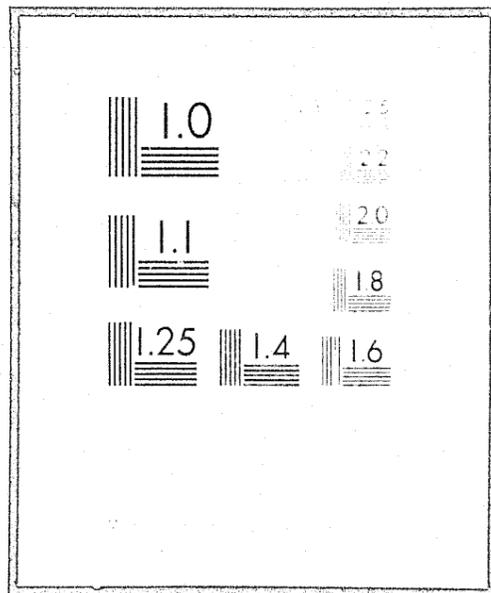


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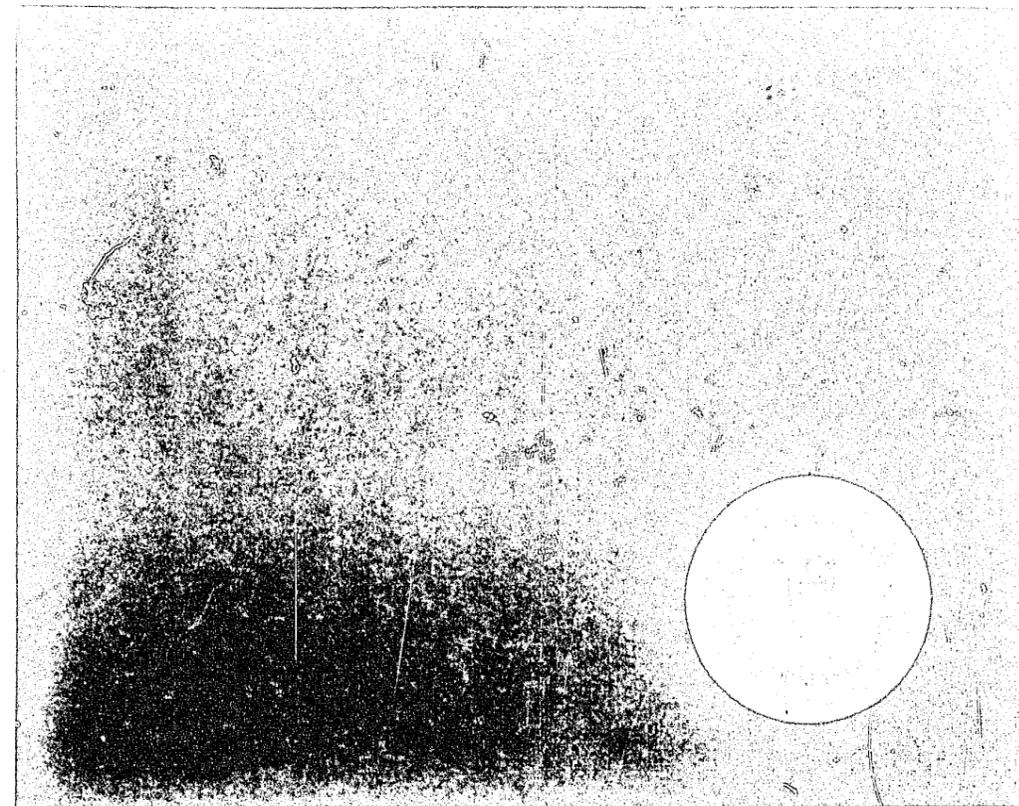
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The National Association of Attorneys General  
Committee on the Office of Attorney General

LEGAL ISSUES IN COMPENSATING VICTIMS  
OF VIOLENT CRIME

The National Association of Attorneys General  
Committee on the Office of Attorney General  
3901 Barrett Drive  
Raleigh, North Carolina 27609

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May, 1976

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## 1. VICTIM COMPENSATION LAWS

Increasingly, interest has grown in the concept of compensating crime victims. The idea has gained support not only from considerations of personal damages and loss of equity, but also from the belief that compensation will result in more rigorous crime prevention and law enforcement.

The purpose of this report is to review the basic concepts involved in victim compensation; the current legislation and law on the matter; the legal ramifications of victim compensation programs; administrative and financial considerations in their implementation and operation; and the activities of Attorneys General under existing legislation.

### Basis for Victim Compensation

The principle of compensating victims of violent crime is not new. In about 1775 B.C. the ancient Babylonian Code of Hammurabi provided that "If a robber has not been caught, the robbed man shall declare his lost property in the presence of the god, and the city and Governor in whose territory and district the robbery was committed, shall replace for him his lost property" and that "if it was a life that was lost, the city and Governor shall pay one mina of silver to his heirs."<sup>1</sup> One commentator has theorized, in this case, the victim compensation principle was based on the supposition that potential offenders would be deterred and the victim or his family would be less inclined toward retribution.<sup>2</sup>

From the Code of Hammurabi, through the works of Jeremy Bentham to those of contemporary commentators, there is at least an implicit recognition that the primary duty of government is to protect its citizens. When a person's security is breached, the government should certainly be effectual enough to provide indemnity. To the same end, the presumed contract among members of a society to refrain from causing physical harm, if breached, results in a claim of restitution, which can be sponsored and administered by the state through victim compensation. Victim compensation is morally and philosophically attractive. If its political attractiveness, which can result in no more than the "tranquilizing showpiece" of a public and "politicians placebo,"<sup>3</sup> is subrogated to the interest of real justice for the victim, then the potential of compensation for innocent victims of violent crime will be realized.

The rationale for compensation varies. Contemporary arguments for crime victim compensation include the obligation of the offender to make restitution, liability on the part of the state for failure to protect victims, and state aid as general social policy.<sup>4</sup> While a Justice of the United States Supreme Court in 1964, Arthur J. Goldberg made the following suggestion:

Whenever the government considers extending a needed service to those accused of crime, the question arises: But what about the victim? We should confront the problem of the victim directly; his burden is not alleviated by denying necessary services to

the accused. Many countries throughout the world, recognizing that crime is a community problem, have designed systems for government compensation of victims of crime. Serious consideration of this approach is long overdue here. The victim of a robbery or an assault has been denied the "protection" of the laws in a very real sense, and society should assume some responsibility for making him whole.<sup>5</sup>

Justice Goldberg was echoing the sentiments of 19th-century Utilitarian, Jeremy Bentham, who also recognized a public obligation to mitigate the plight of the crime victim.<sup>6</sup> More recently, Norval Morris and Gordon Hawkins, in their book The Honest Politician's Guide To Crime Control, expressed the following approach to victim compensation:

[C]rime is endemic in our society and . . . it is only proper for a society so organized that crime is endemic to share the burden which is by chance imposed on particular [unfortunate] individuals. The analogies with workmen's compensation and with compulsory third-party motor vehicle insurance are of some relevance; perhaps a closer analogy in this country is the extensive medical and social welfare provisions of the Veterans Administration legislation by which the community shares in the loss to the individual who has suffered for us from the external aggression of war. We should likewise share the loss to those who suffer for us from the internal aggression of crimes of personal violence.<sup>7</sup>

In a recent study of victim compensation programs, Herbert Edelhertz and Gilbert Geis, have said in a more negative vein that "such endeavors can be nothing more than public placebos, tranquilizing showpieces aimed at placating the public and protecting the politician, all for a negligible price."<sup>8</sup>

Evaluation of the need for such programs or of their effectiveness is outside the scope of this report. However, the increasing number of victim compensation laws makes it apparent that the rationale for their existence has gained increased acceptance, and that state agencies be made aware of the implications of such laws.

#### Enactment of State Laws

In 1964, New Zealand became the first modern state to establish a victim compensation program. A distinguished jurist of the High Court of Ireland, however, has privately advised Maryland Court of Appeals Judge William J. O'Donnell that such a program has been in effect in Ireland since 1848.<sup>9</sup> Great Britain started its program for compensating crime victims in August 1964, following New Zealand, which has become the world's largest in terms of numbers involved and costs. Australia and provinces in Canada initiated programs in 1967. At least eight of ten Canadian provinces have programs: Saskatchewan (1967), Ontario (1967), Alberta (1969), New Brunswick (1971), Manitoba (1971), British Columbia (1972), Quebec (1972), and Newfoundland (1972).

Sweden established a victim compensation program in 1971. The other Scandinavian countries of Norway, Finland, and Denmark have expressed varying degrees of interest in such a program.<sup>10</sup> Japan indicated interest in establishing a victim compensation program by attendance at the Fourth International Conference for the Compensation of the Victims of Violent Crime, Annapolis, Maryland, November 12-15, 1975.

The first states in the United States to have crime victim compensation programs were: California (1965), New York (1966), Hawaii (1967), Maryland (1968), Massachusetts (1968), and New Jersey (1971). The 1968 Maryland victim compensation statute was modeled in large measure from the New York law. The Massachusetts program to compensate crime victims is markedly different from any other American or Canadian program. Massachusetts joins Australia and Northern Ireland in departing from the administrative model utilized in 1963 by New Zealand and later by most other victim compensation programs.

The accompanying table lists the states which have victim compensation statutes and gives citations to those laws. This list does not include states where sentencing statutes may include restitution provisions.

#### STATE STATUTES PROVIDING VICTIM COMPENSATION

<u>State</u>	<u>Citation</u>
Alaska	ALASKA STAT. § 18.67.010 <u>et seq.</u>
California	CAL. GOV'T CODE §§ 13959-13974
Delaware	DEL. CODE ANN. tit. 11, § 9001 <u>et seq.</u>
Georgia	GA. CODE ANN. § 47-518 <u>et seq.</u>
Hawaii	HAWAII REV. LAWS ch. 351
Illinois	ILL. REV. STAT. ch. 70, § 71 <u>et seq.</u>
Kentucky	KY. REV. STAT. ch. 364
Louisiana	LA. REV. STAT. 46:1801 <u>et seq.</u>
Maryland	MD. ANN. CODE art. 26A
Massachusetts	MASS. GEN. LAWS ch. 258A
Minnesota	MINN. STAT. ANN. § 299B.01 <u>et seq.</u>
Nevada	NEV. REV. STAT. § 217,010 <u>et seq.</u>
New Jersey	N.J. REV. STAT. § 52:4B-1 <u>et seq.</u>
New York	N.Y. EXEC. LAW § 670 <u>et seq.</u>
North Dakota	N.D. CENT. CODE § 65-13-01 <u>et seq.</u>
Rhode Island	R.I. GEN. LAWS ANN. § 12-25-1 <u>et seq.</u>
Tennessee	Public Act 736
Washington	WASH. REV. CODE ANN. § 7.68-010 <u>et seq.</u>

The Rhode Island program has been deferred, having been enacted to take effect only following by 120 days the enactment of federal legislation entitled "The Victims of Crime Act of 1972."<sup>11</sup> The Tennessee Act goes into effect July 1, 1976 to establish a compensation fund, which comes from additional court costs against convicted persons or part of the person's prison wages, and becomes effective July 1, 1977 to pay victims.

#### Statutory and Administrative Standards

With the increased interest in victim compensation laws and programs, and their proliferation, attention has been given to developing standards.

Uniformity has been the objective of the work of the Council of State Governments and the National Conference of Commissioners on Uniform State Laws. Moreover, federal proposals have been offered which would lead to a more overarching victim compensation program on the national level. All these groups have outlined factors to be considered in adopting legislation.

#### COSGO Standards

The Council of State Government's Criminal Justice Information and Assistance Project offers guidance in the form of suggested questions to be asked and points to be addressed for an informative response in crime victim compensation legislation.

On the question of how a victim is defined, COSGO suggests that appropriate considerations include: the nature of the crime; Good Samaritians; relatives, householders, and those related sexually; and pecuniary losses incurred by another as a result of the victim's injury or death. On the question of to whom compensation is to be made, appropriate considerations include: dependent eligibility; eligibility of non-fiduciary relatives; police reporting and claimant filing time requirements; retroactivity; contributory illegality; and cooperation with criminal justice agencies. The determination of compensation depends upon identification of pecuniary losses, specification of claimant minimum financial loss eligibility requirements, claimant need, contributory provocation or negligence, and applicability of deductible amounts.

Considerations for financing the compensation fund include specification of legislative appropriation or court fines as the source of funding, and specification of the legislative appropriation as being either from general or specially earmarked revenues. Considerations for application and appellate procedures include: composition and personnel selection for the administering agency; administrative agency powers; the decision-making process; time limitations for reporting a crime and filing a claim; identification of the appellate agency or court; and designation of the appropriate claimant in the event of death or economic loss to the family. In contemplating other sources of compensation, appropriate considerations are: restitution; compensation from collateral sources such as insurance; delay or prompt payment and possible reimbursement in claims processing while settling collateral claims; justification of collateral sources citing Victim Compensation Fund to disallow a claim; and subrogation.

On the question of public information and education, the appropriate considerations are what agency will perform the information and education function, and whether informing victims is a public duty of police, courts, prosecutors, hospitals, or physicians.<sup>12</sup>

Bearing these standards in mind, it is then interesting to consider the Uniform Crime Victims Reparations Act<sup>13</sup> of the National Conference of Commissioners on Uniform State Laws, which has been endorsed by the American Bar Association.

#### Uniform Crime Victims Reparations Act

With the Crime Victims Reparations Act, the National Conference of Commissioners on Uniform State Laws addressed itself to the problem of uniformity for a law applicable to a mobile population where the crime location occurs completely by chance. The Act establishes a compensation program for persons who are criminally injured and for the dependents of persons killed by criminally injurious conduct, which means criminal conduct posing a substantial threat of death or personal injury. Specifically excluded from coverage are most crimes involving motor vehicle use.

Most of the Act concerns the conditions under which an individual is entitled to reparation. Compensable losses include those identifiable as "allowable expense," "work loss," "replacement services loss," and "dependent's economic loss"; these are defined in simple terms. The maximum payment is an aggregate of \$50,000 with a limitation of \$200 per week, except for the "allowable expense" item specially defined at length in the Act. (See Appendix A.) A collateral source deduction is broad, and encompasses all collateral sources but the victim's personal assets.

The Act includes various safeguards against fraudulent claims: intra-family crimes are not compensable; subject crimes must be reported to law enforcement officials within 72 hours of the crime; and claimants are required to cooperate with law enforcement officers. Attorney's fees must be an amount coextensive with actual services rendered, in addition to the victim's or dependent's award and regardless of the claim's success or failure.

On the difficult question of a need requirement, the Act presents various alternative provisions instead of just one policy. The suggested middle course between destitution and no criteria of need is to grant compensation where the victim's standard of living is affected, taking into consideration a formula for certain enumerated deductions.

The Act is to be administered by a board composed of three persons who will serve full or part-time, depending upon the projected workload in any state. Section 6 of the Act provides for notice to the Attorney General and the function of the Attorney General as follows:

Promptly upon receipt of an application for reparations, the Board shall forward a copy of the application and all supporting papers to the [Attorney General], who in appropriate cases may investigate the claim, appear in hearings on the claim, and present evidence in opposition to or support of an award.

Section 16(c) of the Act states that "A final decision of the Board is subject to judicial review on appeal by the claimant, the [Attorney General], or the offender [in the same manner and to the same extent as the decision of a state trial court of general jurisdiction]."

#### Federal Proposals

There have been before the United States Congress at least nine bills regarding crime victim compensation.<sup>14</sup> Five of the nine bills include specific offenses as compensable acts. Four of the bills, HR 287, HR 1903,

HR 2748, and HR 8573 include crimes involving force to a person as compensable acts. Six of the bills include attempt to prevent a crime as a compensable act. Five of the bills include apprehending a suspected criminal as a compensable act. Three of the bills, HR 1449, HR 2748, and S 2022, include aiding a victim of crime. Congressman Rodin's bill, HR 907 4, and Senator Hartke's bill, S 2022, would compensate for any criminal act causing injury or death.

All proposals would include as eligible recipients: the victim; surviving spouse, parent, or child; and persons who are dependent on the deceased for support. Seven of the bills would include those responsible for the maintenance of the victim as eligible recipients. Four of the proposals, HR 598, HR 1449, S 1399, and S 2022 would include Good Samaritans as eligible recipients.

All proposals would include loss of earnings as allowable payments. Five of the proposals would include out-of-pocket expenses as allowable payments. Three bills, HR 287, HR 1449, and HR 8753 would allow payment for pain and suffering. Seven of the bills would allow payment of a death benefit. Four of the bills, HR 287, HR 2748, HR 8753, and S 2022 would allow payment of pecuniary loss to dependents. HR 287 would allow payment for other reasonable loss and HR 1903 would allow payment for reasonable pecuniary losses. Six bills would allow medical expenses payments. Three of the bills, HR 598, HR 1449 and S 1399 would allow vocational rehabilitation payments, with those three and S 2022 also allowing payments for psychological fees. HR 1449 would allow payments for property losses, and HR 2748 would allow payments for future earnings.

Three of the bills, HR 287, HR 1903 and HR 8753 provide a maximum award of \$25,000. Four of the bills, HR 598, HR 1449, HR 9074 and S 1399 provide a maximum award of \$50,000, not to exceed \$150 per week in lost earnings. HR 2748 does not provide a maximum award and Senator Hartke's bill provides for no unjust enrichment. Six bills have no minimum award. The other three provide for a minimum award of \$100, or a net loss of one week of work.

Regarding restrictions, five of the bills would require application for compensation within 2 years of the incident, while the period for the other four is 1 year. Three of the bills, HR 287, HR 1903, and S 1399 provide that the victim may not be a relative of the offender. HR 1449, provides that the victim may not have had intimate contact with the offender. Five of the bills require that the crime be reported to the police within 72 hours. HR 1449 and S 1399 provide that automobile, airplane, and boat injuries will not be covered, unless clearly criminal, while HR 598 has such a provision for only airplane injuries and also requires that the victim prove financial stress. HR 1449 and S 1399 require that the applicant must cooperate with the law enforcement agencies. HR 2748 and HR 8753 require no unjust enrichment, and the former also stipulates that the degree of victim responsibility will be considered.

Funding for HR 287 and HR 8753 would be 75 percent federal and 25 percent state. The latter bill and HR 1903 are limited to the "special maritime and territorial jurisdiction of the United States." HR 598 has provision for a criminal indemnity fund for federal jurisdictions; HR 2748 is restricted to federal jurisdiction; HR 9074 provides aid to state programs at a 90 percent level; S 1399 has provision for a criminal victim indemnity

fund from a 10 percent withholding prison wages; and S 2022 provides for grants to states to pay a federal share of their program with a breakdown of 90 percent federal and 10 percent state.

In his 1975 Crime Message to Congress, President Ford urged the passage of legislation to compensate victims of federal crimes who suffer personal injury or certain economic losses. The recommended funding would consist substantially of fines paid by convicted federal criminals. At the Fourth International Conference for the Compensation of the Innocent Victims of Violent Crime, Bruce E. Fein, Special Assistant to the Assistant Attorney General, Antitrust Division, United States Justice Department, concluded with this (Administration) recommendation:

. . . I think legislation to compensate victims of crime can be most effective if it is widely publicized and does not condition eligibility on financial hardship. Publicity is necessary both to insure that eligible citizens take advantage of the program and to enhance its educational value. The presence of a financial hardship test, in my judgment would substantially undermine the most fundamental justification for the program.<sup>15</sup>

Senator Mansfield's bill, S-1399, has passed the Senate at least five different times, with not even one witness testifying against the concept of victim compensation at the Senate hearings. Considering the support of the basic concept by the Administration, federal victim compensation only lacks support and passage by the House.

As is evident from the foregoing, there is considerable interest in the concept of victim compensation and no shortage of proposals on the matter. The issue seems no longer to be if such programs should be established, rather how they can best be implemented. There is also concern that where introduced such programs maintain a modicum of consistency and conformity, as jurisdictional differences allow. Attempts are being made at both the state and federal levels to meet this need.

## 2. ADMINISTRATION OF PROGRAMS

There are almost as many differences in victim compensation administrative staffs as there are programs. Accordingly, the Uniform Crime Victims Reparations Act has sought to deal with the problem. The Act provides under section 4 for the powers and duties of the board, which is the body responsible for administering the Act. Paragraphs (c) and (d) of section 4 provide for the adoption of administrative rules of practice and procedure, and for a description of the method and course of operation of the board:

(c) The duty to adopt by rule a description of the organization of the board stating the general method and course of operation of the board.

(d) The duty to adopt rules and to implement this Act, including rules for the allowance of attorney's fees for representation of claimants; and to adopt rules providing for discovery proceedings, including medical examination consistent with Sections 9 and 10. Rules shall be statements of general applicability which implement, interpret, or prescribe policy, or describe the procedure or practice requirements of the board.

North Dakota's Uniform Crime Victims Reparations Act has identical enabling provisions.<sup>1</sup> As an example of victim compensation administrative regulations, see North Dakota's Uniform Victims Reparations Act Rules of Practice and Procedure, reproduced herein as Appendix B.

However, not all jurisdictions are in agreement as to administrative organization. California and Hawaii are, for example, administratively quite different from North Dakota and, to a degree, from each other.

### Staffs and Budgets in California and Hawaii

California's victim compensation board consists of the Director of the Department of Social Services, the State Controller, and one member appointed by the Governor and sitting at his pleasure.<sup>2</sup> The board sends out the applications, reviews them, forwards a financial information questionnaire to the applicant, and sends the questionnaire to the Attorney General for verification and investigation. The verification is accomplished by a special agent, and then heard by the board in the regular course of its business.

The California administrators are in the process of increasing their investigative staff from four special agents to seven special agents and sixteen claims examiners. This staff is placed in the Attorney General's office, but they report directly to the Board of Control. According to the Assistant Executive Secretary of the State Board of Control, at least one more analyst, hopefully two, and four more clerical personnel will be added. The total will be about seven or eight full-time clerical personnel, and three to four analyst specialists who will do the review.

California is receiving an average of 542 claims per month, a rate which normally increases yearly by 28 to 30 percent. The expectation was for 6,500 claims last year, but growth could be 60 to 70 percent this year because of publicity and several program-related factors. The 1975 budget

for awards and attorney's fees was \$6 million, with only about \$3.2 million to be expended because of the temporary backlog. Investigative cost is budgeted at about \$714,000 a year with \$500,000 of that actually being expended; it is given to the Attorney General on a contract basis for the claims examiners and special agents.

Clerical support, such as typing of documents for warrants, is accomplished by another agency. These warrants of award are drawn and mailed by the State Controller as instructed by the board's directives. The staff feels that this system, while cumbersome, provides an effective check. Another policy in the California office is that files are confidential and will not be given to any person. The Attorney General's report is of a confidential nature between agencies and, therefore, is excluded from the Public Records Act in California. The material gathered is of a confidential nature because it refers to people's medical and financial conditions, and is made available only to those directly necessary to make a decision on that claim. A claim takes six to eight months to be processed. With additional claims examiners, it could take 60 to 90 days.<sup>3</sup>

Hawaii's board has three members appointed by the Governor, one of whom must be an attorney. They are paid \$50 for every meeting. The staff consists only of the administrator and a stenographer. The administrator conducts all the investigations, prepares the annual report, drafts decisions, "and just about [does] what is necessary or is required by [the] office."<sup>4</sup>

Hawaii's annual operational budget of \$40,000 covers salaries, "commission fees," rental of the office, and other incidental administrative costs. In the first year of operation, only \$1,000 was paid; the following year it went up to \$111,000 for 47 awards. In 1970, 121 awards were made totaling \$262,000, the most paid since the inception of the program. In 1971, because of budgetary considerations, only 80 awards were made totaling \$195,000; in 1972, although more awards (138) were made, it only amounted to \$195,000; in 1973, there was a drop back to 95 awards because fewer hearings were being held, and the total awards amounted to \$130,000. In 1974, 116 awards were made totaling \$168,000. In 1975 the awards totaled approximately \$250,000. The Director commented that:

This, in essence, is what the Hawaii program is about: we have a problem with staffing; we have a problem with money; we have a problem with getting the message out to the people. At the present we rely on the police to spread the word for us; we rely on hospitals and I don't think many of our doctors know their patient can come to us.

It should be noted that Hawaii has had a maximum award of \$10,000, has paid legal fees not to exceed 15 percent of awards over \$1,000, has allowed up to \$2,500 or \$3,000 funeral expenses, has compensated property damage to the Good Samaritan, and has compensated pain and suffering.<sup>5</sup> The Hawaii program, with its generosity and comprehensiveness, is representative of the successful manner in which victim compensation administrators cope despite less than adequate staffing, publicity and funding.

### General Program Costs

The amount and total number of awards disbursed in California and Hawaii have been stated above. Disbursements, depending upon the financing

method, may be made from a general appropriation indemnity fund, from funds accumulated through court fines or, potentially, through deductions from prisoners' wages. This section will specify certain costs in Maryland, Massachusetts, New Jersey, and New York, the other jurisdictions having tried and experienced victim compensation programs.

The Maryland program, with an open-ended ceiling on the amount of its awards, has been more generous than any compensation program in the United States.<sup>6</sup> Section 17 of the Maryland victim compensation statute provides for an additional \$5 of court costs on all persons convicted of a crime. Since 1969, the Maryland comptroller has collected court costs as follows:<sup>7</sup>

<u>Fiscal Year</u>	<u>Collected</u>	<u>Expended</u>	<u>Awards</u>
1969	\$118,948.60	\$ None	\$ None
1970	135,438.75	66,151.13	238,000.00
1971	121,969.93	215,000.00	614,283.39
1972	84,253.58	431,136.18	1,036,604.84
1973	90,000.00	531,685.66	893,286.93
1974	104,964.47	635,874.27	771,776.40
1975	118,063.90	1,000,207.21	1,577,644.19
1976 (Estimate)	135,000.00	1,250,000.00	1,750,000.00

There were 638 claims accepted and investigated for 1975: 528 personal injury claims and 115 death claims. Of 412 decisions rendered, 324 awards were made with 88 claims being disallowed. For 25 of the 88 claims disallowed, no crime was committed; in 32 others of the 88, there was no serious financial hardship. These were the two primary reasons for disallowing claims upon which a decision was rendered.<sup>8</sup>

In the Commonwealth of Massachusetts since fiscal year 1969, victim compensation payments have been made as follows:<sup>9</sup>

1969	\$ 991
1970	27,793
1971	65,000
1972	60,000
1973	207,000

Appropriations totaled \$300,000 in fiscal 1974, \$150,000 of which was authorized in a general appropriation bill, and \$150,000 in a deficiency budget. A total of \$624,576.77 has been awarded since July, 1974. Seventy-three cases totaling \$378,338.63 remained, prompting a state treasurer deficiency request for \$338,000 to compensate them. Payments in fiscal year 1974 approximated \$1,000,000. "This large amount is due to the wave of violence that is becoming rampant, particularly in the Greater Boston area, and a growing consciousness on the part of the public as to the existence of the [victim compensation program] ...."

According to the New Jersey Violent Crime Compensation Board's 1974 Annual Report, total disbursements by the board for 1974 totaled \$796,564.22 for 350 awards out of 598 concluded claims. Of the 248 claims denied, most were disallowed for failure to cooperate, or for lack of a minimum financial loss. For comparison, the board disbursed \$47,060.13 in 1972, and \$262,828.06 in the last six months of 1973. From January through October,

1975, the board rendered 409 decisions, made 253 awards, and disbursed \$784,691.51. Some of the problems involved in processing claims were mentioned in the 1974 Annual Report:

The Board attempts, when possible, to render a decision within 120 - 150 days of receipt of the claim. There are, of course, numerous reasons which may cause delay in completion and disposition of a claim. At the request of a law enforcement agency, the Board may be required to postpone investigation until criminal matters are concluded. Pending such criminal matters, necessary police reports, witness statements, etc. are often unavailable to the Board. Pending Workman's Compensation claims may delay disposition since any Workman's Compensation award must be taken into account in computing an award to an innocent victim of a violent crime. Continuing medical treatment in a protracted case precludes the computation of a final unreimbursable medical expense. Arranging for impartial medical examinations is often difficult. To bring patient and doctor together at the same place and time is not always as easy as it may seem. Attorneys are often called to trial courts on short notice necessitating the cancellation of appointments with the Board. Treating physicians are not always prompt in returning the information necessary to complete a claim. Lastly, the increase in the number of claims being presented to the Board causes delay in investigation and in review.

The New Jersey Board concluded in the 1974 report that while the number of claims received in 1974 represented approximately 2-1/2 claims for each 100 violent crimes reported in New Jersey, the board is far from idle. The case load is such that with a continuation or acceleration of the marked increase shown in November and December, the board will unquestionably require additional staff. The figures suggest the likelihood that approximately 1,400 claims have been received during 1975. While this represents only five claims for each 100 violent crimes reported, it obviously doubles the already heavy burden being carried by the three board members and eight staff members.

The projected increase in claims received by the board infers a corresponding increase in workload. Each claim requires investigation, processing, review and decision. With each of these, the volume of field investigation and internal "paperwork" grows correspondingly. Further, there is cause to believe that the increase in claims will continue for many succeeding years. The board notes with dismay that there appears to be no decrease in the incidence of violent crimes in New Jersey. In U. S. cities of over 100,000 population on reported violent crimes, FBI statistics for 1973 show that Newark ranks first, Camden second and Trenton eighth. Each violent crime creates a new victim. It is anticipated that the investigative staff of four will be grossly insufficient within a relatively short time.

Some idea of the size of New York's operation may be gained by a short recitation of claim dispositions, particularly with the New Jersey claim statistics above in mind. The New York Board rendered 2,399 original decisions in 1974, 222 amended decisions, and 76 reviews: a total of 2,697 decisions for the fiscal year.<sup>10</sup> Of the 2,399 original decisions, 910 claimants received an award. Of the 1,489 claims disallowed, a majority (839) were disallowed for failure to furnish information. The average monthly expenditure for additional medical expenses alone was \$18,556.10.<sup>11</sup>

### 3. THE ROLE OF THE ATTORNEY GENERAL

The average number of claims per month in New York in 1974 was 175. The average for the first three months of 1975 was 232, with the number increasing each month. The cost of victim compensation for New York, as well as the other jurisdictions, is thus a factor of increasing claims and the need for additional personnel.<sup>12</sup>

In general, distinct administrations are established for the operation of victim compensation programs, although the size and scope of administrations differ considerably. Moreover, program costs differ in amount according to several variables: staff size and remuneration, the incidence of crime in a given jurisdiction, the amount of award granted per claim, and the terms of eligibility for compensation. However, expenses do not vary in strict proportion with each of these factors because, for example, certain personnel perform other services or serve *ex officio*, and are separately funded, and not all victims of violent crime file claims. The actual costs for programs will depend upon how these factors are dealt with, and they are matters requiring careful consideration in funding a program.

Eighteen states have enacted legislation to compensate victims of crime. The Attorney General has a distinct role in most of these programs. A purpose of this report is to specify the role of the Attorney General under existing victim compensation legislation. To accomplish this, it is necessary to examine standards and questions for new legislation, existing model legislation, federal proposals, administrative regulations and staff, and cost.

The Attorney General's role in these programs ranges from complete responsibility for investigation, through a more traditional role of advisor to a separate administration board, all the way to the non-role of legally mandated separation from victim compensation administration. The Attorney General is responsible in quite a few programs for the recovery of any improper awards, and can also serve in the seldom utilized and rather impractical process of subrogation. The model Uniform Crime Victims Reparations Act provides that notice of administrative proceedings be given to the Attorney General along with the statutory discretion to investigate, appear at the hearings, present independent evidence in opposition or support of a claim, and appeal.

Some administrative experience has indicated that the program machinery is inadequate to cope with the steadily increasing claims which follow publicity. This has been true in some instances when the Attorney General is responsible for administration, since this duty often has been added to other obligations without commensurate increases in funds and personnel. Another difficulty with assignment of too much Attorney General responsibility for victim compensation is the potential for internal conflict between the sometime inconsistent interests of compensating the innocent victim of violent crime and representing the state which pays or administers the indemnity.

#### Investigating and Processing Claims

California is one of several states where the Attorney General handles certain aspects of claims investigation. The California claim, or "application for assistance," must contain "[a]n authorization permitting the Attorney General to verify the contents of the application."<sup>1</sup> Upon acceptance by the board, the application is routed to the Attorney General for verification, investigation, and the return of a report to the board. It is mandated that the victim cooperate with the Attorney General in the verification of the application information: "Failure so to cooperate shall be reported to the board [by the Attorney General], which, in its discretion, may reject the application on this ground alone."<sup>2</sup>

The board is required to notify the Attorney General of the date, time, and place of the hearing.<sup>3</sup> At the hearing, the board reviews the Attorney General's report, evidence and the application for assistance. "[T]he board shall receive recommendations from the Attorney General ... and evidence showing": (a) the nature of the crime (or Good Samaritan act); (b) substantial and material action by the claimant; (c) personal injury or death as a direct consequence; (d) the extent of injury or damage; and "(e) [s]uch other evidence as the board may require." If the claimant does not appear at the hearing, the board may act "solely on the application, the Attorney General's report, and any evidence in the record."<sup>4</sup>

In the Massachusetts program, the Attorney General and the judiciary perform the roles occupied by administrative agencies in the other jurisdictions. The Massachusetts procedure for obtaining compensation commences with filing a petition with the local court clerk.

Said clerk shall immediately notify the attorney general of the claim. Such notification shall be in writing, with copies of such material as is included in the claim or in support thereof.<sup>5</sup>

A member of the Attorney General's staff begins an investigation pursuant to statutory provision: "The attorney general shall investigate such claim, prior to the opening of formal court proceedings."<sup>6</sup> The appropriate authorities, such as the police, are contacted for verification. The following items need to be investigated: the commission of a crime; reporting of the crime to police within 48 hours; the legitimacy and reasonableness of medical or other expenses; the actual suffering of earnings losses claimed; and, the non-existence of insurance or other source of reimbursement for any part of the amount claimed.

The clerk of the court then notifies the Attorney General and claimant of the date and time of any hearing. At such a hearing, "The attorney general shall present any information he may have in support of or in opposition to the claim."<sup>7</sup> If the Attorney General's recommendation is favorable to the claim, the court determines the amount to be awarded. If the Attorney General denies the claim, then the claimant must convince the court of its validity, but the procedure does not become adversarial. The claimant may appeal the judge's decision in the courts, but only on a question of law.

Commentators Edelhertz and Geis<sup>8</sup> have expressed numerous reservations about the judicial model of victim compensation as promulgated in Massachusetts:

The principal one is the lack of central responsibility for operation of the program. No Massachusetts official has as his main responsibility the duty to see that all eligible victims of crime are made aware of their rights under the statute and are helped to obtain the relief to which they may be entitled .... There is no separate budget request for the program as a whole that can be considered as part of the budget-making process of the commonwealth. Instead, each agency involved - the attorney general, the courts, and perhaps the state treasurer - will at most make this a line item in its budget request and perhaps include compensation responsibilities as one of a potpourri of justifications to support the funding requested.

... Steps should [also] be taken to enlarge the Victim's Bureau with additional attorneys, with investigative assistants, and with additional clerical help.<sup>9</sup>

Bearing in mind the problems noted with the judicial model of victim compensation, one of the other states providing for claim investigation by the Attorney General, North Dakota, was the first state to adopt, in 1975,

the Uniform Crime Victims Reparations Act approved by the American Bar Association. The North Dakota Act specifies that "Promptly upon receipt of an application for reparations, the board shall forward a copy of the application and all supporting papers to the attorney general, who in appropriate cases may investigate the claim, appear in hearings on the claim, and present evidence in opposition to or support of an award."<sup>10</sup> However, Special Assistant Attorney General Richard J. Gross, staff attorney for the administering Workmen's Compensation Bureau and Executive Administrator of the Uniform Act (claims examiner, investigator and legal counsel; in effect, administrator and staff), identifies this feature as one of the weaknesses of the Act.<sup>11</sup> He states that this provision makes for "totally unnecessary duplication..."<sup>12</sup> of administrative effort. There is no reason for two agencies to perform identical administrative tasks.

The final role of the Attorney General in the North Dakota claims process is the capacity to appeal a final decision of the board: "A final decision of the board is subject to judicial review on appeal by the claimant, the attorney general, or the offender in the same manner and to the same extent as a decision of the district court."<sup>13</sup>

#### Informing Victims of the Program

In addition to the investigative duties of the Attorney General in California, the statute also provides for informing crime victims of the indemnification program and furnishing application forms. The statute provides that the Attorney General "shall set standards to be followed by local law enforcement agencies for this purpose and may require them to file with him a description of the procedures adopted by each agency to comply."<sup>14</sup> These standards have been summarized, as follows, in a memo to all local law enforcement agencies from Attorney General Younger:

(1) Law enforcement officers are required to provide to victims of their families a sheet describing the victim program and where to obtain application forms. This sheet shall also identify a Victims of Violent Crime Liaison Officer and his telephone number. Every reporting officer shall indicate in his police report the date when potential claimants were provided with the sheet. Alternatively, a law enforcement agency may devise a system whereby potential claimants are notified by mail of the availability of the program and are advised of the name of the Liaison Officer from whom further information may be obtained;

(2) All law enforcement agencies shall appoint a Victims of Violent Crime Liaison Officer. This officer will coordinate closely with the State Board of Control and shall obtain from the Board application forms which are to be disseminated to the interested public;

(3) The program shall be discussed in general agency meetings and new and trainee officers shall be made aware of the program's existence.

Many of the local law enforcement agencies have filed descriptions of their respective procedures.

#### Advisor to Board

In Hawaii, the Attorney General has a distinct role in the process of compensating crime victims. The Hawaii statute provides that eligibility for compensation shall be determined by a criminal injuries compensation commission, which is composed of three members appointed by the Governor. The Attorney General serves as legal advisor to the commission. Pursuant to the role of advisor, the Hawaii Attorney General has rendered several opinions regarding criminal injuries compensation. Opinion 69-27, for example, states that the amount of welfare payments made to a victim for food and necessities during disability is not deductible from awarded compensation.

Another instance of the Attorney General's advisory role is found in North Dakota. Attorney General Allen I. Olson has issued a number of official opinions in response to questions regarding that state's Crime Victims Reparations Act, and opinions have concerned such subjects as: retroactivity, the definition of "work loss," subrogation, open records, a finding of not guilty against the perpetrator of the action which gave rise to the claim precludes the claimant from recovery under the Act.

#### Awards Review and Recovery

The largest and most active United States crime victim compensation program is that of New York. The three-member New York Crime Victims Compensation Board determines awards. The board is empowered "[t]o request from the division of state police, from county or municipal police departments and agencies and from any other state or municipal department or agency, or public authority, and the same are hereby authorized to provide such assistance and data as will enable the board to carry out its functions and duties."<sup>15</sup> This at least implies that the board may request general assistance and data from the Attorney General, who is in turn at least implicitly authorized to provide such assistance. When the board makes a final decision on a claim, its secretary must promptly notify the claimant, the Attorney General and the Comptroller, and give each a copy of the decision.<sup>16</sup>

The principal role for the Attorney General in New York is the capacity to commence a summary proceeding in the appellate division of the Supreme Court if he determines that the board's award is improper or excessive.

Within thirty days after receipt of the copy of the report containing the final decision of the board, the attorney general may, if in his judgment the award is improper or excessive, commence a proceeding ... to review the decision of the board. Within thirty days after receipt of the copy of such report, the comptroller may, if in his judgment the award is improper or excessive, request the attorney general to commence a proceeding ... to review the decision of the board in which event the attorney general shall commence such a proceeding. Such proceeding shall be heard in a summary manner and shall have precedence over all other civil cases in such court. There

shall be no other judicial review of any decision made or action taken by the board, by a member of the board, or by the secretary of the board with respect to any claim.<sup>17</sup>

The Maryland procedure for the Attorney General is similar to that in New York. In Maryland, compensation awards are made by a three-member Criminal Injuries Compensation Board. The secretary of board notifies the claimant, the Secretary of Public Safety and Correctional Services, the Attorney General and the Comptroller of all the final decisions of the board and furnishes each with a copy of the report setting forth the decision.<sup>18</sup> Just as the Maryland notice provision is similar to New York's, so is the judicial review provision, except that Maryland's judicial review provision vests recovery discretion in addition to the Attorney General.<sup>19</sup>

The structure of the Rhode Island victim compensation program is similar to that of Massachusetts, although the responsibilities of the Attorney General are not as clearly specified. Like New York and Maryland, the Rhode Island statute requires notice of an application for compensation to be given to the Attorney General.<sup>20</sup> An interesting provision of the statute mandates the following course: "Upon application from the Attorney General or the person or persons alleged to have caused the injury or death, the court shall suspend proceedings under this [Criminal Injuries Compensation] chapter until such application is withdrawn or until a prosecution for an offense arising out of such act is no longer pending or imminent."<sup>21</sup>

Under the following general provision regarding the finality of decision, the Rhode Island Attorney General could take steps to recover any improper or excessive award:

The orders and decisions of the court ["special session of the superior court" handling applications] shall be final. However, the court may at any time, on its own motion or on the application of the attorney general, or of the victim or his dependents, or of the offender, vary any order for the payment of compensation made under this chapter in such manner as the court sees fit, whether as to terms of the order or by increasing or decreasing the amount of the award or otherwise.<sup>22</sup>

This capacity for the Attorney General to appeal is similar to a more specific provision in North Dakota.<sup>23</sup>

A more general appeals provision is in the State of Washington's Victims of Crime Compensation Statute<sup>24</sup> which provides,

The provisions contained in chapter 51.52 RCW as now or hereafter amended relating to appeals shall govern appeals under this chapter: Provided, that no provision contained in chapter 51.52 RCW concerning employers as parties to any settlement, appeal or other action shall apply to this chapter: Provided further, that appeals taken from a decision of the board of industrial insurance appeals under this chapter shall be governed by the provisions relating to judicial review of administrative decisions contained in RCW 34.04.130 and 34.04.140 as now or hereafter amended.

## Subrogation

Closely related to the Attorney General's role in recovering improper awards is his role in subrogation. In the Massachusetts program, any compensation subrogates

the commonwealth, to the extent of such compensation paid, to any right or right of action accruing to the claimant or to the victim to recover payments on account of losses resulting from the crime with respect to which the compensation has been paid. The Attorney General may enforce the subrogation, and he shall bring suit to recover from any person to whom compensation is paid, to the extent of the compensation actually paid under this chapter, any amount received by the claimant from any source exceeding the actual loss to the victim.<sup>25</sup>

The Louisiana law authorizes the Attorney General to recover from a person convicted of a crime, the amount of compensation paid out to the victim. The Attorney General, within one year from the date on which the judgment of conviction became final, may institute a civil action against such persons for the recovery of the whole or any part of such compensation. Any amount greater than that paid pursuant to the order for payment of compensation is recovered and collected in any such action, the board pays the balance to the applicant. The board provides to the Attorney General such information, data, and reports as the Attorney General requires to institute actions.<sup>26</sup>

The subrogation provision for the judicially (court of claims) modeled Crime Victims Compensation Act of the State of Illinois is as follows:

The Court of Claims may offer or may award compensation on the condition that the applicant or other recipient subrogate to the State his rights to collect damages from the assailant. In such a case the Attorney General may, on behalf of the state, bring suit against an assailant for money damages, but must first notify the applicant or other recipient of compensation, as the case may be, and give him an opportunity to participate in the prosecution of the suit. The excess of the amount recovered in any such suit over the amount of compensation offered and accepted or awarded under this Act plus costs of suit and attorneys fees actually incurred shall be paid to the applicant or recipient of compensation, as the case may be.<sup>27</sup>

Section 80(c) of the compensation statute reserves a charge for the State of Illinois in the amount of the compensation paid on all claims, demands, and causes of action against the assailant. The charge attaches to any resulting verdict, judgment, or decree and recovered money or property. "On petition filed by the Attorney General on behalf of the State or by the applicant or other recipient of compensation, the circuit court, on written notice to all interested parties, shall adjudicate the rights of the parties and enforce the charge."<sup>28</sup>

Although the Illinois statute does not explicitly say so, it has fallen to the Illinois Attorney General to also investigate victim compensation

applications, and to submit a report to the court of claims.<sup>29</sup> The statute makes some reference to the practice in the following provision:

A person is entitled to compensation under this Act if: ... (g) his application for compensation under this Act is filed with the Court of Claims within 2 years of the date of the injury to the victim or within such further extension of time as the Court of Claims for good cause shown, allows provided, that, notice of intent to file a claim is filed in the Office of the Attorney General within 2 months of the date of injury, or within such further extension as the Court of Claims, for good cause shown, allows.<sup>30</sup>

The subrogation provision for Georgia's Good Samaritan Compensation program is as follows:

Whenever an order for the payment of indemnification for personal injury or death or for damages to property is or has been made under this law [sections 47-518 through 47-526], the State of Georgia shall, under payment of the amount of the order, be subrogated to the cause of action of the application against the person or persons responsible for such injury or death or damages to property and the Attorney General shall be authorized to bring an action against such person or persons for the amount of the damages sustained by the applicant. If an amount greater than that paid pursuant to the order is recovered and collected in any such action, the State, after deducting the expenses incurred, shall pay the balance to the applicant.<sup>31</sup>

The other victim compensation states have subrogation provisions either subrogating the state generally, with no specific direction to the Attorney General (including Delaware,<sup>32</sup> Minnesota,<sup>33</sup> and Rhode Island<sup>34</sup>), or, subrogating the victim compensation board (including Alaska,<sup>35</sup> Hawaii,<sup>36</sup> Nevada,<sup>37</sup> New Jersey,<sup>38</sup> and Washington.<sup>39</sup>)

The problem with the subrogation role is that recovery from an impoverished offender is difficult. In discussing the necessity of victim compensation's cost being borne ultimately by the taxpayers, Edelhertz and Geis concluded that: "It is, we believe, an illusion to look to criminal fines, or subrogation, as a substantial source for financing reparations to crime victims."<sup>40</sup> In any event, the legal machinery is there for Attorney General utilization and satisfaction of the retribution function.

## Membership on Board

In one state, the Attorney General is a member of the administering board. Nevada's Board of Examiners, a constitutional entity which is responsible for receiving compensation claims, consists of the Attorney General, Governor, and Secretary of State.<sup>41</sup>

However, in another state, New Jersey, the law expressly states that the victim compensation board shall be independent of the Attorney General: "For the purposes of complying with the Constitution (Article V, Section IV, paragraph 1) the board is allocated to the Department of Law and Public Safety but, notwithstanding said allocation, the board shall be independent of any supervision or control by the department or the Attorney General or any other officer of the department."<sup>42</sup>

#### 4. LEGAL ISSUES

A number of issues have been litigated in the area of crime victim compensation, although the total of reported cases is small. A survey of these issues is important as a guide to the subject matter that can be confronted in court.

##### Definition of Victim

Those who are critical of victim compensation point to the difficulties of deciding who is a "victim." Approximately one-fourth of all violent crimes are in some way precipitated by the victims, e.g., victims of confidence games, prostitutes who are victims of their clients, wealthy people who go slumming, and some victims of rape, statutory or otherwise.<sup>1</sup> Another problem is that there is practically no information about victims of violent crime. No broad statistics have been developed to indicate who the victims of crime are, what their incomes are, or from what strata of society they come.<sup>2</sup> The definition of a victim is one of the threshold legal issues in crime victim compensation.

The first case in which the Court of Appeals of Maryland confronted the Criminal Injuries Compensation Act was Criminal Injuries Compensation Board v. Gould.<sup>3</sup> Regarding the nature of a victim, the court observed in passing that the Maryland program permitted the compensation of "unreimbursed" victims of crime for "their personal injuries and loss of earnings, if the victim would otherwise suffer serious financial hardship."<sup>4</sup> The court cited the Maryland General Assembly's declaration of policy and legislative intent when it recognized in Gould that

many innocent persons suffer personal physical injury or death as a result of criminal acts, or in their efforts to prevent crime or apprehend a person committing or attempting to commit a crime [Good Samaritan concept]; that such persons, or their dependents, may thereby suffer disability, incur financial hardships or become dependent upon public assistance.<sup>5</sup>

The definition of victim thus includes attributes of non-reimbursement, personal injury, loss of earnings, serious financial hardship, innocence, and a criminal act or good Samaritan act. The court noted that "The Act provides not only that the victim, but in the event of his death, his surviving spouse, children or other dependents may be eligible for awards; it incorporates a good-Samaritan concept by providing for compensation if the victim's injury or death resulted from apprehending a criminal or attempting to prevent a criminal act (§ 5(a)).... The prerequisites for an award emphasize the incurring of 'serious financial hardship.'"<sup>6</sup>

The New York case of Weisinger v. Rensselaer,<sup>7</sup> resolved the more specific victim issue of whether a husband can receive an award for injuries sustained when he was shot by his wife, who had been living separate and apart. In Weisinger, the petitioner was shot in the chest by his wife with a shotgun. The wife was indicted for attempted murder. The applicable statutory provision, New York Executive Law § 624(2), was as follows:

A person who is criminally responsible for the crime upon which a claim is based or an accomplice of such person or a member of the family of such persons shall not be eligible to receive an award with respect to such claim.

The Sullivan County Supreme Court ruled the petitioner ineligible for compensation, reasoning that "family" means any person related within the third degree of affinity, and that affinity is a relationship by marriage.<sup>8</sup>

Hicks v. Hatem, another Maryland Court of Appeals decision, recognized that "the word 'family' more frequently connotes the existence of a marital or blood relationship, or a legal status approximating such a relationship."<sup>9</sup> The Hicks court noted that the "broad" definition of "family" in the Maryland Criminal Injuries Compensation Act was limited in application to that Act.<sup>10</sup> Inasmuch as the Maryland victim compensation definition of family is for exclusionary purposes, it is not unexpectedly "broad," and is identical to New York's definition.<sup>11</sup> The Maryland provision states that;

"Family" when used with reference to a person, shall mean (1) any person related to such person within the third degree of consanguinity or affinity, (2) any person maintaining a sexual relationship with such person, or (3) any person residing in the same household with such person.<sup>12</sup>

One of the more interesting issues related to victim definition involves criminal injury of incarcerated prisoners by fellow prisoners. This issue has been litigated in Ontario, and by reason of similar legal background and victim compensation statute, may be of interest in the United States. In the Matter of Robert James Sheehan was a 1973 case that came into the Divisional Court, Supreme Court of Ontario after decision by the Criminal Injuries Compensation Board. Sheehan was an inmate of a Canadian federal penitentiary when he was assaulted and injured by fellow prisoners. Sheehan and several other inmates, criminally injured during a prison riot, filed claims for compensation with the board. The board denied the claims because the claimants were incarcerated for criminal behavior themselves, because the federal penitentiary was outside of Ontario's jurisdiction, and because Sheehan and the others had not attempted to obtain compensation for damages from other government agencies.

The Divisional Court held these circumstances to be irrelevant and unconnected to the criminal assaults on the victims. The court said that if the legislature intended federal penitentiary inmates to be excluded from coverage under the Ontario Compensation for Victims of Crime Act, it should have said so. The board appealed to the Court of Appeal, Supreme Court of Ontario. It won dismissal, on administrative law grounds, of the claimant's application for judicial review of the board decision. The court of appeal did suggest, however, that the claimant was unquestionably eligible for an award, but for the broad administrative discretion in the hands of the board.

##### Method of Payment

The issue of the recipient of victim compensation is inseparable from

the general issue of victim definition. Indeed, many of the foregoing cases are responsive both to victim definition, and the question of to whom compensation is to be made.

One of the more important specific issues of the payee question has been the eligibility for compensation of those financially responsible for or dependent upon the victim. In addition to the aforementioned cases, the Appellate Division of the Superior Court of New Jersey touched upon that issue in the case of In re Hollywood.<sup>13</sup> Ethel Hollywood appealed from one of the first orders of the newly established New Jersey Violent Crimes Compensation Board.

The order which is the subject of this appeal recites that appellant was dependent on her deceased [murdered] son to supplement her support. She was awarded for her support \$75 per month commencing January 3, 1972 and continuing until the entire [statutory] sum of \$10,000 is used or until her death, whichever occurs first. Should she remarry the Board reserved the right to review the case to determine whether to reduce or discontinue the monthly payments. She was awarded an initial payment of \$750 for the ten months from January 3, 1972 to October 3, 1972. Her counsel was allowed a fee of \$1,000, with the first payment of \$500 in October 1973, and said counsel was to continue to render services to appellant until they were fully paid without additional charges.<sup>14</sup>

The New Jersey law<sup>15</sup> provides for the statutory maximum compensation amount of \$10,000, and further specifies payment in lump sum, "except that in the case of death or protracted disability the award may provide for periodic payments to compensate for loss of earnings or support." The appellant contended that the failure of the board to adopt guiding rules or regulations made the statutory provision unenforceable.

The court pointed out the statute<sup>16</sup> which provided for board consideration of the availability of compensation funds gave the board wide discretion for individualized approaches. The court held that the board's decision to make monthly payments over 10 1/2 years was not arbitrary, capricious or unreasonable, and declined to interfere with its determination.

#### Time of Filing Claims

Another specific issue affecting the payee is filing time requirements. In Johnsen v. Nissman,<sup>17</sup> the New York Crime Victims Compensation Board appealed a judgment directing it to accept for filing the petitioner's untimely compensation claim. Petitioner's claim was made 3-1/2 years after the incident. New York Executive Law § 625(2) prescribes a 90-day limit for filing claims.

The New York Appellate Division, Second Department reversed the judgment, reasoning as follows:

The legislative history of this chapter makes it clear that the filing provisions of that section were intended to operate with the same effect as those contained in section 50-e of the General Municipal Law with respect to the filing of notices of claim

against the State and its political subdivisions. Consequently, petitioner's claim is barred from consideration by the respondent board by subdivision 2 of section 625 and no other provisions of law or consideration of justice can operate to toll its application. Compensation awards under article 22 of the Executive Law are "a matter of grace" (Executive Law, § 620). The law creates no enforceable legal right and no cause of action accrues.<sup>18</sup>

In another New York case, Hayes v. Van Rensselaer,<sup>19</sup> the issue was whether the Crime Victims Compensation Board should permit an infant petitioner to file a late notice of claim. The statutory provision in question read as follows:

A claim must be filed by the claimant not later than ninety days after the occurrence of the crime upon which such claim is based, or not later than ninety days after the death of the victim, provided, however, that upon good cause shown, the board may extend the time for a period not exceeding one year after such occurrence.<sup>20</sup>

The infant was allegedly assaulted on April 17, 1967, and a claim was not filed until November 17, 1970. In another analogy to the New York General Municipal Law (Section 50-3(5)), the New York County Supreme Court held that "Section 625(2) of the Executive Law must be construed as establishing an inflexible one-year standard."<sup>21</sup>

#### Eligibility

California was the first state in the United States to have a program compensating victims of crime, having enacted the legislation in 1965. California has a "need" requirement, by which indemnification of crime victims is provided to those "who are needy." Certain administrative difficulties have resulted in a new "serious financial hardship" test,<sup>22</sup> which the Assistant Executive Secretary of the State Board of Control claimed "is rarely used by the California Board [of Control], but it is there if we need it."<sup>23</sup>

Hawaii Attorney General Opinion 69-22 cites HAWAII REV. LAWS § 351-31(a)(3) in holding that dependents stand in the shoes of the victim and are entitled in aggregate to no more than \$10,000 maximum award for a particular victim. Section 351-31(a)(3) provides for discretionary award "[i]n the case of the death of the victim, to or for the benefit of any one or more of the dependents of the deceased victim."

A basic question which has been litigated in Ontario concerns when, in fact, the claimant is a victim of crime, as opposed to being the victim of some other hazard. In the Matter of Joseph Jean Paul Fregeau was a much-traveled 1972 case involving a fireman injured in the line of duty fighting an explosion fire in Toronto. The Ontario Criminal Injuries Compensation Board denied fireman Fregeau's claim for compensation. Claimant Fregeau asserted that the cause of the fire was arson, and that he was therefore a victim of crime. However, the board noted that insurance fraud charges against one Guiseppe Bongiovanni had been dismissed, and "the Board cannot come to any other conclusion than that the applicant received the injuries in the course of his duties as a fireman, rather than that he was a victim of crime...."

The case went on appeal to the Divisional Court of the Supreme Court of Ontario. That court observed that the Ontario legislation provided for compensation "whether or not any person is apprehended, prosecuted, or convicted." The court suggested that the board had

been misled by the form of the application which referred only to the offence of fraud: this led the Board to consider only one criminal offence and to disregard the implication that arson was involved. In other words, the Board failed to answer the essential question before it, whether, in this case, Fregeau was injured by the act of any other person occurring in or resulting directly from the commission of an offence against the Criminal Code .... [The Board] left unanswered the main question as to the criminal origin of the fire. If the Board had manifestly considered the evidence and rejected it as insufficient or decided not to act upon it, there would be no loss of jurisdiction.

The board's decision was quashed by the appeal court and remitted for rehearing and reconsideration.

On rehearing, the board pointed out that the burden was on the claimant to prove a crime had been committed. The claimant attempted to show the deliberate use of kerosene in the starting of the fire. However, the board uncovered evidence indicating that the injuries were apparently caused by explosion and fire from leaking natural gas meters. One member of the board also attached a comment to the board opinion stating, "Under Section 3(1)(a) of the [Ontario] Act, as amended, in order to qualify for an award of compensation, the applicant must have been injured by an act or omission occurring in or resulting directly from an offence." The board member found sufficient intervening cause to add the following conclusion:

In any event, the evidence does not support the contention that the applicant was injured by the initial fire. Hence, even on the assumption that the initial fire was due to arson, it could not be said that the applicant sustained his injuries directly from the fire and, therefore, directly from the arson.

There has apparently been no further litigation of the case, probably because of the expense and time involved for the claimant, and also because of the legal difficulty of reversing an administrative decision.<sup>24</sup>

#### Victim Participation in Illegal Activities

A somewhat less basic, but equally important issue, has been the prohibition of compensation to those injured or killed while engaged in illegal activity. Several Ontario cases provide guidance on this question. In the Matter of Harrison John Biggs involved a 50-year old man who became paraplegic as a result of a gunshot wound sustained when a masked man entered his bedroom and shot him in the spine. In denying the claim, the board noted the familiarity of the gunman in knocking at Biggs' apartment door at 3:45 a.m. on a Saturday morning and calling out Biggs' nickname, "Biggsy." The board concluded:

This applicant has an extensive criminal record for crimes of violence. The Board proposes to reject this application having

regard to his criminal record before the events giving rise to his claim for compensation. The Board is of the opinion that the injury suffered by the applicant is directly related to his character and way of life.

The relevant Ontario statutory provision says that "the Board shall have regard to all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his injury or death"<sup>25</sup> in determining whether to award compensation and in determining the amount of the award.

A more involved case was In the Matter of Clarence Talbot. Clarence Talbot was shot four times by one Ronald Radlin at the a tavern in Windsor, Ontario. Radlin admitted to the board that he had fired the injuring shots, but stated that he did so in fear of his life and self-defense to an attack by Talbot and his cousin, who was carrying a knife. Both Clarence Talbot and his cousin had criminal records, with Talbot's being manslaughter by means of a knife. The board concluded, in rather boiler-plate fashion: "It is the decision of the Board that having regard to all the relevant circumstances and the behaviour of this victim[,] no award of compensation should be made to him." The board reasoned as follows:

We bear in mind the [statutory] language ... which empowers us to make an order for compensation even though the offender was not convicted of the offence giving rise to the injury. But having read the transcript of evidence and the judge's charge to the jury[,] there is also present in our consideration the evidence of the conduct of the victim at the time of the shooting, the evidence of the offender that he acted as he did in shooting at the applicant through fear for his life and in self-defence, and that the jury which heard all the evidence acquitted the offender.

On appeal to the Divisional Court of the Supreme Court of Ontario, the decision of the board was summarily upheld, despite what the court identified as an "ingenious argument of counsel for the appellant." The court concluded that

the Board erred in law relying upon the verdict of the jury in the case of The Queen v. Radlin, which verdict depended upon proof beyond a reasonable doubt. Accordingly the Board further erred in failing to hold the appellant is entitled to an order for compensation upon proof on the balance of probabilities and in failing to find that the appellant had satisfied that burden.

Two other Ontario cases cover both the issue of non-eligibility of participants in illegal activity, and non-eligibility for failure to identify the offender or refusal to cooperate with criminal justice agencies. In the Matter of Antonio Morra was a case in which the applicant was unable to account for his presence on a street corner in downtown Toronto at 1:30 in the morning.

According to his sworn testimony a girl approached him at the time and place above indicated. Her purpose was not in doubt. He said "No" because of lack of funds but, after consulting her

male companion who was nearby, she returned to say that she was not concerned with his financial state and, on her invitation, they proceeded to "go for a walk" closely followed by what obviously was the male half of the team.

When the group had walked about five blocks, Morra was allegedly brutally beaten and relieved of his wallet. The police interviewed the injured man at a hospital, but, "He left no doubt that he didn't want the police in the picture; he didn't want to get involved, and he did not want to go to court." The board denied the claim, reasoning that the admitted behavior of the applicant and his non-cooperation with the police precluded any award. The Ontario Compensation for Victims of Crime Act specifies that the board may deny compensation "where it is satisfied that the applicant has refused reasonable co-operation with, or failed to report promptly the offence to, a law enforcement agency."

In the Matter of Gladstone Minzie was a case involving an unemployed welder who filed an application for compensation of injuries sustained in a shooting. Minzie "got into an altercation with one 'Chineman' concerning the theft of victim's mail from his apartment ... The applicant admitted to police that he had knocked Chineman to the ground and was kicking him when one Stickman, who accompanied Chineman, pulled out a gun and shot him once in the left forearm, once in the right forearm and once in the upper right thigh." A little over a month later, Minzie himself was charged with attempted murder in a separate shooting incident and was identified in a line-up. However, at a later hearing, the witness was unable to identify Minzie. The board observed that he was apparently afraid to do so, and that he was stated to be a member of a gang which was involved in internal violence. The board found the applicant to be ineligible for compensation by reason of the contribution of his code of conduct and way of life to his injuries, and by reason of his lack of effort to cooperate with the police.

#### Amount of Compensation

The general issue of how compensation is to be determined was a concern of Gurley v. Commonwealth.<sup>26</sup> Gurley was a Massachusetts case involving a claim for compensation by dependents of a victim of violent crime. The District Court found for the Commonwealth of Massachusetts and when the petitioners appealed, the Appellate Division could find no prejudicial error and dismissed the report. The petitioners appealed this ruling, presenting a case for the Supreme Judicial Court of Massachusetts where all of the issues concerned the manner of computing damages recoverable by victims and their dependents.

The relevant Massachusetts statutory provisions read as follows:

Any compensation paid under this chapter shall be in an amount not exceeding out-of-pocket loss, together with loss of earnings or support resulting from such injury. Any compensation for loss of earnings or support shall be in an amount equal to the actual loss sustained; provided, however, that no award under this chapter shall exceed ten thousand dollars.<sup>27</sup>

The statute also provides that any compensation "shall be reduced by the amount of any payments received or to be received as a result of the injury

(a) from or on behalf of the offender, (b) under insurance programs, or (c) from public funds:" (Chap. 258A § 6).

The petitioners first alleged that the statutory phrase "compensation for loss of earnings or support" included "future loss of earnings and support."<sup>28</sup> The Commonwealth did not contest this allegation. The court decided as follows:

We can see no logical reason why the victim's death should not be treated as a permanent loss of support to be computed on the basis of life expectancy and actuarial tables in determining the victim's future loss of earning capacity .... We conclude that the judge erred in the denial of the petitioners' request for a ruling to this effect.<sup>29</sup>

The central question for the court's decision was the resolution of two opposite theories of damage computation:

The petitioners requested the judge to rule that '[a]ny subtractions from the total amount of the compensation to which the claimants are entitled must be made from the total amount of compensation to which all claimants are entitled without regard to, and before, application of the ten thousand (\$10,000.00) dollar maximum award specified in General Laws, Chapter 258A, Section 5.' The judge denied this request for ruling and instead granted the Commonwealth's request for ruling which computed damages by first applying a \$10,000 limit to the actual loss sustained (which exceeded \$10,000 in the instant case) and subtracting all the benefits received as a result of the injury from the \$10,000 figure.<sup>30</sup>

The court found error in the judge's denial of the petitioners' requested rulings, reasoning that it was unambiguously intended for \$10,000 to be the limit upon final recovery. "The use of the word 'award' and the reference to the entire 'chapter'" in the second statutory provision, supra, "lead us to conclude that the \$10,000 provision is not a specific ceiling on the computation of the 'actual loss sustained' but a general limitation applying to the ultimate 'award' due under the statute."<sup>31</sup>

The petitioners' third argument was that "no deductions should be made from the compensation to which they were entitled on account of life insurance benefits and welfare payments the petitioners were receiving as a result of the victim's death."<sup>32</sup> The court held that the second statutory provision, chapter 258A § 6, supra, explicitly provides otherwise.

The last claim by the petitioners was their alleged entitlement to 6 percent per annum interest on the award from date of death of the victim until the payment date of the award. The court reasoned as follows:

The petitioners have misplaced their reliance on cases where this court has awarded interest despite the absence of express statutory authorization .... These cases are based on contract law and are not controlling in a noncontractual context where the Commonwealth has voluntarily waived its sovereign immunity

to a limited extent in order to compensate victims of violent crime; a right which did not exist prior to the enactment of G.L. c. 258A .... In waiving its immunity, the Commonwealth established certain rights of recovery which cannot be extended beyond those expressly conferred by the statute .... 33

It is interesting to note the references to "right" and "rights" of compensation and recovery, with the denomination of compensation as "noncontractual," given the implicit basis for compensation: that the state is attempting to atone for any abrogation of its duty to secure and protect its (voluntary) citizens.<sup>34</sup>

A curious case out of California, Worthington v. State Board of Control,<sup>35</sup> involved an action in which a private citizen sought a writ of mandate to compel the respondent Board of Control to set aside its decision on his claim for indemnification. The citizen had sustained damages as a result of his attempt to prevent the commission of a crime. The case came to the California Court of Appeal on appeal from a denial of the writ by the Superior Court of the County of San Francisco. The appellant contended on appeal that the award should include an allowance analogous to the general damages of a tort action.

The Board of Control conducted the original hearing and recommended that the California Legislature appropriate an indemnity of \$2,777.50, to be reduced by \$1,000 in previously paid rewards. When the Budget Act passed, appropriating the recommended \$1,777.50, the appellant was notified that the appropriation would be paid upon execution of a full release of all claims against the state relating to the claim's subject matter. When appellant executed the release and received delivery of a warrant for \$1,777.50, the respondent Board of Control moved to dismiss the appeal for mootness pursuant to the release. The court denied the motion, ruling the release to be "totally ineffective," and reasoning that once a determination had been made

by the state authority having jurisdiction over the program as to the amount to be paid .... the further role of the Board of Control staff was only ministerial; it was to see to the drawing of funds and the transmittal thereof to the claimant. The volunteer act of a zealous employee in seeking to hold the legislative appropriation to ransom until appellant signed a general release was without authority. The claimant would have been entitled to a writ of mandate to compel the delivery of a warrant drawn in accordance with the appropriation, but we do not think he lost any rights by failing to assume the expense of that remedy; where the giving of the release was imposed as an unlawful condition to payment, we hold that the release was of no effect.<sup>36</sup>

The court nonetheless decided that the appeal on the whole had no merit. It distinguished an appropriation "recommendation" from an actual state assumption of liability in tort. As an alternative remedy, it suggested contacting legislative representatives and seeking hearings to urge larger compensation. The court concluded with a general policy outline of the administering board's role in determining compensation:

For purposes of this program, the Board of Control acts in an advisory staff capacity to the Legislature. If there is dissatisfaction with the procedures followed by the board, the rules

adopted by it, or the advice it gives to the Legislature, the remedies are exclusively legislative: the statute can be changed or a meritorious claim can be augmented in the appropriation. There is no provision for any court either to make a direct award of money damages (where the statute creates no liability) or to specify what kind of advice the Board of Control shall render to the Legislature.<sup>37</sup>

The more specific compensation issue of whether negligence or provocation by the victim is a factor in rejecting or reducing compensation was referred to briefly in passing in another California case, Young v. Desert View Management Corp.<sup>38</sup> In an action by a patron against a restaurant-bar for injuries sustained when he was shot attempting to ascertain a robber's license number, the California Court of Appeal noted that the legislature afforded alternative relief for the Samaritan-minded in the California Victims of Crimes, and the Indemnification of Private Citizens statutes. Although "If a person is assaulted and cries 'help', inducing response from a stranger who is also assaulted," the court would not hold the initial victim liable to the Good Samaritan, the court did imply that some negligence or provocation would be tolerated in compensating the second victim pursuant to victim compensation statute.<sup>39</sup> The possible negligence or provocation is outlined by the rather startling fact situation:

On Friday night, January 29, 1965, he [plaintiff] had dinner in defendant's restaurant and thereafter went into the bar. While there, a man entered the coffee shop, laid a pistol on the cash register and demanded money from Helen Olson, respondent's assistant-manager-cashier .... She said to fellow employees, "Help, I have been robbed." Marilyn Redman, a cocktail waitress, heard her and said to appellant, "A man robbed - just robbed Helen. Help. Let's get a license number." Or, according to appellant, she said, "Mr. Young, someone just held up the coffee shop. Will you go out and see if you can get the license number?" The appellant said nothing but stood up and went through a door leading outside. Other patrons were behind him. Appellant saw no cars in the parking lot or moving but he saw a man walking. He went up to the man and said, "did you see the fellow that knocked off the coffee shop?" The man said, "Yes, and I am about to knock you off, too," whereupon he drew a gun. Appellant started running across the lot but was shot in the back .... None of respondent's employees told appellant the robbery was effected with a pistol. Marilyn Redman was not told of a gun and assumed no gun was involved in the robbery. When appellant went outside and saw the man walking, the man was doing so in a normal manner and did nothing to indicate to plaintiff that he was the robber or had a gun.<sup>40</sup>

This alleged negligence or provocation would probably not be a very great factor in rejecting or reducing compensation to the Good Samaritan victim.

#### Appellate Procedures

An important recent case concerning victim compensation, and the subject of a keynote address at the Fourth International Conference for the

Compensation of the Innocent Victims of Violent Crime,<sup>41</sup> is Criminal Injuries Compensation Board v. Gould.<sup>42</sup> Gould, a self-employed cab driver, was kidnapped, robbed, and shot. He filed a claim with the Maryland Criminal Injuries Compensation Board. When the board disallowed the claim, Mr. Gould appealed. The Montgomery County Circuit Court vacated the decision of the board and remanded the case for further consideration. The board appealed through the Attorney General from the remand. The issue for the Court of Appeals of Maryland was "whether or not there could be any judicial review where a claimant has been denied benefits under the Criminal Injuries Compensation Act, and if such a review were permissible, the nature and scope of the review."<sup>43</sup>

Section 10(a) of the Maryland Criminal Injuries Compensation Act provides for the commencement of a review by the Attorney General in circuit court within 30 days of any board decision involving an "improper" award. The section unqualifyingly permits no other judicial review of any decision or action by the board. The threshold question for the court was the purpose of the victim compensation legislation, and the legislature's intent in its apparent restraint of judicial examination of board decisions.

In Section 1 of the Criminal Injuries Compensation Act, the legislature stated that "it is the legislature's intent that aid, care and support be provided by the State, as a matter of moral responsibility, for ... victims of crime." The court of appeals held that Gould met the statutory eligibility criteria and thus had standing to invoke the circuit court's assistance, reasoning as follows:

We found persuasive those [Supreme Court] decisions which recognized that because a state voluntarily has assumed an inherent humanitarian obligation as it has with the compensation of innocent victims of crime, the means then employed by the state cannot be employed arbitrarily or unreasonably, and if so, judicial relief is available.<sup>44</sup>

The court did not declare section 10a unconstitutional, but rather read into the statute a legislative awareness of the inherent judicial power to review administrative agency actions where it is alleged that the action is arbitrary, illegal, capricious, or unreasonable.

Influenced by ... British decisions, and recognizing that the board still possessed as to Gould a certain discretion in any award which it might make to him, the court treated his document which he had captioned as an appeal, as an application for certiorari, and thus found as a matter of law that the criminal injuries compensation board had undertaken erroneously to overrule the decisions of two workmen's compensation commissions and had, as well, improperly applied to itself the classification of being a law enforcement agency when it denied Gould benefits.<sup>45</sup>

Coincidentally, on January 16, 1975, the date of filing for the Gould opinion, a new bill was introduced and later passed which permits appeal by a claimant within 30 days of a final board decision, "under the applicable provisions of the Administrative Procedure Act, Article 41, §§ 255 and 256

of the [Maryland] Code." Judge O'Donnell has commented on the new judicial review provision:

An intent to grant the right of appeal, if found to be with the Administrative Procedure Act, permits a wider range of review than the limited review we found was permitted under the scope of certiorari .... It seems clear ... that unless the benefits to be awarded to the victims of crime are awardable to him as a matter of grace [Maryland utilizes a welfare theory], a claimant who complies with the eligibility requirements of such a statute is entitled to a judicial review of any adverse decision by a criminal injuries compensation board, either by virtue of the inherent jurisdiction vested in the courts, or by virtue of the provisions of the respective administrative procedure acts.<sup>46</sup>

Interestingly enough, the Gould case also summarizes the apparent positions of other victim compensation jurisdictions regarding judicial review.<sup>47</sup>

Alaska provides that all orders and decisions of its board "shall be final." Hawaii permits judicial review by one aggrieved "on the sole ground that a decision was in excess of the Commission's authority or jurisdiction." In California and New Jersey there are no statutory provisions for appeal, but it appears that since in each a hearing is required, judicial review would be permitted under their respective Administrative Procedure Acts. In Massachusetts the claim is filed in a district court, a hearing is held by a district court judge and decisions are apparently appealable as in other civil cases. In Washington appeals are expressly provided for under that state's Administrative Procedure Act.<sup>48</sup>

However, the Maryland statute is modeled after New York's, and they both undertook to preclude judicial review. At least one New York court, the Supreme Court of Orange County in Utica Mutual Insurance Company v Zamenick, 79 Misc. 2d 1, 350 N.Y.S.2d 329, 330 has followed the New York statute, N.Y. EXEC. LAW § 629,<sup>49</sup> despite the changes in the equivalent Maryland statute wrought by Gould.

#### Application Procedures

Although judicial review and appellate procedures have been the area of greatest concern, there has also been some focus on issues of application procedure. Howard v. Commonwealth of Massachusetts, 40 Mass. App. Dec. 101 (1973) involved a claim for compensation in which petitioner sought recovery for lost wages and medical bills sustained as a result of being the victim of an assault and battery. The district court of Dorchester in Massachusetts made a net award to petitioner of \$7,262.92. The respondent had requested a ruling that the evidence warranted a finding of a not seasonable filing of petitioner's report with the police. The district court had denied the request on the basis of a "good cause" exception.

The statute in question, MASS. G.L. c. 258A § 5, provides in part as follows:

No compensation shall be paid unless the court finds that a crime was committed, that such crime directly resulted in personal physical injury to, or the death of, the victim, and that police records show that crime was promptly reported to the proper authorities. In no case may compensation be paid if the police records show that such report was made more than forty-eight hours after the occurrence of such crime, unless the court finds said report to the police to have been delayed for good cause.

The question presented on appeal was whether the "good cause" exception justification by the trial justice for denying the request for ruling was a special finding sufficient to render the denial immaterial and harmless error.

The Howard case held that the trial court was not justified, as a matter of law, in concluding the report to have been delayed for good cause, "[t]here being no record of any report being filed until ... more than five months after the date of the alleged incident and more than two weeks after the entry of the petition."<sup>50</sup> Because "the denial of a request that a particular finding is warranted, is error unless as a matter of law such was inapplicable or unless by clear and definite findings the court has demonstrated its inapplicability as immateriality,"<sup>51</sup> then, "[c]lear and definite findings of fact," not present in the trial justice's denial, "were required to demonstrate that no error was made in [the] denial of the request."<sup>52</sup> The finding for the petitioner was vacated and judgment entered for the respondent.

Ontario has also had an interesting case on application procedures. In the Matter of John Alfred Hepplewhite involved a 1973 claim in which police reports of investigations were not disclosed to the applicant or his counsel, nor were any of the police officers produced for purposes of cross-examination on their reports. The Divisional Court of the Supreme Court of Ontario held it to be "clear that the allegations and reports which are adverse to the applicant's case should have been disclosed to him before the [board] hearing so that his counsel could have taken what steps he deemed necessary to elucidate the applicant's position in the matter." The case was referred back to the Ontario board for rehearing. On rehearing, the board found the applicant not to be a credible witness, and denied the claim again anyway.

An application procedure issue regarding attorney fees was litigated in In re Hollywood.<sup>53</sup> The appellant's counsel asserted that the New Jersey board erred in ordering a two-installment payment of the \$1000 fee. The statutory provision in question, N.J.S.A. 52:4B-8, provides:

The board may, as a part of any order entered under this act, determine and allow reasonable attorney fees, which shall not exceed 15% of the amount awarded as compensation under section 10 of this act, to be paid in addition to the amount of such compensation, to the attorney representing the applicant, and it shall be unlawful for any such attorney to ask for, contract for or receive any larger sum than the amount so allowed.

The statute contains no provision for future service installment payments. The court held that counsel should be paid in full for services rendered to the award date.

#### Other Sources of Compensation

The most important issue in the area of other sources of compensation is subrogation. In Utica Mutual Insurance Company v. Zamenick,<sup>54</sup> the insurance carrier brought an action for declaratory judgment to support its disclaimer of coverage to the insured. The State of New York made a motion for substitution as the party defendant because of its right of subrogation obtained by payment of the insured's medical expense pursuant to the New York Crime Victims Compensation Act. The medical expenses were sustained as a result of an alleged hit-and-run automobile accident.

The motion for substitution was opposed by defendant on the basis of the state allegedly making improper payments which should preclude subrogation and appearance in the declaratory judgment action. Defendant argued that section 621(3) of the N. Y. Executive Law prohibits payments for motor vehicle injuries unless intentionally inflicted. Therefore, defendant alleged that his acquittal of the intentional infliction crimes of assault in the second degree and reckless assault precludes proper payment by the New York Crime Victims Compensation Board, and thus precluded the appearance of the State of New York in the declaratory judgment action.

The issue for the court was "the subrogation right of the State after payments have been made based on the Board's administrative determination when the alleged criminal is subsequently acquitted of the crime at a criminal trial."<sup>55</sup> The court reasoned that if it accepted the defendant's argument, then a "quantum of evidence" would be imposed upon the board contrary to that specified by the legislature in Executive Law § 627. The effectiveness of the board as an administrative entity would be impeded by all the accoutrements of a criminal trial. The court rejected defendant's argument and granted the motion for substitution of the State of New York as a party defendant.

The preceding description of legal issues in crime victim compensation has been prepared primarily from the limited number of reported cases in the area, both in the United States, and Ontario. While their applicability across jurisdictional boundaries is obviously limited, the number of issues surveyed indicates the wide scope of subjects which any given jurisdiction could confront.

FOOTNOTES

FOOTNOTES

CHAPTER 1

1. Herbert Edelhertz and Gilbert Geis, PUBLIC COMPENSATION TO VICTIMS OF CRIME, Praeger Publishers, New York (1975), p. 7, citing: Cyrus H. Gordon, HAMMURABI'S CODE: QUIANT OR FORWARD-LOOKING?, Holt, Rinehart, and Winston, New York (1960), p. 6; Robert F. Harper, THE CODE OF HAMMURABI 2d ed., University of Chicago Press, Chicago (1904); Arthur Meisel, The Code of Hammurabi: A Study of Babylonian Courts and Procedure, 21 INTRAMURAL LAW REVIEW 191-223 (May, 1966). See also Marvin Wolfgang, Victim Compensation in Crimes of Personal Violence, 50 MINN. L. REV. 224, 225 (1965).
2. Gilbert Geis, State Compensation to Victims of Violent Crime, The President's Commission on Law Enforcement and Administration of Justice, CRIME AND ITS IMPACT 157, 159 (1967). (This article contains a useful bibliography at 157-177.)
3. Edelhertz and Geis, supra note 1, at 237-8.
4. Note, Compensation for Victims of Crime, 33 U. CHI. L. REV. 531, 533-36 (1966).
5. Arthur J. Goldberg, Equality and Government Action, 39 N.Y.U.L.R. 224 (April, 1964).
6. See Edelhertz and Geis, supra note 1, at 8 citing: John Bowring, ed., THE WORKS OF JEREMY BENTHAM, Tait, Edinburgh (1843), vol. I, pp. 386-388.
7. Norval Morris and Gordon Hawkins, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 43 (1970).
8. Edelhertz and Geis, supra note 1, at 237-8.
9. National Association of Attorneys General, Committee on the Office of Attorney General, transcript of FOURTH INTERNATIONAL CONFERENCE FOR THE COMPENSATION OF THE INNOCENT VICTIMS OF VIOLENT CRIME, p. 25.
10. Edelhertz and Geis, supra note 1, at 251.
11. R.I. GEN. LAWS ANN. § 12-25-1 (1972).
12. The Council of State Governments, A LEGISLATOR'S GUIDE TO THE ASSESSMENT OF CRIMINAL JUSTICE LEGISLATION, pp. 9-12 (1975).
13. See Appendix A. See also Paul F. Rothstein, How the Uniform Crime Victims Reparations Act Works, AMER. BAR ASSN. J. 1531 (Dec. 1974).
14. Mr. Don Leach of the United States Senate Majority Leader's staff has noted a comparative analysis has been completed, outlining some of the provisions of the pending bills, which had been conducted through the offices of the Majority Leader's staff in conjunction with the Library of Congress and Congressional Research Service.

15. Transcript, supra note 9, at 31. See generally transcript, supra note 9, at 1, 5, 21-2, 30-36.

CHAPTER 2

1. See N.D. CENT. CODE § 65-13-05, paragraphs (2) and (3).
2. Information on California is from National Association of Attorneys General, Committee on the Office of Attorney General, transcript of FOURTH INTERNATIONAL CONFERENCE FOR THE COMPENSATION OF THE INNOCENT VICTIMS OF VIOLENT CRIME, p. 11.
3. Id. at 14.
4. Id. at 15.
5. Id.
6. Herbert Edelhertz and Gilbert Geis, PUBLIC COMPENSATION TO VICTIMS OF CRIME, Praeger Publishers, New York (1975), p. 174.
7. Maryland, Criminal Injuries Compensation Board, SIXTH ANNUAL REPORT (Baltimore, October 1, 1975), p. 10.
8. See id. at 7.
9. Letter: Legislative Research Bureau, Boston, Massachusetts, to Ronald A. Allbee, Vermont Legislative Council, Montpelier, Vermont, May 15, 1975.
10. New York, 1974 EIGHTH ANNUAL REPORT OF THE CRIME VICTIMS COMPENSATION BOARD, p. 11.
11. Id. at 13
12. Id. at 20.

CHAPTER 3

1. CAL. GOV'T CODE § 13961(d)(4).
2. CAL. GOV'T CODE § 13962(c).
3. CAL. GOV'T CODE §§ 13962(b), 13973.
4. CAL. GOV'T CODE § 13963(a) § 13973.
5. MASS. GEN. LAWS ch. 258A § 4 (1968).
6. Id.
7. Id.
8. Edelhertz and Geis, supra Chapter 1, note 1. (This book contains a useful bibliography at 294-300.)

9. Id. at 127-8.
10. N.D. CENT. CODE § 65-13-07 (1975).
11. STATEMENT of Richard J. Gross before the Subcommittee on Criminal Justice, United States House of Representatives, Appendix A.
12. Id.
13. N.D. CENT. CODE § 65-13-17 (3).
14. CAL. GOV'T CODE § 13968(c).
15. N.Y. EXEC. LAW § 623 (1966).
16. N.Y. EXEC. LAW § 628(4).
17. N.Y. EXEC. LAW § 629(1).
18. MD. ANN. CODE art. 26A, § 9(c).
19. MD. ANN. CODE art. 26A, § 10(a).
20. R.I. GEN. LAWS ANN. § 12-25-3(a).
21. R.I. GEN. LAWS ANN. § 12-25-3(f).
22. R.I. GEN. LAWS ANN. § 12-25-9.
23. Supra note 13.
24. See WASH. REV. CODE ANN. § 7.68.10 as amended (1975).
25. MASS. GEN. LAWS. ch. 258A §7.
26. LA. REV. STAT. 46:1816 (1972).
27. ILL. REV. STAT. ch. 70 § 80(a) (1973).
28. ILL. REV. STAT. ch. 70 § 80(c).
29. CRIME VICTIMS COMPENSATION pamphlet, issued by Michael J. Howlett, Secretary of State and Ex Officio Clerk of the Court of Claims, State of Illinois.
30. ILL. REV. STAT. ch. 70 § 73(g).
31. GA. CODE ANN. § 47-526 (Supp. 1972).
32. DEL. CODE ANN. tit. 11 § 9010 (Supp. 1975).
33. MINN. STAT. ANN. § 299B.10 (1974).
34. R.I. GEN. LAWS ANN. § 12-25-10.

35. ALASKA STAT. § 18.67.140 (1972).
36. HAWAII REV. LAWS § 351-35.
37. NEV. REV. STAT. § 217.240 (1969).
38. N.J. REV. STAT. § 52:4B-20 (1971).
39. WASH. REV. CODE ANN. § 7.68.050 (1974).
40. Edelhertz and Geis, supra Chapter 1, note 1, at 290.
41. Id. at 183.
42. N.J. REV. STAT. § 52:4B-3.

#### CHAPTER 4

1. Henry Weihofen, Compensation for Victims of Criminal Violence: A Round Table, 8 J. PUB. LAW 209, 217 (1959).
2. James Starrs, A Modest Proposal to Insure Justice for Victims of Crime, 50 MINN. L. REV. 285 (1965).
3. Criminal Injuries Compensation Board v. Gould, 273 Md. 486, 331 A.2d 55 (1975).
4. Id. at 486, 495-6.
5. Id. at 496. See also, Young v. Desert View Management Corp., 276 C.A. 2d 294, 300 (1969).
6. Hicks v. Hatem, 265 Md. 260, 289 A.2d 325 (1972).
7. Weisinger v. Rensselaer, 79 Misc.2d 1023, 362 N.Y.S.2d 126 (1974).
8. Weisinger v. Rensselaer, 362 N.Y.S.2d 126, 127 (1974).
9. Supra note 6, at 260, 264 (1972).
10. Id. at n.l.
11. N.Y. EXEC. LAW § 621(4).
12. MD. ANN. CODE art. 26A § 2(d).
13. In re Hollywood, 124 N.J. Super. 50, 304 A.2d 747 (1973).
14. Id. at 52-3.
15. N.J.S.A. 52:4B-18.
16. N.J.S.A. 52:4B-9.
17. Johnsen v. Nissman, 39 A.D.2d 578, 331 N.Y.S.2d 796 (1972).

18. Id.
19. Hayes v. Van Rensselaer, 69 Misc.2d 315, 329 N.Y.S.2d 900 (1972).
20. N.Y. EXEC. LAW § 625(2).
21. Hayes v. Rensselaer, 329 N.Y.S.2d 900 (1972).
22. CAL. GOV'T CODE § 13964(d) (1973).
23. Transcript, supra, Chapter 1, note 9, at p. 12.
24. Similarly, see supra note 13.
25. Ontario Compensation for Victims of Crime Act, as amended, § 17(1) (1971).
26. Gurley v. Commonwealth, 296 N.E.2d 477 (1973).
27. MASS. G.L. c. 285A § 5, inserted by St. 1967, c. 852 § 1.
28. Supra note 26, at 477, 479.
29. Id.
30. Id.
31. Id. at 480.
32. Id.
33. Citations omitted; id. at 481.
34. See Chapter 1, pp. 1-2, supra.
35. Worthington v. State Board of Control, 266 C.A.2d 697, 72 Cal. Rptr. 449, 32 A.L.R.3d 1441 (1968).
36. Worthington, 266 C.A.2d at 700, 72 Cal. Rptr. at 451.
37. Worthington, 266 C.A.2d at 701, 72 Cal. Rptr. at 451.
38. Young v. Desert View Management Corp., 276 C.A.2d at 294, 79 Cal. Rptr. at 848 (1969).
39. Young, 276 C.A.2d at 300, 79 Cal. Rptr. at 851.
40. Young, 275 C.A.2d at 296-7, 79 Cal. Rptr. at 849.
41. Supra Chapter 1, note 9, at 22-30.
42. Supra note 3.
43. Supra note 41, at 25.
44. Id. at 29.

45. Id.
46. Id. at 30.
47. Supra note 3 at 497, 331 A.2d 55, 62-3 (1975).
48. Gould, supra note 3, at n.7.
49. See also supra Chapter 1, note 9, at 29.
50. Howard v. Commonwealth of Massachusetts, 50 Mass. App. Dec. 101, 106-7 (1973).
51. Citations omitted, id. at 105-6.
52. Id. at 107.
53. Supra note 13.
54. Utica Mutual Insurance Company v. Zamenick, 76 Misc.2d 1, 350 N.Y.S.2d 329 (1973).
55. Utica, 350 N.Y.S.2d 329, 330 (1973).

APPENDICES

## UNIFORM CRIME VICTIMS REPARATIONS ACT

Section 1. [Definitions.]

(a) As used in this Act, the words and phrases in this Section have meanings indicated.

(b) "Board" means the Crime Victims Reparations Board created under Section 3.

(c) "Claimant" means any of the following claiming reparations under this Act: a victim, a dependent of a deceased victim, a third person other than a collateral source, or an authorized person acting on behalf of any of them.

(d) "Collateral source" means a source of benefits or advantages for economic loss otherwise reparable under this Act which the victim or claimant has received, or which is readily available to him, from: (1) the offender; (2) the government of the United States or any agency thereof, a state or any of its political subdivisions, or an instrumentality of two or more states, unless the law providing for the benefits or advantages makes them excess or secondary to benefits under this Act; (3) Social Security, Medicare, and Medicaid; (4) state required temporary non-occupational disability insurance; (5) workmen's compensation; (6) wage continuation programs of any employer; (7) proceeds of a contract of insurance payable to the victim for loss which he sustained because of the criminally injurious conduct; or (8) a contract providing prepaid hospital and other health care services, or benefits for disability.

(e) "Criminally injurious conduct" means conduct that (1) occurs or is attempted in this State, (2) poses a substantial threat of personal injury or death, and (3) is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this State. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle except when intended to cause personal injury or death.

(f) "Dependent" means a natural person wholly or partially dependent upon the victim for care or support and includes a child of the victim born after his death.

(g) "Economic loss" means economic detriment consisting only of allowable expense, work loss, replacement services loss, and, if injury causes death, dependent's economic loss and dependent's replacement services loss. Noneconomic detriment is not loss. However, economic detriment is loss although caused by pain and suffering or physical impairment.

(1) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care. The term includes a total charge not in excess of \$500 for expenses in any way related to funeral, cremation, and burial. It does not include that portion of a charge for a room in a hospital, clinic, convalescent or nursing home, or any other institution engaged in providing nursing care and related services, in excess of a reasonable and customary charge for semi-private accommodations, unless other accommodations are medically required.

(2) "Work loss" means loss of income from work the injured person would have performed if he had not been injured, and expenses reasonably incurred by him in obtaining services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him or by income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake.

(3) "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured.

(4) "Dependent's economic loss" means loss after decedent's death of contributions of things of economic value to his dependents, not including services they would have received from the decedent if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of decedent's death.

(5) "Dependent's replacement services loss" means loss reasonably incurred by dependents after decedent's death in obtaining ordinary and necessary services in lieu of those the decedent would have performed for their benefit if he had not suffered the fatal injury, less expenses of the dependents avoided by reason of decedent's death and not subtracted in calculating dependent's economic loss.

(h) "Non-economic detriment" means pain, suffering, inconvenience, physical impairment, and other non-pecuniary damage.

(i) "Victim" means a person who suffers personal injury or death as a result of (1) criminally injurious conduct, (2) the good faith effort of any person to prevent criminally injurious conduct, or (3) the good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.

## COMMENT

The words "criminally injurious conduct" are used throughout this Act rather than the simple word "crime" because if the word "crime" were used, it would need to be given an artificial meaning. The reason is that not all crimes will result in reparations under this Act, and those crimes which are reparable fall under the definition here given for "criminally injurious conduct."

The definitions of "economic loss" and its components are derived, with essential modifications, from the Uniform Motor Vehicle Accident Reparations Act.

Section 2. [Award of Reparations.] The Board shall award reparations for economic loss arising from criminally injurious conduct if satisfied by a preponderance of the evidence that the requirements for reparations have been met.

Section 3. [Crime Victims Reparations Board.]

(a) A Crime Reparations Board is created [in the executive branch], consisting of three members appointed by the Governor [with the advice and consent of the Senate]. At least one member shall be a person admitted to the bar of this State.

(b) The term of office of each member shall be [6] years and until his successor is appointed and qualified, except that of the members first appointed one each shall be appointed to serve for terms of [2], [4], and [6] years. A person appointed to fill a vacancy shall be appointed for the remainder of the unexpired term.

(c) The Governor shall designate a member who is admitted to the bar of this State to serve as chairman at the pleasure of the Governor.

(d) Members shall [serve full time, receive an annual salary prescribed by the governor within the available appropriation not exceeding [ ] dollars,] [serve part time, and receive [ ] dollars per diem,] and be reimbursed for actual expenditures incurred in performance of their duties in the same manner as State officials generally.

Section 4. [Powers and Duties of the Board.]

(a) In addition to the powers and duties specified elsewhere in this Act, the Board has the powers and duties specified in this section.

(b) The duty to establish and maintain a principal office and other necessary offices within this state, appoint employees and agents as necessary, and prescribe their duties and compensation.

(c) The duty to adopt by rule a description of the organization of the board stating the general method and course of operation of the Board.

(d) The duty to adopt rules to implement this Act, including rules for the allowance of attorney's fees for representation of claimants; and to adopt rules providing for discovery proceedings, including medical examination consistent with Section 9 and 10. Rules shall be statements of general applicability which implement, interpret, or prescribe policy, or describe the procedure or practice requirements of the Board.

(e) The duty to prescribe forms for applications for reparations.

(f) The duty to hear and determine all matters relating to claims for reparations, and the power to reinvestigate or reopen claims without regard to statutes of limitations or periods of prescription.

(g) The power to request from prosecuting attorneys and law enforcement officers investigations and data to enable the Board to determine whether, and the extent to which, a claimant qualifies for reparations. A statute providing confidentiality for a claimant's or victim's juvenile court records does not apply to proceedings under this Act.

(h) The duty, if it would contribute to the function of the Board, to subpoena witnesses and other prospective evidence, administer oaths or affirmations, conduct hearings, and receive relevant, nonprivileged evidence.

(i) The power to take notice of judicially cognizable facts and general, technical, and scientific facts within their specialized knowledge.

(j) The duty to make available for public inspection all Board decisions and opinions, rules, written statements of policy, and interpretations formulated, adopted, or used by the Board in discharging its functions.

(k) The duty to publicize widely the availability of reparations and information regarding the filing of claims therefor.

COMMENT

This section and section 8 contain details which are redundant in a state having an adequate Administrative Procedures Act. Incorporation of these details in this Act ought not to be taken as encouragement to repetitive legislation. Each state must tailor the Act to its situation, by eliminating needless procedural details.

This Act does not include elaborate requirements for public notice and hearings relating to the rule making function of the Board, because the kinds of beneficiaries to be expected under this Act do not have an identifiable interest in procedural rules.

Section 5. [Application for Reparations; Awards; Limitations on Awards.]

(a) An applicant for an award of reparations shall apply in writing in a form that conforms substantially to that prescribed by the Board.

(b) Reparations may not be awarded unless the claim is filed with the Board within one year after the injury or death upon which the claim is based.

(c) Reparations may not be awarded to a claimant who is the offender or an accomplice of the offender, nor to any claimant if the award would unjustly benefit the offender or accomplice. [Unless the Board determines that the interests of justice otherwise require in a particular case, reparations may not be awarded to the spouse of, or a person living in the same household with, the offender or his accomplice or to the parent, child, brother, or sister of the offender or his accomplice.]

COMMENT

The victims of a large percentage of crimes are relatives by blood or marriage of the offender or his accomplice, or live in the same household with him. The award of reparations in these cases involves serious questions of policy. Among those questions are the cost of the program, the possibility of fraud and collusion, and other social judgments. The unjust enrichment language at the end of the first sentence of subsection (c) may or may not alone provide adequate protection. The bracketed language at the end of subsection (c) should be included or omitted in an enacting State according to the legislative appraisal of the questions of policy involved.

(d) Reparations may not be awarded unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within 72 hours after its occurrence or the Board finds there was good cause for the failure to report within that time.

(e) The Board, upon finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies, may deny, reconsider, or reduce an award of reparations.

(f) Reparations otherwise payable to a claimant shall be reduced or denied (1) to the extent the economic loss upon which the claim is based is recouped from other persons, including collateral sources, and (2) to the extent the Board deems reasonable because of the contributory misconduct of the claimant or of a victim through whom he claims.

[(g) (1) Reparations may be awarded only if the Board finds that unless the claimant is awarded reparations, he will suffer financial stress as the result of economic loss otherwise reparable. A claimant suffers

financial stress only if he cannot maintain his customary level of health, safety, and education for himself and his dependents without undue financial hardship. In making its finding the Board shall consider all relevant factors, including:

- (i) the number of claimant's dependents;
- (ii) the usual living expenses of the claimant and his family;
- (iii) the special needs of the claimant and his dependents;
- (iv) the claimant's income and potential earning capacity; and
- (v) the claimant's resources.

(2) Reparations may not be awarded if the claimant's economic loss does not exceed ten percent of his net financial resources. A claimant's net financial resources do not include the present value of future earnings and shall be determined by the Board by deducting from his total financial resources:

- (i) one year's earnings;
- (ii) the claimant's equity, up to \$30,000, in his home;
- (iii) one motor vehicle; and
- (iv) any other property exempt from execution under [the general personal property exemptions statute of this State.]

(3) Notwithstanding paragraph (2):

(i) the board may award reparations to a claimant who possesses net financial resources in excess of those allowable under paragraph (2) if, considering the claimant's age, life expectancy, physical or mental condition, and expectancy of income including future earning power, it finds that the claimant's financial resources will become exhausted during his lifetime; or

(ii) The Board may (A) reject the claim finally, or (B) reject the claim and reserve to the claimant the right to reopen his claim, if it appears that the exhaustion of claimant's financial resources is probable, in which event the Board may reopen pursuant to an application to reopen if it finds that the resources available to the claimant from the time of denial of an award were prudently expended for personal or family needs.]

#### COMMENT

Inclusion of a requirement of economic need for financial stress on the part of the victim appears to be accountable only as a cost-reduction factor. While the argument that the State ought not bear the loss of persons rich enough to care for themselves has appeal, in essence it reads a welfare concept into a program not related to welfare. Inclusion of the test will unquestionably increase administrative costs by requiring elaborate investigations into the resources of each claimant. Any savings produced by a needs test may thus be dissipated in the cost of administering that test. On balance, then, elimination of any requirement of financial stress seems wise. If the test is included, however, a real threat to the integrity of the program is posed because a strict "needs" requirement will limit benefits of the program to persons already on welfare and thus be merely an exercise in bookkeeping. The details suggested in the criterion for economic stress are designed to prevent that result.

[(h) Reparations may not be awarded if the economic loss is less than [\$100].]

#### ALTERNATIVE A

[(i) Reparations for work loss, replacement services loss, dependent's economic loss, and dependent's replacement services loss may not exceed \$200 per week.]

#### ALTERNATIVE B

[(i) Reparations for work loss, replacement services loss, dependent's economic loss, and dependent's replacement services loss may not exceed the amount by which the victim's income is reduced below \$200 per week.]

#### COMMENT

Alternative A should be adopted in a State which desires a maximum weekly limit on reparations but does not incorporate the financial stress test of subsection (g). Alternative B should be adopted in a State which enacts subsection (g).

[(j) Reparations payable to a victim and to all other claimants sustaining economic loss because of injury to or death of that victim may not exceed [\$50,000] in the aggregate.]

Section 6. [Notice to Attorney General; Function of Attorney General.] Promptly upon receipt of an application for reparations, the Board shall forward a copy of the application and all supporting papers to the [Attorney General], who in appropriate cases may investigate the claim, appear in hearings on the claim, and present evidence in opposition to or support of an award.

Section 7. [Informal Disposition; Contested Case.] Unless precluded by law, informal disposition may be made of a claim by stipulation, agreed settlement, consent order, or default. A claim not so disposed of is a contested case.

Section 8. [Contested Cases; Notice; Hearing; Records.]

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice of hearing shall include:

- (1) a statement of the time, place, and nature of the hearing;
- (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) a reference to the particular sections of the statutes and rules involved; and
- (4) a short and plain statement of the matters asserted.

To the extent that the board is unable to state the matters at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite statement shall be furnished.

(c) Every interested person shall be afforded an opportunity to appear and be heard and to offer evidence and argument on any issue relevant to his interest, and examine witnesses and offer evidence in reply to any matter of an evidentiary nature in the record relevant to his interest.

(d) A record of the proceedings shall be made and shall include: (1) the application and supporting documents; (2) all pleadings, motions, and intermediate rulings; (3) evidence offered, received, or considered; (4) a statement of matters officially noticed; (5) all staff memoranda or data submitted to the Board in connection with its consideration of the case; and (6) offers of proof, objections, and rulings.

(e) Oral proceedings or any part thereof shall be transcribed on request of any party, who shall pay transcription costs unless otherwise ordered by the Board.

(f) Determinations of the Board shall be made in writing, supported by findings of fact and conclusions of law based exclusively on the record, and mailed promptly to all parties.

#### Section 9. [Evidence of Physical Condition.]

(a) There is no privilege, except privileges arising from the attorney-client relationship, as to communications or records relevant to an issue of the physical, mental, or emotional condition of the claimant or victim in a proceedings under this Act in which that condition is an element.

(b) If the mental, physical, or emotional condition of a victim or claimant is material to a claim, the Board may order the victim or claimant to submit to a mental or physical examination by a physician or psychologist, and may order an autopsy of a deceased victim. The order may be made for good cause shown upon notice to the person to be examined and to all persons who have appeared. The order shall specify the time, place, manner, conditions, and scope of the examination or autopsy and the person by whom it is to be made, and shall require the person to file with the Board a detailed written report of the examination or autopsy. The report shall set out his findings, including results of all tests made, diagnoses, prognoses, and other conclusions and reports of earlier examinations of the same conditions.

(c) On request of the person examined, the Board shall furnish him a copy of the report. If the victim is deceased, the Board, on request, shall furnish the claimant a copy of the report.

(d) The Board may require the claimant to supplement the application with any reasonably available medical or psychological reports relating to the injury for which reparations are claimed.

Section 10. [Enforcement of Board's Orders.] If a person refuses to comply with an order under this Act or asserts a privilege, except privileges arising from the attorney-client relationship, to withhold or suppress evidence relevant to a claim, the Board may make any just order including denial of the claim, but may not find the person in contempt. If necessary to carry out any of its powers and duties, the Board may petition the [ ] Court for an appropriate order, but the Court may not find a person in contempt for refusal to submit to a medical or physical examination.

#### Section 11. [Award and Payment of Reparations.]

(a) An award may be made whether or not any person is prosecuted or convicted. Proof of conviction of a person whose acts give rise to a claim is conclusive evidence that the crime was committed, unless an application for rehearing, an appeal of the conviction, or certiorari is pending, or a rehearing or new trial has been ordered.

(b) The Board may suspend the proceedings pending disposition of a criminal prosecution that has been commenced or is imminent, but may make a tentative award under Section 15.

Section 12. [Attorney's Fees.] As part of an order, the Board shall determine and award reasonable attorney's fees, commensurate with services rendered, to be paid by the State to the attorney representing the claimant. Additional attorney's fees may be awarded by a court in the event of review. Attorney's fees may be denied on a finding that the claim or appeal is frivolous. Awards of attorney's fees shall be in addition to awards of reparations and may be made whether or not reparations are awarded. It is unlawful for an attorney to contract for or receive any larger sum than the amount allowed.

#### Section 13. [Subrogation; Actions; Allocation of Expenses.]

(a) If reparations are awarded, the State is subrogated to all the claimant's rights to receive or recover benefits or advantages, for economic loss for which and to the extent only that reparations are awarded, from a source which is or, if readily available to the victim or claimant would be, a collateral source.

(b) As a prerequisite to bringing an action to recover damages related to criminally injurious conduct for which reparations are claimed or awarded, the claimant shall give the Board prior written notice of the proposed action. After receiving the notice, the Board shall promptly (1) join in the action as a party plaintiff to recover reparations awarded, (2) require the claimant to bring the action in his individual name as a trustee in behalf of the State, to recover reparations awarded, or (3) reserve its rights and do neither in the proposed action. If, as requested by the Board, the claimant brings the action as trustee and recovers reparations awarded by the Board, he may deduct from the reparations recovered in behalf of the State the reasonable expenses, including attorney's fees, allocable by the court for that recovery.

(c) If a judgment or verdict indicates separately economic loss and non-economic detriment, payments on the judgment shall be allocated between them in proportion to the amounts indicated. In an action in a court of this State arising out of criminally injurious conduct, the judge, on timely motion, shall direct the jury to return a special verdict, indicating separately the awards for non-economic detriment, punitive damages, and economic loss.

#### Section 14. [Manner of Payment; Non-assignability and Exemptions.]

(a) The Board may provide for the payment of an award in a lump sum or in installments. The part of an award equal to the amount of economic loss accrued to the date of the award shall be paid in a lump sum. An award for allowable expense that would accrue after the award is made may not be paid in a lump sum. Except as provided in subsection (b), the part of an award that may not be paid in a lump sum shall be paid in installments.

(b) At the instance of the claimant, the Board may commute future economic loss, other than allowable expense, to a lump sum but only upon a finding by the Board that: (1) the award in a lump sum will promote the interests of the claimant; or (2) the present value of all future economic loss other than allowable expense, does not exceed [\$1,000].

(c) An award for future economic loss payable in installments may be made only for a period as to which the Board can reasonably determine future economic loss. The Board may reconsider and modify an award for future economic loss payable in installments, upon its finding that a material and substantial change of circumstances has occurred.

(d) An award is not subject to execution, attachment, garnishment, or other process, except that an award for allowable expense is not exempt from

a claim of a creditor to the extent that he provided products, services, or accommodations the costs of which are included in the award.

(e) An assignment or agreement to assign a right to reparations for loss accruing in the future is unenforceable, except (1) an assignment of a right to reparations for the work loss to secure payment of alimony, maintenance, or child support; or (2) an assignment of a right to reparations for allowable expense to the extent that the benefits are for the cost of products, services, or accommodations necessitated by the injury or death on which the claim is based and are provided or to be provided by the assignee.

Section 15. [Tentative Awards.] If the Board determines that the claimant will suffer financial hardship unless a tentative award is made, and it appears likely that a final award will be made, an amount may be paid to the claimant, to be deducted from the final award or repaid by and recoverable from the claimant to the extent that it exceeds the final award.

Section 16. [Reconsideration and Review of Board Decisions.]

(a) The Board, on its own motion or on request of the claimant, may reconsider a decision making or denying an award or determining its amount. The Board shall reconsider at least annually every award being paid in installments. An order on reconsideration of an award shall not require refund of amounts previously paid unless the award was obtained by fraud.

(b) The right of reconsideration does not affect the finality of a Board decision for the purpose of judicial review.

(c) A final decision of the Board is subject to judicial review on appeal by the claimant, the [Attorney General], or the offender [in the same manner and to the same extent as the decision of a state trial court of general jurisdiction].

Section 17. [Reports.] The Board shall prepare and transmit [Annually] to the Governor and the Legislature a report of its activities, including the name of the claimant, a brief description of the facts, and the amount of reparations awarded in each case, and a statistical summary of claims and awards made and denied.

Section 18. [Uniformity of Application and Construction.] This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states enacting it.

Section 19. [Severability.] If any provision of this Act or the application thereof to any person is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 20. [Title.] This Act may be cited as the Uniform Crime Victims Reparations Act.

## APPENDIX B

### UNIFORM CRIME VICTIMS REPARATIONS ACT; RULES OF PRACTICE AND PROCEDURE

R65-13-01. INTENT. These rules are intended to ensure that any individual appearing before the Board shall receive a determination which has been arrived at in a fundamentally fair manner.

### R65-13-02. DEFINITIONS

1. "Act" means the Uniform Crime Victims Reparations Act.
2. "Board" means the Workmen's Compensation Bureau.
3. "Executive Administrator" means that individual appointed by the Board to enforce the Act; who hereinafter, shall be referred to as the Administrator.
4. "Person" means individuals, partnerships, corporations, and associations or organized groups.

R65-13-03. LIBERAL CONSTRUCTION. These rules shall be liberally construed to secure a just and speedy determination of the issues.

R65-13-04. FILING OF CLAIMS. All claims must be filed with the Board within one year of the incident upon which the claim is based. A claim shall be deemed to be filed upon receipt by the Board or the Administrator of any written notice from the claimant or the representative of the claimant which expresses an intent to request compensation under the Act.

R65-13-05. INVESTIGATION OF CLAIMS. During investigation of the claim, the Administrator shall obtain from the claimant and other persons all information reasonably related to the validity of the claim, including, but not limited to, information concerning:

1. The occurrence of a crime;
2. The extent of the claimant's economic loss;
3. The extent to which the victim or the claimant has cooperated with law enforcement officials;
4. The extent to which collateral sources are available to the claimant;
5. The extent to which the victim or claimant has been guilty of contributory misconduct.

Failure by the claimant or his representative to cooperate with the investigation may constitute a ground for denial of a claim.

R65-13-06. INVESTIGATIVE REPORT AND RECOMMENDATION. Within thirty (30) days of the Administrator's receipt of a claim, the Administrator shall file a report with the Board which shall recommend a decision on the claim approving the amount claimed, modifying the amount claimed, or dismissing the claim; together with the results of the investigation.

R65-13-07. DECISION OF BOARD. Within ten (10) days of receipt of the recommendation of the Administrator, the Board shall issue a decision on the claim approving the amount claimed, modifying the amount claimed, or dismissing the claim, together with its reasons for doing so; and it shall inform the claimant of the decision and of the claimant's right to a hearing by certified mail.

R65-13-08. REQUEST FOR HEARING. If a claimant or a member of the Board, within thirty (30) days of the mailing of the decision, applies in writing to the Board for consideration of the decision, a hearing shall be conducted according to law and the provisions set out herein. Any proceeding pursuant to such a request shall be treated as a contested case.

R65-13-09. PREHEARING CONFERENCE. Within ten (10) days of the receipt of a request for a hearing, the Board shall appoint one of its members as a hearing officer who shall commence the contested case by serving upon all known parties a document of initiation and notice stating:

1. The commencement of the contested case;
2. The time and place of a prehearing conference;
3. The purpose of the prehearing conference;
4. The name of the hearing officer;
5. The rights of the parties to counsel;
6. That failure to attend may prejudice the party's right in this and subsequent proceedings; and
7. A copy of these rules.

The purposes of the prehearing conference are to simplify the issues to be determined and to reach a settlement on those issues without the necessity of a formal hearing. Informal disposition may be made of any contested case or any issue therein by stipulation, agreed settlement, consent order or default at any point in the proceeding, subject to approval by the Board.

R65-13-10. INTERVENTION BY INTERESTED PARTY. Upon timely application, any person shall be permitted to intervene in a contested case upon showing that such person's legal rights, duties, or privileges may be determined or affected in a contested case; unless, in the discretion of the hearing officer, such person's interest is adequately represented by one of the parties participating in the case.

R65-13-11. CONSOLIDATION. Whenever, before a hearing on any contested case, the Board, either on its own motion or upon petition by any party, determines (a) that separate contested cases present substantially the same issues of fact or law, (b) that a holding in one case would affect the rights of parties in another case and (c) that consolidation would not substantially prejudice any party, the Board may order such cases consolidated for a single hearing on the merits. Within five (5) days following an order on consolidation, the Board shall serve on all parties a Notice of Consolidation containing an explanation of the reasons for consolidation. The parties may also agree and stipulate to such consolidation.

R65-13-12. HEARING. In the event that the issues were not settled through a prehearing conference, at least thirty (30) days prior to the hearing date, the Board shall serve notice of hearing on all parties to the case. Such notice shall contain the requirements prescribed by Section 65-13-09 (1) of the NDCC.

The Board may prohibit the operation of a camera, lights, recording equipment or other devices in the hearing room if such operation would, in its opinion, interfere with or disrupt the proceedings.

R65-13-13. EVIDENCE. The admissibility of evidence in any proceeding before the Board shall be determined insofar as circumstances will permit, in accordance with the practice in the district court, with the privilege exceptions noted in Section 65-13-10 of the NDCC. The Board may waive the usual common law or statutory rules of evidence if such waiver is necessary to ascertain the substantial rights of all parties to the proceeding, but only evidence of probative value shall be accepted.

R65-13-14. SUBPOENAS, DEPOSITIONS. The Board shall issue subpoenas and subpoena duces tecum, either at its own instance or upon written application of any party made not less than ten (10) days prior to a hearing if it would contribute to the function of the Board. The written request shall designate the names and address of witnesses and the locations of documents, books, payrolls, personal records, correspondence, papers or any other evidence necessary to the claim. The cost of service, witness, and mileage fees shall be borne by the party at whose request a subpoena is issued unless otherwise ordered by the Board.

The Board, on its own motion or upon written application of any party, shall take or cause to be taken affidavits or depositions of witnesses residing within or without the state, whenever it deems such procedure necessary. The Board may set appropriate terms and conditions pertaining to the taking of affidavits or depositions. The requesting party shall bear the expense unless otherwise ordered by the Board.

R65-13-15. INFORMATION NOT PRESENTED AT FORMAL HEARING. Consideration of information not presented at a formal hearing shall be pursuant to Section 28-32-07 of the NDCC.

R65-13-16. DECISION. A determination shall be made by the Board pursuant to Section 28-32-08 of the NDCC.

R65-13-17. REHEARING. A rehearing may be had pursuant to Section 28-32-09 of the NDCC.

R65-13-18. APPEAL. An appeal from a Board decision may be had to the same extent and in the same manner as provided in Section 28-32-15 of the NDCC.

R65-13-19. ATTORNEYS. Any party shall have a right to be represented by an attorney at any stage in the proceedings regarding a claim. Attorney's fees for the claimant only will be paid by the Board from the time a claim becomes contested and to a maximum hourly rate of \$30.00. However, the Board may deny attorney's fees upon a finding that a claim or appeal is frivolous.

The attorney shall file a notice of legal representation, or when appropriate, a notice of substitution prior to or together with that attorney's first communication with or appearance before the Board, whichever is first. After the filing of a notice of legal representation or of substitution, copies of all written communications or notices to the parties shall be sent to such attorney in lieu of the party so represented.

R65-13-20. FORMS. The Board shall prepare and furnish, free of cost, blank forms and shall have the same available on request of any interested party at the Board office. Such forms shall include but not be limited to: claim forms, claimant's supplementary forms, legal representation and substitution forms; law enforcement, witness and employer certifications; certification of the supplier of services, and physicians report forms.

R65-13-21. TENTATIVE AWARDS. Tentative awards may be made for work loss or replacement services only and shall not exceed \$800.

65-13-A. METHOD AND COURSE OF OPERATION. After a claim is filed, the Administrator shall examine the claim and make an initial recommendation as to its eligibility for coverage under the Act. If the recommendation is to dismiss the claim, the Board must approve the recommendation before the claim can be dismissed. If the recommendation is to approve the claim, the Administrator must proceed to investigate the claim.

The investigation must include interviews and/or signed statements by the investigating officer, if there was one, the attending physician, if there was one, and at least one witness, if there was one. After this investigation, the Administrator must again recommend approval or dismissal of a claim. If the recommendation is to dismiss a claim, the Board must approve that recommendation before the claim can be dismissed. If the recommendation is to approve the claim, a supplementary form must then be sent to the claimant.

The purpose of the supplementary form is to gather information from the claimant concerning his expenses and losses and collateral sources of recovery. Following receipt of that supplementary form from the claimant, the Administrator must conduct a supplementary investigation to verify that form.

Following this second investigation, the Administrator shall make a final recommendation on the claim. That recommendation must be to approve the claim, modify the claim, or dismiss the claim. That recommendation must

be supported by a report containing the papers and information received during the investigation of the claim. A copy of that report and information must be submitted to the Attorney General as well.

The recommendation of the Administrator is not binding upon the Board. After an examination of the recommendation, report, and information submitted by the Administrator, the Board must make a decision, by majority vote, to approve the claim, modify the claim, or dismiss the claim.

If the decision is to modify or approve the claim and the claimant is satisfied with the decision, payments may begin in the amount approved. If the decision is to dismiss the claim, no payment may be made.

In the event that a hearing is requested, the Board must appoint one of its members as a hearing officer who must call and send notice of a prehearing conference. Following the prehearing conference, the hearing officer must recommend a dismissal, modification of the award, or full award, which recommendation must be approved by the full Board before it can become effective. If the recommendation is approved by the Board and acceptable to the claimant, no hearing need be held. If the Board does not approve the recommendation of the hearing officer or if the decision of the Board is not acceptable to the claimant, a hearing before the full Board must be held.

At any time after receipt of a claim, the Administrator may recommend and/or the Board may grant a tentative award pursuant to the Act.

65-13-B. ORGANIZATION. The Board shall appoint an Administrator and a secretary to the Administrator. The Administrator shall be an attorney qualified to practice law in the courts of this state. The secretary to the Administrator shall possess such skills as would qualify that person as a Clerk Stenographer II. The salary of the Administrator and the secretary shall be paid directly from the Crime Victims Reparations Fund, hereinafter referred to as the Fund, unless and until other funds can be secured for the administration of the Act.

The Board establishes, within the Legal Department of the Workmen's Compensation Bureau, an office for the use of the Administrator and the secretary to the Administrator of the Act. The office and furniture for the Administrator and the secretary shall be supplied free of charge to the Fund in return for services rendered by the Administrator and the secretary to the Workmen's Compensation Bureau.

All supplies, travel, and other expenses attributable to the Administrator and the secretary shall be paid directly from the Fund unless and until other funds can be secured for the administration of the Act.

**END**

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