\item 1953, CA, p. 277.

\item 1950, 2 KB.P. CA, p. 43.
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Vinayaka Mudaliar v. Parathasarathi,\textsuperscript{28} where the award of Rs. 12,000/- made by the trial Court was reduced to Rs. 6,000/-.

3.5 A NEW VISION ON COMPENSATION TO VICTIMS OF CRIME

An insight into the evolution of law regarding compensation to the victims of crime and abuse of power, thus reveals that in the course of history of civil and criminal administration of justice system, the payment of compensation to the victims of crime irrespective of the civil and criminal dichotomy has come to stay. Over the years several doctrinal principles have been developed concerning the need and justification for payment of compensation to the victims of crime be it a civil law case like torts or be it a criminal law case.

In the changed scenario, the state playing a predominant role in the socio-economic justice programmes for the people development incidentally has also made the state often an agency encroaching upon the constitutional protection extended to the citizens in the matter of life, liberty and property. In the ultimate analysis not only the wrongful acts of private individuals but also the wrongful acts of the state are becoming the cause of worry of the victims. It is in this back-drop that the activist judiciary through its reasoned decisions and the efforts of various criminologists, scholars, etc., over the years that new vistas have been opened up in the annals of jurisprudence, concerning compensation to the victims of crime and abuse of power, who has been hitherto a

\textsuperscript{28} AIR 1919. M.P. 1067.
neglected lot in the criminal justice system. The contribution made by the Indian Judiciary in this regard is elaborately dealt in chapter IV.

Every crime has a victim and ignoring him and not making any attempt to provide him solace or restitution, would be a challenge to protection of his human rights also.

The present criminal system of justice is in favour of the accused because under the accusatorial system an accused is presumed to be innocent till proved guilty and the burden of proof always rests on the prosecution, the presumption of innocence gives right to various constitutional and legal rights insofar as the offender is concerned. His Right not to be arrested except in accordance with the law, right to be produced before the Magistrate within 24 hours of his arrest, right to be represented by a counsel, right to legal aid in respect of certain case, right to bail, right to public trial, right to test evidence by cross-examining, right to be heard about the sentence, immunity from compulsory testimony and so on and so forth.

Thus, the criminal justice system today is basically concerned with criminals, whether it is their conviction, treatment, reformation or rehabilitation. The purpose of criminal justice system appears, at present, to be confined to the simple object of ascertaining guilt or innocence and use the victim only as a witness, Since, the central object of legal process is to promote and maintain public confidence in the administration of justice, therefore there is an urgent need for giving a well-defined status to
the victim under the criminal law. His interest in getting the offence punished cannot be ignored or completely subordinated to the interest of the State. Otherwise, the victim will remain discontented and may develop a tendency to take the law into his own hands in order to seek revenge.

A victim of crime or his heirs after suffering at the hands of the offender have the choice to either move a court of law or go to the police station to seek redressal of the grievance. For him unfortunately neither of the two is an attractive proposition. If he is hesitant to approach the police station for the reasons which are buy no means unknown, his reluctance to approach the court is also not without reason.

If he opts for the first which is understandably less expensive and less arduous his expectations are not always met because what the law provides is not always practiced and the police in this country with exceptions here and there has unfortunately failed to inspire confidence in the minds of the society. There are complaints of police indifference when they go to report crime which not only discourages him but also makes him an object of ridicule. May be it is because of the fact that police today is over burdened, it has a variety of roles to perform and the investigation of cases therefore receives a poor priority. Under the existing criminal laws in our country the victim is not having any right to ensure that the crime is properly and effectively investigated by the police,. It will be in the interest of justice to recognize the right of the victim in cognizable offences to know about the progress in the investigation as well as an opportunity to provide relevant evidence
apart from making the statement. If the police is going to file a final report before the magistrate, the victim (or the first informant) must be heard. No final report of closure of a case should be accepted by the Magistrate without notice to the de facto complainant and providing him with an opportunity of having his say.

So far as the second option is concerned, i.e. to go to the court, apart from the expense involved, the obligation to appear on every date of hearing is quite a deterrent.

In the present system of criminal justice, speaking generally, offences registered by the police are treated as offences against the State which gets an offence investigated by its agency, moves the court for trial of the offender and prosecutes him in a court of law. Right to bail is regarded as a right of the accused but there is no corresponding right available to the victim or his heirs to oppose bail. It is left to the State only to oppose or not to oppose the grant of bail. Neither at the stage of framing charges or passing an order of discharge are the views of the victim ascertained, let alone considered. He is not to be consulted. Even after the case ends up in a conviction, it is the State which defends the judgment of the trial court in appeal, if any, filed against the conviction and sentence. The victim of crime has hardly any role to play in the whole proceedings except that he may, if alive, be examined by the prosecution as a witness.

Under the Cr.P.C, a victim of crime has got a very limited right of revision and that too under exceptional circumstances. An accused has the statutory right to be heard on the question of
quantum of sentence after conviction is recorded, but unfortunately a victim of the crime is not so heard. It is strange that in spite of the fact that a victim of crime, who suffers at the hands of the accused and moves the State through the police or the courts to seek injustice, is given the impression that after having lodged the report or the complaint, he is a "Mr Nobody". Even where he engages a counsel, during the trial of a case, instituted on a police challan or at the hearing of the appeal, his counsel is treated only as a "counsel by sufferance" and may or may not be heard by the court depending upon the attitude of the State counsel. He can at the best assist the public prosecutor but that also in case the public prosecutor really wants to be assisted by him. A victim of crime is, thus, a minute witness to the whole drama. If alive, he may appear as a witness and there again the provisions of Evidence Act of relevancy of facts notwithstanding, he is subjected to continual questioning, with the court almost silently watching. After the evidence is recorded and arguments heard comes the verdict of the accused being guilty or not guilty – a matter of great concern to the victim of crime.

It humiliates and frustrates a victim of crime when the offender goes unpunished or is let off with a relatively minor punishment as the present system pays no attention to his injured feelings. Imposition of appropriate punishment on the criminal is the response of the courts to the society's cry for justice. Indifference to the rights of the victim of crime is fast eroding the faith of the society in general and the victim of crime in particular in the criminal justice system and this has already given rise to the incidents of crime and lawlessness, in the form of terrorism, which
is raising its ugly head to settle private and political scores over the adversary with the barrel of gun.

Victims of war and accidents have the right to claim compensation under the statute. But there is no such right available to other victims, though compensation has been awarded in a few cases, at the discretion of the court and some statutory provisions have also been enacted in the Criminal Procedure Code.

A victim of crime has hardly any guaranteed right except may be of getting some assistance by way of payment of compensation, but even here the statutory provisions are grossly inadequate. These provisions suffer from inherent limitations also about the extent of fine, capacity of the criminal to pay and the like. Award of fair and reasonable compensation to the victim might act as a balm on his wound, and may also deter to whatever little extent, the criminal but there is no such statute in this country which takes care of it.

### i. Common Law Regarding Compensation In Torts And Crimes

Edwin H. Sutherland (1924), the Dean of American Sociological Criminology, rather peevishly questioned this distinction between torts and crimes in the first edition of his text book, written more than fifty years ago, Sutherland noted that; in theory, civil law is said to be concerned with wrong against individuals, and criminal law is concerned with wrongs against the public, for which punishment was the decreed response. In the
criminal court the state is in control, in the Civil Court, parties oppose one another. But Sutherland found such distinctions less than logical.

In recent years this historical differentiation is questioned by many people, first, because it is sociologically unsound to make such an opposition between the individual and the public. If a tort (that is, a violation of civil law) injures an individual, it injures the public to some extent. Some torts do more injury to the public than some crimes. Most crimes and most torts injure some particular individual more than other individuals. But it is not necessary that a particular individual be injured either by a tort or a crime, for there are torts, known as "penal actions," in which any individual whatever who will bring suit may recover damages for injuries done to the community, and there are crimes, such as treason that need not cause special injury to one individual more than to another. In addition, criminal courts in the last generation especially have been using reparation very frequently as one method of dealing with offenders; and civil courts have been assessing exemplary damages in civil actions, which amount to punishment.

Authority on tort law, Sutherland\(^2^9\) point out that an affinity remains between the criminal law and the law of torts. Their distinction between the two areas is essentially a programatic one, rather than a logical differentiation. Largely because of historical circumstances, they observe some acts are regarded as torts; other as crimes.

\(^{2^9}\) See Seavery et al. 1964; 1.
The law of torts and crimes is important for purposes of the present study for a number of reasons: For one thing tort law offers something of prototype for approaching a satisfactory definition of crime victims. For another, state compensation to crime victims—the subject of this chapter—is essentially an attempt to interconnect the area of crime and tort by bringing crime victims formally within, the ambit of what essentially is the form of tort law that places the state in the position of the offender, subject to process that allows public compensation to be awarded to the crime victim. The development of victim compensation programmes, particularly with regard to the kinds of persons embraced within the compensation laws and rationales for inclusion and exclusion of potential claimants, will concern us below.

There are arguments that principle of restitution or compensation in relation to a crime only serves civil justice ends and is non-criminal in form, however as Schafer says, the compensatory aspect of restitution is a logical extension of the "symbolic compensation already offered criminal punishment".

Although restitution appears to share with Civil Law aim of compensation, close examination reveals that its principal value is not its ability to make the victims feel compensated as a whole, but rather its utility as a corrective device.

Restitution also serves the retributive goals of punishment, it is also an effective deterrent. It also reflects Judicial concern with

rehabilitation. At the same time it requires no greater procedural protection than those normally employed in sentencing.

The object of Criminal Law and Civil Law overlap to a significant extent. By penalising negligence and breaches of contract, civil systems attempt to maximise public safety and not only with societal harm, but also with harm, to victims, the enforcement of criminal law protects not only society as a whole, but also its individual members. Criminal law defines each person's minimum responsibility to fellow members of society.

Hence the award of compensation to the victim of crime in criminal proceedings was not considered as a procedural flaw.

Crime victim compensation is one of the pillars of victim assistance. For many victims worldwide, it serves as the primary means of financial aid in the aftermath of victimization. While restitution laws requiring reparation to crime victims, there is one important distinction between the two sources of financial relief for crime victims: victim compensation does not require the apprehension and conviction of the offender to provide financial relief to the victims. While the physical and psychological impact of crime may be the most obvious and serious toll taken by a crime, the financial impact can also be devastating.

ii. The Socio-Economic And Legal Dimensions Of Compensation

The concept of compensation is inextricably linked to the socio-economic and legal norms prevailing in the society. Thus,

the issue of payment of compensation arises several queries which need to be tacked judiciously. These include the level of poverty, crime rate, the causes and consequences, the responsibility of the state and the society at large, the constitutional and legal framework concerning the rights of the victim to claim compensation etc.,

A counter argument is put forth against the scheme of victim compensation, from the point of view of the prevailing conditions of poverty. It is stated that, in a “below-the-poverty-line-economy” with majority of criminals from such a background, compensation recovery but an unequal provision that benefit those with financial means and seems unrealistic in the poor society with little material benefits. Inquiry as to financial status seems to be a good alternative, but on the whole process the victim can turn out to be the looser.

The whole problem ingrained in any schemes of compensation is the means and mobilization of funds, in the existing socio-economic environment, the state needs to find ways and means to raise or create a compensation fund, to make payment to the victim, not only, as part of its legal duty but also as a moral duty, for its failure to protect the citizens against its own agencies and also the private persons.

Then there are crimes that cannot be measured or make up in terms of monetary compensation especially in cases of rape that affect the victim psychologically as much as physically. These cannot be sufficiently repaired, but to consider such means one
can never draw the line. Thus, on the whole, there are several socio-economic factors which have a definite bearing on the entire framework of victim compensation.

In ancient civilizations, the victim of an offence was the central figure in any criminal setting. In our pre-modern polity the injured or the victim had a vital say in matters connected with restitution or retribution. But gradually, as one civilization gave way to another, private revenge gave way to public justice, which the Government taking on the responsibility for meeting out justice the offender has become the *prima donna* and the victim is completely forgotten.

The earlier lawyers attempted to define crime and torts putting them in to two water-tight compartments, there is no doubt that the same wrong way give rise to plural actions one in crime and the other in torts; the former targets punishment of the offender whereas the latter aims at compensating the injured party. Their nature can be substantiated if we discuss here some definitions of crime and torts and point out the distinction between them. According to Keeny, “Crimes are wrongs whose sanction are punititve, and are in no way remissible by any private person but are remissible by the crown alone if remissible at all. In Mann Owen it was held that the proper definition of the word “crime” is an offence for which law awards punishment.

A. VICTIMS OF CRIME

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrators are identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution
8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission
occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

16. Police, justice, health, social service and other personnel concerned should receive training to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid.

17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

B. VICTIMS OF ABUSE OF POWER

18. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

19. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.

20. States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.
21. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

iv. Crime Scenario in India

The following table provides an overview of the crime scenario in India. In the year 2004, there was a sharp increase in the number of cases registered and in the year 2005, the number of cases registered declined drastically by 16.7 percent when compared to the year 2004. In the year 2004, the Indian Penal Code (IPC) and Special and Local Laws (SLL) crimes constituted 30.4 and 69.6 percent, respectively and during 2005, 63.7 percent accounted for SLL crimes and 36.3 percent for IPC crimes. The rate (per 1,00,000 population) of total IPC and SLL crimes was 455.8 in 2005, showing a decline over the previous years.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of offences</th>
<th>Ratio</th>
<th>Rate per 1,00,000 population</th>
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</thead>
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<td></td>
<td>Legislation</td>
<td>IPC-SLL</td>
<td>IPC-SLL</td>
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<td>17,69,308</td>
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<td>41,96,766</td>
<td>1:2.30</td>
</tr>
<tr>
<td>2005</td>
<td>18,22,602</td>
<td>32,03,735</td>
<td>1:1.76</td>
</tr>
</tbody>
</table>
According to Crime in India, 2005 (official crime statistics compiled and published by the National Crime Records Bureau, Ministry of Home Affairs, Government of India), 39 percent of the offences were crimes against body, crimes against property were 35.3 percent, crime against public order were 5.9 percent, economic crimes were 6.3 percent, 8.2 percent of the cases comes under burglary, theft comes to 24.8 percent and so on. There was an increase of about 31.1 per cent in the number of cases registered under cheating, a high percentage of increase (67.4 percent) was seen in importation of girls (from foreign country)2, 15 percent increase was seen in cases registered under Narcotic Drugs and Psychotropic Substances Act, 1985, 13.7 percent increase in gambling, a huge percentage (119.6) of increase was seen in cases registered under Indecent Representation of Women (Prohibition) Act, 1986, also 63.5 percent increase was seen in copyright violations (National Crime Records Bureau, 2006:31–39).

Also, national crime statistics show a grim picture of women's status in India, which is driven by social, economic and cultural factors. An analysis of the official statistics for India for the period 1991–2001 shows an overall increase in the crimes committed against women. During the period, there was an increase in the offence of rape committed on women by 5.34 percent, cruelty by husband and relatives by 11.32 percent, and molestation by 6.8 percent (Srinivasan, 2004). The above statistics provide a bird's eye view on the nature and extent of crime victimization in India. Besides, data about the loss of lives due to natural calamities and consequent misery is really mind boggling.
To cite an example, in December 2004, due to Tsunami, thousands of lives were lost and hundreds of people—particularly children and women—were orphaned in the State of Tamil Nadu alone. Such people are also vulnerable to various forms of crime victimization. Thousands of children are being used in exploitative forms of labor and thousands of children are living and working in the streets where they have often been subjected to different forms of exploitation.

The impact of victimization on different kinds of victims due to different types of crimes has been varied such as physical, psychological and financial. Researchers have indicated that the impact of victimization not only affects the victim but also the victims' immediate family and next of kin, relatives, neighbors and acquaintances. This holds true for the emotional as well as the financial consequences and the effects can last for a few months or years or in some cases for life long. Hence, the consequences of victimization emphasize the urgent need, not only to prevent victimization but also to protect the victims and provide them with all kinds of assistance during and after the criminal justice process. The traditional approaches of handling of crime have not altered the position of victims of crime for better in anyway. Contrary to the common belief held by criminal justice officials that victims would expect retaliation or retribution to their offenders, many victims are found to be interested in restorative approaches in order to deal with disputes rather than punishments and penalties to the offender. One recognized method of protection of victims is compensation to victims of crime. For providing monetary compensation and for protecting certain other rights of the victims,
there are some provisions both in the Constitutional Law of India and in the criminal laws.

A comprehensive scheme for payment of compensation by offender, as well as by State, based on sound and certain legal premise should be evolved.

The compensation to the victims of crime should be State responsibility and for implementing this welfare measure an appropriate body should be set up. A victim of an offence should be legally allowed to intervene in the criminal proceedings against the offender to claim compensation for loss or injury. Judicial Administrative Mechanism should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

3.6. JUSTIFICATION FOR VICTIM COMPENSATION

Victim compensation is a novel idea and if successfully meted out it retains the equity between the injured and the injurer. Victim's ego gets satisfied and he feels a sense of belongingness and security in the society. The modern world has almost discouraged the reimbursement to the victim by the offender or his family; because the state sponsored punishment supplanted victim and family reparations. The restitution has been replaced by punishment.

As justice should not only be done but it must been seen to have been done, therefore according to punishment to the offender
or violator of the rights, be it may legal rights, fundamental rights or human rights, of an individual is just the former part of justice i.e. the justice has been done by punishing the culprit. But the later part that it must be seen to have been done still requires something more to be done. It requires just not only punishment to the accused but caring for the victim and protection of his rights and supporting him in times of distress. The case of according compensation to the victim gets impetus because:

i. The victim must get the recompense from the violator who has tampered with his right to safety and peace along with right to live with dignity.

ii. The victim must get the recompense from the society because it failed to provide him condense atmosphere worth living, and protect him during such invasions into his rights.

iii. The victims must get the recompense from the State as it is the duty of the State to check the deviant behaviour and maintain peace and order in the society.

The idea of victim compensation to such victim is not new but also existing in the ancient time, which got lost in the later period when the State emerged focusing primarily on retribution on behalf of a victim by itself. The later criminal justice system due to it’s over emphasis on the offender and his rights, lost sight of the victims. After Independence, we the people of India devised for

33. V.N.Rajan, Victimology in India, APH 1993, J.L.Barkas, victim, peel press.
ourselves an excellent piece of State craft in the form of Constitution of India, wherein due to the commitment to the human dignity, we classified certain rights as the fundamental rights was done and granting of powers to the various wings governing "we the people" under the expectation that they shall never toy with these basic rights, took place. Apart from it, India became signatory to various international Covenants and Conventions with regard to the human rights which also warrant the State to take care of the human rights and other rights mentioned therein which are primarily indispensable so far as the human being is concerned.

Keeping in view the above background one can say that now again the shift is towards the victim who had come to the forefront and the principle of victim compensation have been accepted in several criminal justice systems.

i. Purpose of compensation

What purpose is served by paying compensation awards to victims?

State compensation for victims of crime is relatively a recent phenomenon. The first compensation scheme for victims of violent crime commenced in New Zealand on the 1 January 1964, while the United Kingdom followed later in the same year (California established a scheme in 1965 and New South Wale Wales was the first Australian State in 1967 to institute a similar scheme)

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the United Nations
General Assembly resolution 40/34 of 29 November 1985. It states:

Compensation

1. When compensation is not fully available from the offender or other sources States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

2. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Internationally, it has been accepted that States should attempt to provide financial compensation to victims, or dependants of victims, of intentional violence where compensation is not available by any other means.

Compensating victims of violent crime for expenses reasonably incurred as a result of a criminal offence is an important initiative for society. It should be noted that there is no
obligation on the State to compensate victims of crime, except perhaps a moral one. Several rationales for compensation have been offered over the years, including 'strict liability' or 'government liability' theory (where the government is said to have broken its social contract between it and its citizens); the 'social welfare' theory (the state has a humanitarian obligation to assist crime victims); and the 'shared risk' or 'equal protection' theory (the burdens of victimization should be shared throughout society). Peter Burns, in his book Criminal Injuries Compensation (1992), concludes that victims compensation "is primarily a form of state charity designed to soothe the public..." Whatever the true motivation behind compensation programs for victims of crime is, we believe it is in the public interest.

For those whose lives have been devastated by violent crime, the impact of the crime may remain for the rest of the survivor's life. While monetary awards will never make up for the injuries suffered or loss of life, it can compensate for some of the financial losses (emergency expenses, lost wages, medical expenses, psychological counselling, pain and suffering and funeral costs) and provide victims with a means to get their lives back in order.

The purpose of compensation is to provide victims and survivors of violent crime with a financial award or token, as a means of showing society's compassion for and solidarity with those innocents irrevocably harmed by acts of violence. We feel

34. Peter Burns, Criminal Injuries Compensation, (B, Butterworths: Toronto, 1992) at 237.
that society has an ethical obligation to recognize and repair the harm done to individuals as a result of their victimization. Given the amount of public funds used to incarcerate, rehabilitate and supervise offenders, compensation for victims of violent crime should be seen as a welcoming means of balancing the scales of justice. Although victim victims, survivors and their advocates may be highly critical of the effectiveness of state this in no way means that compensation is unnecessary.

ii. Limitations

Should any groups or individuals be excluded from receiving victim compensation payments (e.g. persons whose behaviour significantly contributed to their injury or loss, persons whose expenses or losses are compensable through other sources such as disability insurance)?

The people who have contributed in some manner to their own death or injury, those who do not cooperate with law enforcement or those who do not report the offence promptly should not be eligible for compensation.

There are several serious concerns surrounding the dynamics of sexual violence that adjudicators must recognize in order to ensure that victims can be compensated. This includes recognition that many sexual assault victims do not report immediately or at all to the police for various reasons. Also, there are societal myths surrounding sexual violence that must not be interpreted by adjudicators to mean a victim contributed to their own injury thereby reducing or denying an award.
We also agree that it is reasonable to require that the incident be an act of violence as per the *Criminal Code* and that there be enough reliable information to support the claim (medical/therapeutic and other forms of corroboration should be allowable in the case of sexual violence where there is no police report made). Compensation should not be allowed if the victim has received any benefits, compensation or indemnity from other sources.

Applications can be denied at the outset. For example, convicted offenders, currently incarcerated for violent crimes should not be eligible to benefit from crimes compensation legislation if injured while in prison. Such applications should be deemed ineligible on the basis that being incarcerated contributed directly or indirectly to their injury.

iii. Concerns for compensation

Are there ways other than direct monetary compensation to better serve victims of crime? If so, what are the victim service priorities that the government should consider?

The value of and need for compassionate services and sensitive support for persons who have the misfortune of becoming victims of crime cannot be understated. We appreciate the dedication of professionals working in victims' services and the practical assistance and support offered by so many service providers in State.
For instance, the cost of crime in Canada is largely borne by victims. In 2003, crime in Canada cost an estimated $70 billion, a majority of which, $47 billion or 67%, was borne by the victims. Victim costs include the value of damaged or stolen property, pain and suffering, loss of income and productivity, and health services. Criminal justice system expenditures such as police, courts, and correctional services comprised $13 billion or 19% of the estimated total cost of crime. The remaining $10 billion, or 14%, was spent on defensive measures such as security devices and protective services. Assessments by type of crime category revealed that property crimes cost Canadians the most, at $40 billion, while violent crimes cost $18 billion and other crimes $12 billion.35

The costs of crime directly impact victims, thus compensation must remain a government priority. Helping victims overcome the devastating impact of violent crime is an important way to serve crime victims. Monetary compensation is necessary in many cases, especially with respect to emergency payments, income loss, medical/dental/therapy expenses, loss of support, travel expenses, pain and suffering and funeral/burial costs. The formal process of being awarded compensation itself has substantial psychological and/or therapeutic benefits for crime victims.

While many jurisdictions around the world are doing away with pain and suffering awards, these awards are crucial to many victims whose lives are broken by violent crime. They are an

important recognition of the physical, emotional and psychological harm caused by violence and can allow survivors to regain some lost ground.

In Australia, the Victorian government's decision in 1996, with the enactment of the *Victims of Crime Assistance Act 1996* (Vic), to abolish government-funded victim compensation for 'pain and suffering' was drastic. This was by far (well over 90%) the most substantial element of victim compensation awards in Victoria. The government did so because the other generally allowable entitlements of victim compensation – actual expenses incurred by victims and 'loss of earnings' often were not nearly as important for the majority of victims (especially the unemployed or where other sources covered any loss of salary).

In fact, early figures showed that the introduction of the *Victims of Crime Assistance Act 1996* in Victoria cut the number of applications for victim compensation from about 5,000 per year to only 124 in 1997-98. The reasoning behind this move was articulated in parliament by the then Victorian Attorney-General, Jan -Wade, de, when she introduced the Bill that eventually abolished government funded compensation for pain and suffering. The focus of victim compensation was to be far more responsive to the needs of crime victims. The new service (the Victims Referral and Assistance Scheme) would offer free immediate counselling using a voucher system, and its main basis would be the psychological and physical recovery of victims, resulting in a more 'integrated approach'. She argued that it not certain that monetary benefits deriving from pain and suffering awards really assist
victims to recover and seek counselling. This is especially the case as often this compensation comes many months after the criminal event, and counselling is often not provided until this time as well.

It is important for all survivors of violent crime to be able to access the services they need and want, including compensation. When governments attempt to highlight victim service priorities, groups of individuals who have equally been victimized by violent crime, who suffer similar losses and devastation, will be left out. An award of financial compensation provides crime victims with choices as to how they should spend the money, whereas an ‘assistance’ only model assumes that the victim only needs counselling or other forms of psychological assistance, and is thus paternalistic.

iv. Determining compensation

Should victim compensation be based on the nature of the injury, expenses incurred, or a combination of both? If injury-based, what criteria should be considered in the development of a benefits schedule (e.g., loss of income, pain and suffering,)? If expense-based, what expenses should be recoverable?

Compensation should be a combination of both injury and expense-based benefits. i.e., physical, emotional and psychological injuries should be compensated, as well as expenses that are reasonably incurred as a result of violent victimization. Expenses that are appropriate to include are:
- Expenses incurred or to be incurred as a result of the victim's injury or death. This would include the cost of counselling, physiotherapy, eye glasses, dentures, etc.
- Emergency expenses incurred as a result of the victim's injury or death. These expenses include such items as medical costs, funeral expenses and interim counselling.
- Loss of wages where total or partial disability affects the victim's ability to work.
- Financial loss to dependants of a deceased victim.
- Pain and suffering.
- Maintenance of a child born as a result of sexual assault.

The injury known as "mental or nervous shock" is too unyielding. Homicide survivors must provide medical evidence of a psychological injury, where such an injury is assumed for sexual assault survivors. The violent, unexpected murder of a close relative, particularly the murder of a child, should provide for an automatic pain and suffering award because the severe psychological trauma is implicit.

"Normal" grief that a parent would feel after a child has been murdered is not sufficient to qualify for pain and suffering under any legislation. In order to qualify for mental or nervous shock, an applicant must be able to show that he/she was unable to function normally over an extended period. This normally means the applicant has been hospitalized or suffers a psychiatric/psychological injury that is lasting, for example depression or post-traumatic stress disorder, and can be
substantiated by a medical doctor, the therapist or counselor. Victims must therefore be treated medically or psychologically to prove that they were so shocked by what occurred that they developed a psychological injury.

As agency that works on a daily basis with families impacted by homicide, can attest to the life-long psychological scars that result depression, suicidal ideations, phobias, anxiety and post-traumatic stress are common. The problem victims’ encounter is they do not always have the ability or means to seek medical assistance or psychological counselling to address these issues, which can last for many years or even a lifetime after the murder. Furthermore, it is still not socially acceptable for fathers in particular, to seek therapy for the shock and devastation they endure when their child is murdered. They must continue to provide for their families. Also, it is not common practice for some ethnicities to seek counselling outside of the extended family setting. The Board needs to be responsive to the diverse needs of people of all ages, races, religions, ethnicity, sexual orientation, physical ability and socio-economic status.

What the legislation fails to recognize is that there is not a clear and accepted method of reacting to the murder of a loved one. Some people need to continue functioning in society to deal with the loss and return to turn work immediately, while others may appear to stop functioning norm normally and require hospitalization, medication for depression and/or counselling/therapy for years to come. The point is that each person is doing what it takes for him him/her to survive. One
should not have to have a nervous breakdown, be committed to a hospital, require medication or attempt suicide to show that he/she is experiencing pain and suffering.

v. Factors determining compensation

Should compensation be based on other factors? If so, what are they?

Compensation should be based on financial need, in some very specific circumstances, for example where the extent of injury will take time to determine, where dependants are left without a parent or where there is a catastrophic injury where the compensation awards would not be sufficient to cover all of the required medical expenses, home care, housing renovations, etc.

Catastrophic injury such as: Injuries that are considered devastating, due to the enormous impact they have on the lives of the individuals who experience them, including the following: brain injury, spinal cord injury, accidental amputation, severe burns, multiple fractures or other neurological urological disorders.

It should also assess the long-term needs of victims, especially with respect to counselling. Further, it is not fair or right for victims to be suddenly cut off from trauma counselling due to reaching a limit or to be forced to seek pro bono counselling services on their own.

vi. Compensation Delivery Model

In awarding compensation, which delivery model would be more responsive to victims needs: an administrative model, an
adjudicative hearing model; or a hybrid administrative/adjudicative hearing model?

The hybrid administrative/adjudicative model is the best solution. It allows the flexibility to hear directly from victims who wish to be heard in the adjudicative model, but is also sensitive to victims who do not wish to re-tell their stories again and again. These files can be handled on an administrative basis, that the expenses to be considered by the Board should remain the same, even if the model for delivery becomes a hybrid model.

One should not support the purely administrative model based solely on injury because these programs tend to forget the human element involved. The injuries victims have suffered do not easily fit into categories and are certainly not all physical in nature. The Financial Benefits Program does not pay compensation for costs or losses. For example, it does not cover property damage, medical expenses, funeral costs, loss of wages or pain and suffering. This program effectively eliminates a large number of victims of violent crime from eligibility.

It is crucial that victims be given the choice to have an oral hearing if they wish to be heard, or to proceed through the administrative model, where possible (understanding difficult circumstances arise in which the Board does not have enough evidence and must hear from the victim/s/survivor directly in an oral hearing). What is positive about this model is that it allows some victims an opportunity to address the decision-makers directly. There are certain instances where an adjudicative hearing
model would be preferable, and the Board should retain the flexibility to allow for this, if and when, it is deemed necessary and/or it is at the victim's request. Using the hybrid model would allow for hearings when necessary, but also the ability make awards using an administrative system (although fixed limits or its amounts should be set in a schedule). The Board must remain in empowered to powered vary its awards (if it makes legal error, its decisions can be appealed).

Yet, in summing up, the assessment of compensation, “the emphasis has to be on the compensatory and not on the punitive element. The objective is to apply balm to the wounds\textsuperscript{36} and not to punish the transgressor or the offender...”. The award of compensation in the public law jurisdiction, it was clarified, was without prejudice to any other action in law including a civil suit for damages. That is, this is a remedy that is “in addition to the traditional remedies and not in derogation” of other remedies. And, the compensation awarded by the court and paid by the state may be adjusted against any amount which may be awarded to the claimant as damages in a civil suit. The device of compensation should be viewed as a public law remedy, as an “interim” measure, as ex gratia, and as a welfare measure holding that the “claim for compensation is based on the principle of strict liability to which the defence of sovereign immunity is not available.

\textsuperscript{36} or to be “a palliative”, as the court said in Rudul Sah.