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WARBURTON, T. J. The availability of compensation for victims...

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THE AVAILABILITY OF COMPENSATION FOR
VICTIMS OF SEXUAL ASSAULT

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ABSTRACT

Compensation for victims of sexual violation is currently available under three separate procedures: The Accident Rehabilitation and Compensation Insurance Act 1992, civil proceedings and the Criminal Justice Act 1985. The latter procedures focus on the financial ability of an offender to provide adequate reimbursement for victims whose injuries have caused a financial and emotional loss. However, if the offender is not able to meet these costs, the state has provided a safety-net within the accident compensation regime.

Whilst the accident compensation scheme was originally designed to meet the needs of victims who had suffered injuries in the workplace, victims of crime were included within its ambit in 1974. Despite their inclusion, the scheme has never specifically focussed on the needs of victims of crime. In particular, victims of sexual assault suffer a range of physical and psychological injuries which are inadequately addressed under the accident compensation procedures. In 1992, reforms to the scheme resulted in a reduction in the provision of services for injury sufferers. This reduction has ensured that sexual assault victims are further disadvantaged by their inclusion in the 1992 Act.

This paper examines the history of criminal injuries compensation and provides an overview of the current procedures, thereby highlighting both the positive and negative aspects of each procedure as it relates to victims of sexual assault. Whilst these schemes provide some relief to victims, the effects of rape ensure that many victims are unable to fully utilise the available resources. As the state reduces its commitment to victims of accidents, reforms are needed to ensure that victims of sexual assault and other criminal injuries are not ignored in the process.

WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 14200 words.

I. INTRODUCTION

In March 1996, a conference was held in Wellington to assess the reforms that had taken place in legislation and amongst social agencies over the last ten years concerning the treatment of rape victims and their experiences within the legal system. The conference addressed, as the starting point of reforms, the 1985 amendment to the Crimes Act 1961. This amendment acknowledged the seriousness of all sexual assaults by including them within the one definition of sexual violation. Rape was no longer considered as the most damaging crime. Instead, any sexual violation was recognised as being equally harmful to the victim. The "consent" requirement was also amended to include a subjective/objective element. Sexual violation is now committed where the defendant does not believe on reasonable grounds that consent was given.¹

Whilst the 1985 amendments and other later reforms have been welcomed by groups involved in the welfare and treatment of rape victims, the conference highlighted a number of concerns in the management of rape by various government and voluntary agencies. One such concern is the ability of the government and society in general to provide adequate financial assistance to rape victims for recovery from the consequences of sexual assault.

The Accident Rehabilitation and Compensation Insurance Act 1992 specifically includes within its cover victims of sexual violation, whether or not physical injury has occurred.²

¹ Crimes Act 1961, s.128; Wilson J *Changes To The Law Since 1985* background paper to the Chief Justice for the "Rape: Ten Years Progress?" Conference (March 1996, Wellington).

² The Accident Rehabilitation and Compensation Insurance Act 1992.

S.4: Definition of "personal injury": 1) For the purposes of this Act, "personal injury" means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person

s.8(3): Cover under this Act shall also extend to personal injury which is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with or in relation to the first person...which is within the description of any offence listed in the First Schedule to this Act.

The First Schedule: lists sexual offences covered by this Act.

However, given the nature of sexual violation and its consequences for victims, is the new Act sufficiently able to respond to the needs of victims of this type of crime?³

Rape is a traumatic experience...and the needs of the rape victim are pronounced and long term. She usually suffers major emotional and sexual problems in the aftermath of the offence, which may take her months or even years to overcome. These difficulties are caused both by the nature and effect of the rape itself, and also by the negative social attitudes which often stigmatise the rape victim and add to her problems of adjustment.

Victims of rape are primarily women. The gender-specific nature of rape has consequences on the financial eligibility of victims to receive accident compensation under the new Act. Women primarily earn less income on average than men and they are also more likely to have taken time out from the workforce during their careers or are working full-time in the unpaid domestic sphere.⁴ Although sexual violation affects both male and female victims, the focus in the 1992 Act on earnings-related compensation directly creates inequity in the amount of compensation received for similar crimes.

The crime of rape is also characterised by under-reporting to the police. The intimate nature of the crime, the ordeal of the police and medical investigations as well as the criminal trial and general societal attitudes to rape (particularly where the offender is an acquaintance of the victim) ensure that rape is not consistently reported to police.⁵ The majority of rape victims confine contact to specialist counselling services such as Help centres and Rape Crisis. These centres also deal with historic rather than current rape cases. Rape Crisis reported in 1996 that their centres are contacted by victims on an average of fourteen years after the sexual assault occurred.⁶ As attitudes to consent and

³ Young W *Rape Study: A Discussion of Law And Practice* (28 Feb 1983) vol.1, 60.

⁴ Delany L "Accident Rehabilitation And Compensation Bill: A Feminist Assessment" (1992) 22 VUWLR 79-102, 81-82. In 1991, women represented 44% of the paid workforce. Average weekly earnings during that year: \$637.81 for males and \$477.25 for women.

⁵ Between 1993 and 1995, over 91% of Rape Crisis clients knew their attacker. The National Collective of Rape Crisis *Date Rape Information Sheet* (April 1996) 1; *Pursuing Justice: A Rape Victim's/Survivor's Perspective*, Jordan J *Women Rape and the Reporting Process*, Koss M *Redefining Rape*, papers delivered at the "Rape: Ten Years Progress?" Conference (March 1996, Wellington).

⁶ The National Collective of Rape Crisis *Date Rape Information Sheet* (April 1996) 1.

personal autonomy have changed and developed in recent decades, many women are only now feeling able to disclose the event to an outsider.

The consequences of rape dramatically affect women's lives. While physical injuries can be severe, many victims suffer primarily from psychological injuries. A 1993 medical study reported the occurrence of physical injuries among only 40-60% of rape victims, whilst the most significant injuries were psychological.⁷ In 1974, Burgess and Holstrom conducted a survey with 92 adult rape victims. The victims reported symptoms occurring in two phases. The acute phase lasted between two to three weeks after the sexual assault and included symptoms such as skeletal muscle tension, nausea, headaches and severe mood swings. Anxiety and depression were also common features as well as the desire to change identity by altering their daily routines, telephone numbers and addresses.⁸ The latter symptoms include the desire to secure the safety of the victim's environment and can entail significant financial costs.

The second phase, which begins immediately after the initial reaction, can last between six months and a year. Yet again, this phase is characterised by a desire to change residence and workplace and an increasing reliance on family support. Nightmares and the development of phobias were also common including sexual fears and fears of being outside, in a crowd or alone.⁹ Later studies have confirmed the Burgess and Holstrom research adding symptoms such as eating disorders and substance abuse.¹⁰ The trauma of the rape is also not confined to the victim. Families are often equally affected. In one recent study, four of the five married victims were divorced within 18 months of a stranger rape assault.¹¹ Medical practitioners have categorised the above effects of rape as

⁷ Dunn S & Gilchrist V "Sexual Assault" (1993) 20 Primary Care 359,364.

⁸ Block A "Rape Trauma Syndrome as Scientific Expert Testimony" (1990) 19 Archives of Sexual Behavior 309, 310.

⁹ Above n 8,310-311.

¹⁰ Nadelson C "Consequences of Rape: Clinical And Treatment Aspects" (1989) 51 Psychotherapy Psychosom 187,188.

¹¹ Above n 10,188.

characteristic of posttraumatic stress disorder and rape trauma syndrome has been recognised in the United States courts.¹²

Sexual assault and rape trauma syndrome produce a dramatic impact on the victim's life. For most victims it takes one month after the assault to be able to function within the family, two months within social situations and eight months within the workplace.¹³ This ability to resume normal daily life is further dependent on the nature of the sexual assault. Assault by an acquaintance or relative (the most common form of sexual assault) produces the additional issues of betrayal and secrecy.¹⁴

The above medical studies are united on one central theme, the importance of family and societal support in the rehabilitation of the rape victim. The ability to protect the victim and allay questions of guilt, shame and humiliation have been identified as prerequisites in aiding a victim's recovery.¹⁵ This identification of the vital role that society can play in ensuring that its members are able to participate fully in the community has important consequences for any social policy related to victims of crime. The United Nations has also recognised the primary role society can play in aiding the recovery of victims of crime by including the provision of state-funded compensation to victims who have sustained "...significant bodily injury or impairment of physical or mental health as a result of serious crimes".¹⁶ The issue in this paper is how can New Zealand society best perform this role? The characteristics of sexual violation and its aftermath present social policy analysts with a difficult task in developing an adequate compensation scheme for victims. Whilst various legal journal articles have focussed on certain aspects of victim compensation, no comprehensive research has been undertaken which provides a complete presentation of

¹² Above n 8,317.

¹³ Above n 7, 369.

¹⁴ Above n 10,189.

¹⁵ Above n 10,189 & n 8,311.

¹⁶ UN Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power 1985, Article 12. New Zealand was a state signatory.

the variety of options currently available to sexual assault victims.¹⁷ Without such a comprehensive review of present measures, discussions on reform are difficult.

This paper will examine the new Accident Rehabilitation and Compensation Insurance Act 1992 and its effectiveness in providing rape victims with the necessary resources to successfully rehabilitate. It will also examine other options available to rape victims seeking financial compensation. Given the unique features of rape, are the current compensation measures providing adequate cover for victims of sexual assault?¹⁸ In New Zealand, reform of victim compensation law has been demanded by some legal practitioners.¹⁹ This paper seeks to examine the positive and negative consequences of current policy, thereby providing a framework within which reform measures may be discussed.

II. THE AVAILABILITY OF VICTIM COMPENSATION PRIOR TO 1992

In 1963, New Zealand was the first western nation to provide state-funded victim compensation. Prior to this, victims of crime relied on civil proceedings in order to gain compensation directly from the offender. The financial health of the offender was, therefore, directly at issue. Compensation was only available to victims in circumstances where the offender had been identified and had sufficient assets to reimburse costs arising from the crime and subsequent court proceedings.

The Criminal Injuries Compensation Act 1963 specifically provided state relief to victims of crime. A consolidated fund was established from money appropriated by Parliament

¹⁷ See: Bawdon F "Putting A Price On Rape: Increasing Compensation Awards" (1993) 143 *New Law Journal* 371-372; Delany L "Accident Rehabilitation And Compensation Bill: A Feminist Assessment" (1992) 22 *VUWLR* 79-102; MacKenzie R "Lump Sums Or Litigation? Compensation for Sexual Abuse. The Case For Reinstatement Of A Compensation For Criminal Injuries Scheme" (1993) 15 *NZULR* 367-395; Tobin R "Reinventing The Wheel: Criminal Injuries Compensation?" (1994) *NZLJ* 378-383; Miller R "An Analysis And Critique of the 1992 Changes To New Zealand's Accident Compensation Scheme" (1992) 5 *CLR* 1-16.

¹⁸ A 1985 study examined the financial consequences of sexual assault for the victim. 17% suffered increased costs due to fear which included self defence classes, buying a car, increased use of taxis, paying more rent to live in a safer area, fitting security devices in the home. 15% suffered loss of earnings and some victims lost their jobs. 10% moved house. Additional costs ranged from childcare expenses while victims recovered and the cost of prescriptions. Bawdon F "Putting a Price On Rape: Increasing Compensation Awards" (1993) 143 *New Law Journal* 371, 372.

¹⁹ Tobin R "Reinventing The Wheel: Criminal Injuries Compensation?" (1994) *NZLJ* 378-383.

and the Crimes Compensation Tribunal was also given the power to recover money from convicted offenders and victims who subsequently successfully sued offenders in civil proceedings.²⁰

The need for state relief had been demonstrated by research in Britain which highlighted the deprivation suffered by victims when the offender was not in a position to offer compensation. An additional justification was offered by Dr Robson, Secretary of Justice. Capital punishment had recently been abolished and work-release schemes for convicted offenders were under consideration. Victim compensation was offered:²¹

"...as a palliative to blunt opposition to these penal reforms, as well as to respond to the public's general concern about crime. In addition, the legislation was consistent with the multitude of benefits offered citizens under the social security system."

The Criminal Injuries Compensation Act 1963 limited state relief to serious personal injury offences such as murder, assault and rape. Eligibility under the scheme was dependant on injury defined as actual bodily harm and included pregnancy and mental or nervous shock.

Applications were sent to a tribunal and the victim was allowed to have counsel present. The tribunal could make an award once satisfied, on the balance of probabilities, that the offence had occurred and injury had resulted. The behaviour of the victim, which may have directly or indirectly contributed to the offence, was also taken into account and victims who were related to the offender or living in the offender's household were not eligible for compensation.

Compensation was awarded for expenses incurred by the injury, loss of earnings, pain and suffering and any other reasonable loss. The tribunal had discretion to award lump-sum or periodic payments.²²

The Act specifically allowed for compensation to victims of rape and acknowledged mental as well as physical injury. However, applications had to be made within a year of

²⁰ Criminal Injuries Compensation Act 1963, ss.22-25.

²¹ Dr Robson quoted in Meiners R *Victim Compensation* (Lexington Books, Massachusetts, 1978) 9-10.

²² Above n 20, ss.2,12,17,18,19, Schedule to the Act.

the injury and sexual assault by a relative or spouse barred any claim. The prevalence of acquaintance rape and delays in reporting would, therefore, have excluded many victims from claiming compensation under this Act.²³

In 1966 a Royal Commission of Inquiry, chaired by Mr Justice Woodhouse, was established to investigate and report on the law relating to compensation for injuries suffered in the workplace. Although the main focus of the Commission's report concentrated on employment accidents, the Commission extended its terms of reference:²⁴

There has been such concentration upon the risks faced by men during the working day that considerable hazards they must face during the rest of each 24 hours...have been virtually disregarded. But workers do not change their status at 5pm, and if injured on the highway or at home they are the same men, and their needs and the country's need of them are unchanged.

The central recommendation of the Commission was the creation of a comprehensive state-funded compensation scheme for every man and woman regarding every type of accident. The development of such a scheme was to be in line with five guiding principles: a) community responsibility b) comprehensive entitlement c) complete rehabilitation d) real compensation and e) administrative efficiency. New Zealand citizens were asked to relinquish their rights to claim in civil proceedings. In return, the state would provide assistance for all injuries.

Although not commonly associated with the term "accident", injuries sustained by victims of criminal activity were included within the scheme. A brief paragraph in the Report recommended the inclusion of victims of crime, without any specific discussion on whether crime victims needs differed from other injury sufferers. The Commission was satisfied that "...the scheme is all-embracing and particular groups in the community need not be specifically mentioned."²⁵

²³ In 1967, only 21 awards were made by the Tribunal. Total expenditure in that same year equalled \$6,039. *Personal Injury: A Commentary On The Report Of The Royal Commission Of Inquiry Into Compensation For Personal Injury In New Zealand* (Government Print, Wellington, 1969) 37.

²⁴ Royal Commission Of Inquiry *Compensation For Personal Injury In New Zealand* (Government Print, Wellington, December 1967) 21.

²⁵ Above n 24, 112.

In 1972, on the recommendation of the Commission, the government enacted the Accident Compensation Act. The Criminal Injuries Compensation Act 1963 was subsequently repealed in 1974 and crime victims were no longer given separate legislative status.²⁶ As mentioned above, the 1963 Act was not widely used and victims of crimes not mentioned in the schedule to the Act were excluded from compensation. Although victims of rape were included in the legislation, the time limit provision and bar on claims for injuries sustained through rape by relatives and spouses excluded the possibility of many claims. Did the subsequent inclusion of rape victims within the accident compensation scheme offer any improvement in coverage?

The Accident Compensation Acts in 1972 and 1982 featured a number of provisions applicable to rape victims seeking compensation.

Rape victims were eligible under the new compensation scheme if they could establish they had suffered personal injury by accident. ACC required proof that the rape had occurred, however police complaints were not mandatory. This allowed women who did not want to go through the trauma of a rape investigation to claim eligibility through medical and psychiatric reports.²⁷ The Criminal Injuries Compensation Act also did not require the prosecution of an offender. However, proof on the balance of probabilities that the crime had occurred placed a heavier onus on the victim than required under the ACC legislation. The contributory behaviour clause in the Criminal Injuries Compensation Act was also removed. Establishing an injury by accident was sufficient to claim compensation whether or not the victim's personal conduct contributed to the injury. Once an injury by accident had been established, a range of compensation was available. In addition to earnings-related compensation and compensation for medical treatment, a rape victim was eligible under s.79 for a lump-sum payment for loss of enjoyment of life, or pain and mental suffering. This provision applied to non-earners as well as earners and was, therefore, a significant source of compensation for women.

The Royal Commission of Inquiry had originally cautioned against the provision of lump-sum awards. In their view, large one-off payments could be easily dissipated on the

²⁶ The Criminal Injuries Compensation Act 1963 was repealed by ss 6 & 12 of the Accident Compensation Amendment Act 1974.

²⁷ MacKenzie R "Lump Sums or Litigation? Compensation for Sexual Abuse. The Case for Reinstatement of a Compensation for Criminal Injuries Scheme" (1993) 15 NZULR 373-374.

immediate needs of the injured person, leaving little money aside to meet future costs. This argument focussed primarily on those persons who have sustained permanent injury.²⁸ The Commission was originally established to examine work-related accidents and as outlined above, inadequate attention was paid to victims of crime as a separate group. Its recommendation in favour of periodic payments, therefore, had little practical weight for rape victims whose compensation needs are more immediate. Counselling costs and changes in a victim's environment are short-term expenses and the majority of rape victims do not suffer injuries that require long term payments. The Commission had recommended lump sum payments for minor permanent disabilities and the government compromised in allowing periodic payments for earnings-related compensation and lump-sum payments for loss of enjoyment, and pain and suffering.²⁹

The maximum amount payable under the lump-sum award was set in 1974 at \$10,000 and as the limit was not increased through legislation, the courts introduced inflation-adjusted concepts which witnessed a rise in the level of payments awarded to victims underneath the \$10,000 threshold.³⁰ In contrast, the Criminal Injuries Compensation Act allowed only a maximum of \$2,000 for pecuniary loss and expenses and \$1,000 for pain and suffering.³¹

The immediate needs of victims for lump-sum payments to assist with changes to their accommodation or securing their environment was not provided under the ACC regime. Lump-sum payments for pain and suffering were not paid out until the condition had stabilised or until two years after the offence had occurred.

Surprisingly, the number of actual payments for sexual assault injuries by ACC under this section were small. In 1981, only three claims were accepted by ACC in spite of one hundred and forty-one prosecutions for rape by the police in the same year. Eligibility requirements, being less stringent than police complaints, should have ensured that

²⁸ Above n 24, 60-61.

²⁹ Above n 24, 123-124.

³⁰ The Hon Bill Birch *Accident Compensation: A Fairer Scheme* (Government Print, Wellington, 30 July 1991) 50-51.

³¹ Above n 23, 37. The original Act had allowed only one thousand pounds for pecuniary loss and expenses and five hundred pounds for pain and suffering.

compensation was claimed and accepted by at least half the number of police prosecutions. In one study, the absence of ACC-paid compensation was directly related to a lack of awareness by rape victims that they were eligible to claim compensation under the Act.³² By 1991, the situation had changed and ACC provided \$9.7 million in lump sum payments to 961 women and girls and 114 men and boys.³³ However, this included payments for child abuse which was at the time receiving significant public awareness.

This rapid rise in the volume of lump-sum payments prompted the government to review its accident compensation legislation. The Ministerial Working Party on the Accident Compensation Corporation believed that the increase in sums being allocated by the courts was resulting in a disparity between injuries. For example, a sports person suffering from a series of injuries could claim awards for each separate injury while a tetraplegic who suffered one major accident could only receive \$10,000. The levies on employers and employees were also not able to meet the demand on ACC funds and the working group proposed abolishing the lump-sum provision and shifting the focus of the Act onto social and vocational rehabilitation.³⁴

The Victims Task Force opposed the abolition of lump-sum payments. In a response to the *Fairer Scheme* discussion paper, the Task Force argued that lump-sum payments were often the only source of compensation for crime victims who were not eligible to receive earnings-related compensation due to their ability to return to work. The lump-sum payment acted, therefore, as the only gesture available to the state to adequately demonstrate society's recognition of the trauma suffered. The Task Force recommended that lump sum compensation should continue to be made available for victims of crime.³⁵

Despite this submission, the Accident Rehabilitation and Compensation Insurance Act introduced in 1992 abolished the lump sum payments and introduced new criteria which has resulted in a decrease in compensation available to victims of rape.

³² Above n 3, 72.

³³ Above n 4, 86. Note that this figure includes both current and historic sexual abuse of children.

³⁴ Above n 30, 51-52.

³⁵ Victims Task Force *Towards Equality In Criminal Justice: Final Report Of The Victims Task Force March 1993* (Victims Task Force, Wellington, 1993) 170-171.

The Accident Compensation Act 1972 and 1982 increased the amount of compensation available to rape victims and removed the bar on rape by relatives and spouses. It also did not require as high a standard of proof as stipulated in the Criminal Injuries Compensation Act and enacted a more liberal no-fault provision of compensation. However, the 1963 statute did ensure special protection for victims of crime and did not bar civil proceedings. The inclusion of crime victims within a general accident compensation scheme also encouraged analysts to ignore crime victims as a separate group with distinct needs. The changes introduced in the new Accident Rehabilitation And Compensation Insurance Act 1992 were the result of complaints which had little relevance for rape victims and yet, the availability of compensation for these victims has since been drastically reduced. The silence in government reports concerning the affect of these changes on rape victims suggests that their needs were not adequately considered during the reforms.

III. THE ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT 1992

The new Accident Rehabilitation and Compensation Insurance Act 1992 provided specific transition clauses for claims relating to incidents occurring before the 1992 reforms. In section 135(3), any person who had suffered a personal injury before July 1992 and had already lodged a claim prior to October 1992 was assessed under the 1982 Act. However under section 135(5), where a claim had not been lodged, compensation was to be assessed under the new scheme. Compensation for non-economic loss occurring prior to the 1992 Act was also still available on written application until April 1993.³⁶ However, victims of rape (which occurred between 1972 and 1992) who have not yet lodged a claim with ACC, will now be assessed under the 1992 scheme regardless of when the injury occurred.

The 1992 Act, following similar provisions in the earlier schemes, excludes the rights of victims to claim compensatory damages from the offender in civil proceedings.³⁷

³⁶ The Accident Rehabilitation and Compensation Insurance Act 1992, s.147(1).

³⁷ Above n 36, s.14.

But in situations where sexual assault occurred prior to the 1972 Act, the section 14 prohibition may not apply. In *H v R*, the victim claimed compensatory damages for sexual abuse occurring between 1967 and 1970. Whilst this claim was not pursued, the court did recognise the availability of compensatory damages for pre-1972 injuries.³⁸ However, as discussed in the later section on civil proceedings, time period restrictions may ensure that this is not a viable alternative claim.

Coverage under the Accident Rehabilitation and Compensation Insurance Act 1992 relates to personal injury, section 4, caused by an accident ("a specific event or series of events that involves the application of a force...external to the human body"). The definition of personal injury excludes injury that does not result in physical harm. However, sexual assault victims have been specifically targeted in section 8 through the inclusion of mental injuries caused by sexual assault regardless of whether or not tangible physical injuries have occurred.³⁹ Whilst Blackwood J argued that the essential nature of rape must involve physical injury, these injuries are often insufficient to meet the standards required in the ACC assessment forms. The Victims Task Force submitted the need for a different method of assessment:⁴⁰

The fact that the female body can sometimes withstand these assaults without severe physical trauma (ie bruises, breaking skin or bleeding...) is no argument for excluding it from the category of physical injury.

The First Schedule to the Act also includes attempted sexual violation as well as actual sexual assault. It is therefore unlikely that a victim of rape will not be covered under the statute.

Victims of rape continue to be eligible for compensation in the new Act despite the absence of charges or convictions against an offender.⁴¹ The "no fault" philosophy in the new Act accommodates the unique features of sexual assault, recognising that a majority of

³⁸ *H v R* [1996] NZFLR 224, 232-233.

³⁹ In *X v Accident Compensation Corporation (Decision No:272/91)* (1991) Accident Compensation Appeal Authority 5-6: Blackwood held that "...The very nature of sexual violation by rape must involve some form of personal injury although the effects may well vary from victim to victim."

⁴⁰ Above n 35, 170.

⁴¹ Above n 36, s.8(4).

rape cases are not reported to the police and for those that are reported and charges are laid, only 50% of these cases result in a conviction.⁴²

An application under section 8(3) is also excluded from the twelve month time limit imposed on making a claim.⁴³ Due to the nature of sexual assault, where the abuse is often not disclosed for months or years after the event, this exception is a positive step. Section 63(3) specifically ties the claim to the first session of treatment rather than when the offence actually occurred. The extension of the time period for victims of sexual assault recognises and validates the experiences of these victims. In a recent study on rape victims, reasons for not making an ACC application included:⁴⁴

"Too shocked and shattered to cope with business"
 "It took me several years to let myself even think about it all"
 "I didn't want to see anyone or talk about the rape"
 "Not until two years later did I realise the effect and actually seek counselling"

For rape victims who suffer injuries that require time away from paid employment, they will receive 80% of their weekly earnings from ACC while they are "incapacitated" as a result of the personal injury.⁴⁵ However, as outlined above, the emphasis on earnings-related compensation as the primary source of state funds reinforces existing social inequalities. In a society where women continue to earn less than their male counterparts, compensation for similar sexual violation offences will be subject to variation.

The majority of victims are also able to return to the workforce or are unpaid workers. For this group, there are few compensation options under the new Act.

⁴² Chief Justice Eichelbaum *Address To The Rape Conference* paper delivered to the "Rape: Ten Years Progress?" Conference (March 1996, Wellington) Presented statistics on the conviction and discharge rates for rape offences between 1986 and 1995.

⁴³ Above n 36, s.63(3).

⁴⁴ A selection of rape victims' testimonies in Hurdle C *Access To The Lump Sum Payment Provisions Of The Accident Compensation Act 1982, By Sexual Assault Survivors* (Victoria University, Wellington, 1987) 34.

⁴⁵ Above n 36, s.39. Test for incapacity, s.37: By reason of the personal injury, unable to engage in employment.

The lump-sum compensation for pain and loss of enjoyment has been replaced by a weekly independence allowance. The 1992 reforms, therefore, have returned to the position originally advocated by the Royal Commission of Inquiry in 1967. The allowance is calculated on a sliding scale with those claiming 100% disability receiving a maximum of \$40 per week. The allowance is applicable for claimants who have a degree of disability over 10% calculated on an assessment criteria listed in the first and second schedules of the Accident Rehabilitation and Compensation Insurance (Independence Allowance Assessment) Regulations 1993.⁴⁶ Any payment for this allowance will not be paid until thirteen weeks after the accident and a person's continuing eligibility is periodically assessed.⁴⁷ The independence allowance is, however, available to non-earners as well as earners and does not discriminate between the earning capacity of workers.

The reality of the assessment criteria ensures that most rape victims will not receive any significant compensation under the Act. The lump-sum option available to victims in the 1972 and 1982 accident compensation legislation, enabled victims to move location or introduce safety measures in their work, domestic and/or social environment. It also aided their recovery in providing a one-off payment rather than an on-going reminder that they are a victim. The reassessment provisions for the independence allowance could cause additional trauma for victims in reliving the event at later stages.

Whilst the positive reinforcement of a "no fault" philosophy remains in the Act, the replacement of the lump-sum payment with a lesser weekly amount does not recognise the distinction between an accident and a deliberate illegal act. For many victims, state compensation is important. It represented society's acknowledgement that suffering had occurred as a result of sexual violation and the victim was not to blame for the crime.⁴⁸ This acknowledgement has been significantly reduced. The assessment regime for the independence allowance ensures that victims will receive a maximum of \$5 per week.

⁴⁶ The regulations concentrate on physical injuries. Out of 136 questions, there is one question relating to sexual activity and 29 questions examining mental injuries. If a rape victim suffered mental injuries only, including contemplating suicide, the victim would be classified as 20% disabled and entitled to \$5 per week.

⁴⁷ Above n 36, s.54.

⁴⁸ Above n 44, 56.

Aside from earnings related compensation and the independence allowance, the new Act also promotes rehabilitation measures. One emergency counselling session is available to the victim who suffers mental injury from a sexual assault provided it is given within twenty-four hours of the rape. This section refers to telephone rather than face-to-face counselling for victims. But generally, counselling will be provided for the victim on a face-to-face basis for a period not exceeding 20 hours. To qualify for counselling, ACC must be satisfied that the claimant has suffered a personal injury and the counselling will assist in reducing the injury or that a doctor has referred the victim for counselling. If the victim requires further counselling, ACC must be satisfied that the continuation is as a result of the personal injury. The corporation can also require a second opinion if it considers the counselling unnecessary or inappropriate.⁴⁹ Requiring a second opinion could be traumatic for rape victims due to the sensitive nature of the crime. In order to feel comfortable in disclosing the occurrence, a victim needs to establish a rapport with the counsellor.

In order to assess whether counselling is necessary, the victim has two initial counselling sessions where she must disclose the sexual assault. A report is then filed with ACC by the counsellor and there is delay until counselling is either approved or denied.⁵⁰ In submissions to the Minister for Accident Compensation in 1994, counsellors criticised this scheme, citing two sessions as insufficient to establish a rapport between client and counsellor which would enable the victim to feel comfortable in disclosing details of sexual assault and the gap between the initial sessions and approval by ACC to continue, is damaging for victims who have disclosed rape and then are forced to wait for therapy.⁵¹

The Accident Rehabilitation and Compensation Insurance Act 1992 presents a number of difficulties for victims of sexual assault. Earnings-related compensation represents eighty percent of wages. An emphasis on the earning capacity of the worker ensures that

⁴⁹ Accident Rehabilitation and Compensation Insurance (Counselling costs) Regulations 1992 ss.24,26 & 27.

⁵⁰ Above n 27, 369.

⁵¹ Submission from the ACC Consumer Network to the Minister for Accident Compensation (31 May 1994).

compensation is not equitably distributed between men and women, while women continue to earn less than their male colleagues. The physical injuries sustained in a sexual assault also, in a majority of cases, do not inhibit the ability of the victim to resume work. The assessment criteria therefore ensure that most victims will be eligible for only a small independence allowance and 20 hours of counselling sessions. This is inadequate compensation for an event that can severely restrict a victim's capacity to freely participate within society. However, as the accident compensation scheme withdraws its coverage from victims of sexual assault, other avenues are available for victims seeking adequate reimbursement.

IV . CIVIL PROCEEDINGS AND EXEMPLARY DAMAGES

The accident and compensation legislation since its inception in 1972 has excluded the ability to claim compensatory damages in the courts. Section 14 of the 1992 Act explicitly removes the right to sue for compensation, as all proceedings are barred where damages arise from the injury sustained. Compensatory damages are concerned with the injuries or losses incurred by the plaintiff, therefore, they are a direct result of the injury.

However the landmark decision in 1982, *Donselaar v Donselaar*, has provided an exception to this general prohibition which allows victims of sexual assault to sue their offenders for expenses not adequately provided under the 1992 ACC scheme. The court held that although civil proceedings for damages "arising directly or indirectly out of personal injury" are excluded under the accident compensation scheme, this statutory bar did not extend to exemplary damages.⁵² Cooke J emphasised the compensatory focus of the ACC scheme and held that by allowing exemplary damages, the court would not be undermining the policymakers objectives as the latter is purely punitive.⁵³ Cooke J argued primarily on public policy grounds, almost avoiding any direct dealing with the section 14 exclusion clause. Richardson J, on the other hand, found no difficulty with section 14. He argued that the statute bar simply does not relate to exemplary damages as these damages do not "arise directly or indirectly out of personal injury." The question of exemplary

⁵² Above n 36, s.14.

⁵³ *Donselaar v Donselaar* [1982] 1 NZLR 104-107.

damages is directed towards the conduct of the defendant rather than the harm suffered by the plaintiff.⁵⁴

In recent years, *Donselaar v Donselaar* has been used to argue for exemplary damages for rape victims. The results have been mixed. Although the Court of Appeal was willing to examine the availability of remedies other than compensation, it was equally unwilling to open the gates too wide:⁵⁵

The Courts will have to keep a tight rein on actions, with a view to countering any temptation, conscious or unconscious, to give exemplary damages merely because the statutory benefits may be felt to be inadequate.

Successfully claiming exemplary damages in court for sexual assault has presented claimants with a number of difficulties. The majority of rape victims do not report the assault immediately after the event and many of the civil proceedings are embarked upon only after the defendant has been convicted in the criminal court. Issues such as double jeopardy, expiration of the time allowed to lodge an action and the inadequacy of available tort and equitable causes of action to deal with sexual assault have proscribed the availability of exemplary damages for victims of rape.

A. Standard required For Exemplary Damages

The focus of exemplary damages concentrates on the defendant's actions, rather than the damage that has resulted. As a consequence, the standard of proof required is high. The damages seek to highlight exceptional actions that are not to be tolerated in society. *Akavi v Taylor Preston Ltd*:⁵⁶

...before an action for exemplary damages can even get off the ground, or pass the threshold test, a plaintiff needs to establish a substratum of facts on the pleadings which, if proved at trial, would show that the case was serious and exceptional, and that the conduct complained of was so outrageous that punishment was called for, as an end in itself, in that there had been a conscious wrongdoing on the part of the defendant in contumelious disregard for the safety of the plaintiff.

⁵⁴ Above n 53, 109.

⁵⁵ Above n 53, 107.

⁵⁶ *Akavi v Taylor Preston Ltd* [1995] NZAR 33,37.

In *W v Counties Manukau Health Limited*, the plaintiff needed to show "high-handed conduct or oppression."⁵⁷

Sexual assault is the violation of one person's rights to physical liberty. The offender commits this violation with intent and no regard for the safety of the victim. It is, therefore, unlikely that where sexual assault is proven it will not meet the high standard required for exemplary damages.⁵⁸

The next matter for decision therefore, is whether the conduct of the defendant is "so outrageous or accompanied by such contumely" that compensatory damages are inadequate. It would be difficult to imagine a plainer case for exemplary damages than an act of violent rape. The affront to the victim in violating her could properly be described as the utmost insult that any woman could suffer.

B. Cause of Action

The majority of civil sexual abuse proceedings rely on the torts of assault and battery as the main causes of action. Assault and battery are classified under the category of trespass and intentional interference with the person.

In order to claim battery, there must have been an intentional act of harmful or offensive contact by another person. Assault is the intentional creation of fear of imminent harm or offensive contact.⁵⁹ For both categories, evidence of actual physical damage is unnecessary. Since a significant proportion of rape cases do not exhibit tangible physical injury, assault and battery offer victims the ability to claim for psychological injuries.⁶⁰ However, the legal distinctions between assault and battery can also prove difficult to reconcile with the effects of sexual assault, as demonstrated in the recent case of *T v H*.

In this case, the plaintiff claimed she was sexually abused as a child by M. M died in May 1992 and the plaintiff lodged her claim against his estate after his death. The causes of

⁵⁷ *W v Counties Manukau Health Limited* Unreported, 13 April 1995, High Court, Auckland Registry, CP 583/94, 13.

⁵⁸ *A v M* [1991] 3 NZLR 228, 252.

⁵⁹ Fleming J *The Law Of Torts* (6 ed., The Law Book Company Limited, Sydney, 1983) 23-24.

⁶⁰ See text at n 40: Sexual assault is an inherently violent act, however, the ability of women's bodies to quickly recover from the physical trauma often ensures that victims are unable to produce tangible evidence of physical injury.

action were assault and battery.⁶¹ The victim claimed battery for the actual physical abuse and assault for the continuing threat to her safety throughout her life, which ceased only on the death of the alleged offender. Whilst the court was willing to accept the battery (although the victim would be unable to recover due to the Limitations Act 1950, as the actual physical abuse took place over twenty years prior to the legal proceedings),⁶² it was less willing to provide a remedy for the assault. In order to circumvent the limitation period regarding the assault, the plaintiff had to demonstrate at least a continuing threat. A threat which occurred twenty years previously as an isolated incident would not now be able to be pursued in the court. However the court was unwilling to accept the continuing threat argument:⁶³

Continuing fear as a result of a threat may certainly be a consequence of the assault, but cannot in my opinion constitute a continuation of the assault itself.

In a dissenting opinion, Cooke P felt that assault and battery were inadequate to deal with the continuing psychological injuries which are symptomatic of rape and sexual assault. According to Cooke P, the lack of precedents in this area allowed the court to examine this issue and form new common law to deal specifically with the unique features of sexual assault.⁶⁴ The difficulty that assault raised in this case, was the lack of actual threats to the victim. Although she lived in continual fear which was only abated on the death of the alleged offender, this was not sufficient to constitute an actual ongoing assault.

Two recent sexual assault cases have also based their claims on a breach of a fiduciary relationship and negligence.

What constitutes a fiduciary relationship? In equity, precedent cases offer guidelines on when such a relationship may arise in a given set of circumstances. However, the concept of a fiduciary relationship is open to expansion.⁶⁵ In commercial dealings, the fiduciary

⁶¹ *T v H* [1995] 3 NZLR 37.

⁶² Refer to the later discussion in this chapter under the subheading *Time Limitations*.

⁶³ Above n 61, 53.

⁶⁴ Above n 61, 42-43.

⁶⁵ Hayton D, *Hayton And Marshall: Cases And Commentary On The Law Of Trusts* (9 ed., Sweet & Maxwell, London, 1991) 589.

relationship arises where one party gains the confidence of the other and acts or appears to act in the other's interest. This relationship is not dependent on a pre-existing relationship, but can "spring" from isolated dealings or transactions.⁶⁶ Relationships that in general terms are assumed to be fiduciary in character include principal/agent and lawyer/client.

In *H v R*, the male plaintiff alleged that as a child, he was subjected on several occasions to sexual abuse by P. P owned a bach near to the plaintiff's family holiday home and the sexual abuse took place over summer holidays. The defendant was an acquaintance of the plaintiff's family.⁶⁷ The court held that sexual abuse had occurred and granted relief for battery. The court, therefore, did not find it necessary to make a decision regarding fiduciary relationships but did offer some obiter comments on the likelihood of any success in such a claim.

Hammond J was unwilling to extend fiduciary relationships to such a category as family acquaintances. Obvious fiduciary relationships including parent/child or doctor/patient have often been addressed in sexual abuse cases and the court felt that it would be unwise to push the boundaries:⁶⁸

But where (as in this case) there are more intermittent relationships - in many cases nothing more than casual visitations - there are obvious problems with the establishment of a fiduciary duty. An otherwise admirable end cannot be met by utilising an important concept, and one which has a distinct moral and functional presence in our law, by watering down the basic concept of a fiduciary.

Given that the judge's comments are strictly obiter, sexual abuse that occurs between an acquaintance and the victim may be able to be categorised as a fiduciary relationship. Establishing such a relationship is fact-specific. It can be argued that where mutual confidence and reliance have developed between two persons, a fiduciary relationship exists. The development of the fiduciary concept was found to be necessary in order to protect a vulnerable partner in an inherently unequal relationship. Although in *H v R* the defendant was a new acquaintance of the family, the abuse occurred once the defendant had gained the trust and confidence of the child. The abuse took place over a period of

⁶⁶ *Hamberg v Barsky* 50 A.2d 345, 346 (1947).

⁶⁷ Above n 38, 224.

⁶⁸ Above n 38, 231.

years. In this case, it is difficult to imagine a clearer example of the imbalance of power which the concept of fiduciary duty was established to protect. A child is particularly vulnerable and when confidence and trust is given to an adult, this vulnerability of the child should be adequate to imply certain duties incumbent on the adult.

In *S v G*, the respondent claimed breach of a fiduciary relationship as well as a breach of duty of care (negligence). The appellant was a medical practitioner who allegedly had a sexual relationship with the respondent while she was under the age of sixteen.⁶⁹

In order to claim negligence,⁷⁰ the victim is required to demonstrate that the alleged offender had a duty to comply with a "...certain standard of conduct for the protection of others against unreasonable risks" and that he or she failed to fulfil that duty which resulted in injury to the victim.⁷¹ The foundation for both the negligence claim and the breach of fiduciary relationship relied on the appellant's position as a doctor within the Centrepont Community. Due to his status, the respondent trusted him and he was under a duty to perform his professional expertise in a manner which did not exploit her sexually.⁷²

The court acknowledged the common source of both claims and decided to treat them as breaches of the same conduct.⁷³

As outlined above, sexual assault may be the subject of civil proceedings under a variety of different causes of action depending on the nature of the abuse, the relationship between the abuser and the victim and the status of the accused. Whilst these causes are available, the success of such a claim is dependent on whether the sexual assault took place recently or occurred several years before. Each cause of action is subject to different limitations on time available to sue.

⁶⁹ *S v G* [1995] 3 NZLR 681.

⁷⁰ For a discussion on the availability of exemplary damages for negligence, refer to the subheading, *The Availability of Financial Assistance From The Courts*, at the end of this chapter.

⁷¹ Above n 59, 99.

⁷² Above n 69, 685.

⁷³ Above n 69, 688-689.

C. Time Limitations

Where the plaintiff is claiming damages in tort (assault, battery and negligence), proceedings must commence within six years from the date in which the cause of action accrued.⁷⁴ In respect of bodily injury, the limitation period is two years, but the court may extend the time limit by a further four years.⁷⁵ However, section 24 provides an exception to these deadlines. Where the victim is under a disability, the cause of action accrues only when the disability ceases to affect the victim. "Disability" is not exhaustively defined but section 2 of the Act includes infancy and unsound mind within the definition.

For child sexual abuse cases, the limitation period usually begins to run when the child reaches the age of majority. Therefore, if a child was sexually abused at the age of twelve, under the section 24 "disability" exception, the victim would not be statute -barred from commencing proceedings eight years later when reaching the age of twenty. Child sexual abuse may also delay the limitation period further. The cause of action accrues in assault and battery (where no evidence of physical damage is required) when the tort is committed. However, for negligence, it accrues from the time damage occurs.⁷⁶ Until as an adult, the victim is able to link subsequent psychological damage to the sexual abuse, the cause of action may not accrue. However, if physical damage resulted at the time of the abuse, then the court may only delay the limitation period until the age of majority has been reached.⁷⁷

The elements in assault and battery include a lack of consent. Despite the cause of action accruing when the actual tort has been committed, the courts have been willing to extend the limitation period in cases where the link between consent and abuse has been belatedly made.⁷⁸

⁷⁴ Limitations Act 1950 s.4.

⁷⁵ Above n 74, s.4(7).

⁷⁶ Above n 61, 45.

⁷⁷ Above n 69, 686-687.

⁷⁸ Above n 38, 229-230.

However, for adult rape victims, the linkage between consent, psychological damage and the actual assault is usually required to be made at the time of the assault. Whereas allowance is made for the inability of children to fully comprehend the consequences of adult behaviour, it would appear inconsistent with the underlying rationale in extending the limitations period, to include adult rape victims within this category. But adult rape victims usually delay reporting rape. Will this naturally preclude a civil claim from being heard two to six years after the event?

In *T v H*, the victim argued that fear of the accused prevented a civil claim until after his death. The court examined whether fear could enable the victim to be included within the section 24 "disability" exception. The court held that where established psychiatric and psychological causes prevent the victim from initiating proceedings, the disability provision is satisfied. However, in that case, the death of the accused meant that the disability exception from the Limitations Act did not apply. The limitation period in the event of the death of the accused is governed by the Law Reform Act 1936, which does not recognise the extension of the limitation period for reasons of disability.⁷⁹ As outlined above, the majority also refused to accept that the fear exhibited by the victim constituted a continuing assault which allowed for a later accrual of action.

T v H does, at least theoretically, open the possibility that an adult victim of rape may claim assault, battery and negligence in civil proceedings even after the limitation period expires, if the victim can prove that psychological causes prevented an earlier claim. In negligence claims, the period can be extended further if damage (including psychological) only arose later than the actual physical assault and battery.

Fiduciary proceedings are not subject to the Limitations Act, as section 4(9) excludes equitable remedies from its jurisdiction. However, where an equitable claim is lodged together with an action in tort for the same conduct, the courts will generally apply similar limitation periods.⁸⁰

⁷⁹ Above n 61, 49-51.

⁸⁰ Above n 38, 230-231 & above n 69, 688-689.

D. Double Jeopardy

Whilst civil proceedings for rape remain relatively rare, the majority of court hearings on rape are conducted in the criminal sphere. However, should a criminal conviction impact on the ability of the rape victim to recover exemplary damages? Securing a criminal conviction would lend considerable support to the establishment of a civil claim and yet, the courts have not been entirely consistent in their approach to the issue of double jeopardy.⁸¹

Section 26(2): No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

Exemplary damages highlight the punitive aspect of the offender's conduct. The similarity, therefore, between a criminal conviction and the award of exemplary damages creates difficulties when a civil claim is commenced after a criminal trial.

In *H v R*, civil proceedings were conducted prior to a criminal charge being laid. The judge held that there would be no issue regarding double jeopardy as the defendant was eighty years old and ill. It was unlikely that the police would bring charges for health reasons. Therefore, the judge felt able to award damages. If the situation had permitted a later criminal charge, the judge suggested that he would not have granted damages. He would have, instead, relied on the later criminal court to apply sections 22 and 28 of the Criminal Justice Act 1985 to provide financial reparation to the victim.⁸²

S v G involved an offender who had already received a custodial sentence for the offence, although the victim was not awarded any reparation during the sentencing. The Court of Appeal did not rule out awarding exemplary damages in cases where there had also been a criminal conviction, but did consider the issue of double jeopardy as one factor against granting the respondent leave to seek remedies. The court held that allowing exemplary damages when a criminal conviction had been obtained would require a weakening of the

⁸¹ The Bill Of Rights Act 1990.

⁸² Above n 38, 233. Refer to Chapter V for a fuller discussion on the application of the Criminal Justice Act 1985.

Bill of Rights provision, which is not necessary given the availability of reparation during sentencing.⁸³

The lower court, in this case, did not examine the Bill of Rights argument and had granted leave for civil proceedings after considering a number of policy ramifications. In criminal trials, the judge has a discretion to allow victim's concerns to be raised when considering reparations. However, as a general rule, the victim has no right to participate in the proceedings and has no legal representation. Once a complaint is made to the police, the victim loses the right to choose which form of proceedings will take place:⁸⁴

If a successful criminal prosecution were held automatically to block any claim for exemplary damages a prosecution might be felt to disadvantage a woman in need of money in which to rehabilitate herself. It would be contrary to good policy if a rule discouraged abused women from cooperating with the police, by giving evidence against sexual offenders, because the very act of giving assistance to convict would preclude a damages claim.

Victims are currently being discouraged from reporting rape to the police due to the difficulties encountered during the police and forensic medical investigations and the trauma of a criminal trial. Any additional obstacles should be avoided. There are also societal ramifications in encouraging victims to choose civil rather than criminal proceedings which could raise issues concerning community safety. Exemplary damages provide financial relief to the plaintiff but do not ensure that the offender is removed from society.⁸⁵

In *D v T* (application to strike out the claim), the court was able to discuss both the Court of Appeal's argument in *S v G* against double jeopardy and the lower court decisions in

⁸³ Above n 69, 692. The Court considered the prejudice against the appellant due to a) the length of time between when the offences occurred and these proceedings, b) the prospect of double punishment and c) the risk that he would be punished not only for the indecencies he committed but also for the indecencies committed on the respondent by other members of the centrepont community, outweighed any gains in allowing the respondent's claim to proceed.

⁸⁴ *G v S* Unreported, 22 June 1994, High Court, Auckland Registry, CP 576/93 48; *Akavi* supports and quotes this passage: see above n 56, 42.

⁸⁵ Refer to *The Availability of Financial Assistance From The Courts* in this chapter for a fuller discussion on the nature and purpose of exemplary damages.

favour of exemplary damages. The court ruled that the Court of Appeal comments were strictly obiter. It allowed the claim to proceed and expressed sympathy with the lower court's discussion of policy.⁸⁶ However, the issue of double jeopardy has not yet been settled and is currently under appeal in this case.

E. Claims Against Third Parties

In the United States, women have been increasingly successful in suing third parties for sexual assault. Such claims focus on a breach of duty of care under the tort of negligence.⁸⁷ Recent examples include a claim against a motel where the victim was raped by an intruder; a transport company following a rape at a railway station and a taxi company where the rape was committed by an employee.⁸⁸

In New Zealand, third party claims for sexual assault are rare and there has been no final decision on the ability of victims to claim under this heading. One recent case has, as yet, only conducted a preliminary hearing for an order for pre-proceedings discovery.⁸⁹

In this case, the offender, a patient at Kingsseat Hospital, had a history of sexual abuse against children. In 1993, the court removed a compulsory patient order and the offender was allowed to leave the hospital. Following his release, the offender sexually assaulted the plaintiff and another boy. The plaintiff issued proceedings against Counties Manukau Health Ltd, claiming exemplary damages for negligence. Counsel argued that the defendant had failed to take adequate steps to prevent or delay the release of the patient, had not recognised the seriousness of the patient's previous sexual offending, had failed to adequately monitor the patient following his release into the community and did not alert the patient's caregiver to the need to watch the patient and monitor his medication.

The main obstacle inhibiting a successful claim against a third party is the tort rule that there is "no general duty of care to prevent one person causing damage to another."⁹⁰ In

⁸⁶ *D v T* Unreported, December 1995, High Court, Auckland Registry, CP 429/94,8-12.

⁸⁷ Refer to discussion below on the availability of exemplary damages for unintentional torts.

⁸⁸ Above n 18, 371.

⁸⁹ Above n 57.

⁹⁰ Above n 57, 6.

this case, the difficulty lay in the fact that the offender was no longer under the compulsory care of the hospital. However in *Smith v Leurs*, the High Court of Australia held that despite the general rule, there can exist special relationships which give rise to a duty of care.⁹¹ In the English *Dorset* case, Borstal officers were held to be responsible in taking reasonable care to prevent the boys under their control from damaging the property of the plaintiff.⁹² However, Counties Manakau Health Ltd no longer held direct control over their patient. Defence counsel argued that voluntary patients are not included within the scope of responsibility suggested under *Dorset* and it was not reasonably foreseeable that the plaintiff would be at risk from the offender, whereas in *Dorset*, the proximity between the plaintiff's property and the Borstal boys was more immediate. Counsel for the plaintiff submitted that there was evidence suggesting the plaintiff was known to the offender and therefore, the duty of care could be limited to particular persons rather than to the public at large. The judge held that in preliminary proceedings, he would not deny the possibility that circumstances could exist where a health authority could owe a duty of care for the activities of its patients and should have taken steps to ensure reasonable supervision following the patient's release. However, this hearing dealt only with preliminary issues. Therefore, the judge was applying a lesser standard of evidence. Despite allowing an order for pre-proceedings discovery, the judge commented that there were "considerable doubts" that the plaintiff would be able to show that a duty of care was owed.⁹³

Sexual assault victims seeking to claim from third parties, therefore, face a major difficulty in establishing whether a party, other than the offender, is sufficiently responsible for the actions of that offender to owe a duty of care to the victim. The evidence must be sufficient to circumvent the rule that no person owes a duty of care for the actions of another. It must also be demonstrated that it was reasonably foreseeable that the victim would be in danger.

⁹¹ *Smith v Leurs* (1945) 70 CLR 256, 261.

⁹² *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004.

⁹³ Above n 57, 7-9, 13.

F. The Availability Of Financial Assistance From The Courts

As outlined above regarding the standard required for exemplary damages, the plaintiff must demonstrate that the conduct of the defendant was "so outrageous or accompanied by such contumely" to justify an award of exemplary damages.⁹⁴

Exemplary damages focus on the conduct of the defendant rather than the loss suffered by the plaintiff. Therefore, elements of intention to commit such an action are relevant in determining whether the conduct was outrageous. Battery and assault constitute intentional torts. Under these headings, exemplary damages are appropriate to censure the behaviour of a defendant who knowingly committed an act that would shock society. As outlined above in *A v M*, rape is a clear example of such conduct for which exemplary damages were designed to apply.

A claim in negligence, however, is categorised as an unintentional tort. A breach of a duty of care does not require the element of intent. Are exemplary damages, therefore, available for the plaintiff in this category? In a recent New Zealand High Court decision, the judge was asked to examine this very issue.⁹⁵

Tipping J presented an historical overview of caselaw and held that whilst intention is normally an element necessary for the establishment of exemplary damages, the latter can be available for negligence claims only if "...the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment".⁹⁶ Therefore, exemplary damages will only be awarded in rare and exceptional negligence cases. As mentioned above in *A v M*, it is difficult to imagine a more clear example of such behaviour as the conduct amounting to sexual violation. However, where the plaintiff is claiming exemplary damages from a third party, this higher standard for negligence may be more difficult to establish.

Breach of a fiduciary relationship has normally attracted an equitable range of remedies which would not be adequate to provide financial assistance to the victim. Damages have

⁹⁴ Above n 58, 252.

⁹⁵ *McLaren Transport Ltd v Somerville* Unreported, 13 August 1996, High Court, Dunedin Registry, AP 2/96.

⁹⁶ Above n 95, 23.

been traditionally considered as separate common law remedies, and therefore, unavailable for equitable claims. However, in a recent New Zealand decision, the court has held that exemplary damages should be available regardless of whether the claim is founded in common law or in equity.⁹⁷

Although exemplary damages are, therefore, available in theory for all the relevant causes of action, will they provide sufficient relief for the victim?

In *McLarin Transport*, the judge held that a compensatory aspect should not be included in any assessment for an exemplary damages award. The ACC scheme provides compensation for victims and any personal belief that the scheme is inadequate should not be reflected in the exemplary damages award. The focus of the exemplary damages is also on the conduct of the defendant, rather than the losses incurred by the plaintiff. The injuries sustained by the plaintiff should not be the determining factor in deciding on the quantum of the award.⁹⁸ Despite this caution, awards for exemplary damages have provided the victims with a higher lump-sum payment than that available under the accident compensation scheme. In addition, an award of damages does not exclude the victim from also receiving ACC payments. Exemplary damages awards have ranged from \$15,000 (*McLaren*) to \$20,000 (*H v R*. In this case, the plaintiff also received \$25,000 for costs). However, a victim must ensure that the costs of pursuing a claim through the civil courts does not outweigh the likelihood of an award. In addition, although costs are often awarded as well as the damages, they do not always cover the actual legal fee in its entirety.

Civil proceedings offer the victim of sexual assault an additional avenue in which to obtain financial help in recovering from the effects of the abuse. However, the limited number of such cases in New Zealand and their low success rate indicate that this is not an entirely practical option. Sexual assault and the damage which results do not sit comfortably within traditional common law causes of action. The majority of injuries are psychological and emotions such as fear and shame prevent the victim from wishing to relive the experience in a courtroom setting. In a 1987 study of sexual assault survivors, 39 of the 141 women did not apply for lump-sum compensation. Reasons given included concern about what

⁹⁷ *Cook v Evatt(no.2)* [1992] 1 NZLR 676.

⁹⁸ Above n 95, 14-16, 19-21.

other people would think, worry that ACC would not believe them and a desire not to relive the rape during the ACC application process.⁹⁹ The procedural requirements for ACC compensation are less intrusive than a criminal or civil trial. The trial is more public and cross-examination can make the victim feel raped a second time.

The majority of rapes eventually reported to the police and rape counselling organisations are historic rather than recent complaints. This would therefore preclude many victims from initiating civil proceedings due to the limitation requirements. The financial relief to be gained from a civil proceeding may also be inadequate to meet the needs of the victim. The costs of civil proceedings are expensive and an exemplary damages award may not be sufficient to cover both the economic loss suffered by the victim and the legal expenses incurred in pursuing a claim. The difficulty in securing a favourable judgement in sexual assault cases establishes a risk which may outweigh any perceived benefit in seeking such a claim. The purpose of exemplary damages is to punish the defendant. Adequate compensation for injuries and financial provision for future rehabilitation are not factors to be included in the award.

The issue of double jeopardy is also as yet unresolved. Sexual assault is a difficult crime to prove, usually occurring between the plaintiff and the defendant in private with no witnesses. A criminal conviction would assist in any civil claim and yet, the Court of Appeal is currently suggesting that such an avenue is inappropriate. The Court of Appeal favours the use of the Criminal Justice Act and reparations through sentencing which require a criminal trial rather than civil proceedings. The victim is left with a difficult choice. Civil proceedings allow the victim to be represented in court. The assault need only be proved on a balance of probabilities and the victim is entitled to receive financial compensation over and above the amount available under ACC. However, a criminal trial lifts the financial and emotional responsibility off the shoulders of the victim. The Crown bears the onus of proving the case. However, is the Court of Appeal justified in its belief that reparations provide an adequate substitute for civil proceedings?

⁹⁹ Above n 44, 35-38.

V. REPARATIONS, FINES AND THE CRIMINAL JUSTICE ACT 1985

Amendments made in 1987 and 1993 to the Criminal Justice Act 1985 have allowed reparation payments and fines to be made by the offender to the victim. Section 22 authorises the court to include reparation payments in their sentencing deliberations and section 11 now directs the courts to consider reparations in every case.¹⁰⁰

Reparations are to be made where the victim has suffered either emotional harm or loss or damage to property as a result of an offence. A report is then commissioned by the court examining the extent of the harm suffered, the financial capabilities of the offender and the maximum amount that the offender is likely to be able to pay.¹⁰¹ Section 22, in its application to property loss and emotional harm, focuses on the injuries sustained by a victim due to the offence. Its purpose is to repair the damage caused. That is, it allows for compensation of a loss.

In addition to an order for reparation, the court may also impose a fine on the offender where the offence has resulted in physical or emotional harm to the victim.¹⁰² As this is in addition to a reparation order, the fine is not primarily concerned with compensating the victim for losses incurred. An additional fine on top of section 22 reparations suggests a punitive element in the sentencing decision. This is further evidenced in the primary status accorded to reparations. Where an offender cannot financially afford to meet both the reparation order and the fine, the reparation order to cover losses incurred by the victim must be paid first.¹⁰³ However, while the Act provides for both compensatory and exemplary damages, it is not intended to be a substitute for ACC and civil proceedings.

¹⁰⁰ Criminal Justice Act 1985 & Criminal Justice Amendment Act 1993. Section 11 was amended under the 1993 Act.

¹⁰¹ The Criminal Justice Amendment Act (No.3) 1987 s.4.

¹⁰² Criminal Justice Act 1985 s.27(2) & 28. This was amended to include emotional as well as physical injuries: Criminal Justice Amendment Act (No.3) 1987 s.6.

¹⁰³ Criminal Justice Amendment Act 1993 s.8(2): amends s.22(7) & (8) of the Criminal Justice Act 1985.

There is no statute bar to pursue either of these alternative forms of financial assistance in addition to receiving aid under this Act.¹⁰⁴

However the adequacy of the Criminal Justice Act is limited in scope. The Act relies on a conviction before the reparation payments and fines can be ordered. As rape is significantly under-reported to the police, the majority of victims will not be in a position to receive the benefits under this scheme.

Even where a conviction is secured, the offender is often not able to afford adequate reparation and fine payments. The ability to pay is restricted further where a prison sentence is imposed.¹⁰⁵ That is, a prison sentence will reduce the earning ability of the offender to meet the obligations imposed by the Act.

In *H v R*, the judge held that had the offender been in a position to undergo a criminal trial, the court would have imposed an adequate reparation sum to be given to the victim. In this case, civil damages were provided instead.¹⁰⁶ However, is this the general rule where a conviction is secured? In *S v G*, the court denied exemplary damages citing double jeopardy as a factor against allowing the case to proceed. Yet, despite the existence of the Criminal Justice Act and the financial position of the defendant as a medical practitioner, no reparation or fine was ordered during sentencing to provide for the victim's financial loss.¹⁰⁷

Other cases show a disparity in the award granted to the victim. In *R v Kerr*, the offender was ordered to pay \$10,000 to his victim for rape and indecent assault offences occurring between 1982 and 1983, when the victim was seven to nine years old.¹⁰⁸ However, in *R v W*, the offender was ordered to pay only \$500 after being convicted of three charges of unlawful sexual connection, two charges of rape and one charge of indecent assault over a period of one year on a girl aged 12.¹⁰⁹ Despite the similarity of the offences, the reparation

¹⁰⁴ Criminal Justice Act 1985 ss.24(f) & 28(4).

¹⁰⁵ Sir Maurice Casey *Sentencing Policy Of New Zealand Courts* paper delivered to the "Rape: Ten Years Progress?" Conference (Wellington, March 1996).

¹⁰⁶ Above n 38, 233.

¹⁰⁷ Above n 69, 692.

¹⁰⁸ *R v Kerr* Unreported, 18 August 1994, Court of Appeal, CA 119/94, 1-2.

¹⁰⁹ *R v W* Unreported, 7 July 1994, Court of Appeal, CA 48/94, 1-2.

awards were disparate. The focus is on the ability of the offender to pay rather than on the needs of the victim to secure appropriate compensation for their loss.

Additional problems have also occurred regarding the reliability of the payments. Once a reparation order or fine has been made in favour of the victim, compliance has been low. In 1993, the Victims Task Force reported that overall only 53% of the total reparation ordered by the courts has been paid to the victims.¹¹⁰ The Task Force believed that the victims should receive at least \$250 from the state immediately after the order is made and that the state should be responsible for recovering the money from the offender. This would at least ensure that part of the sum is secured by the victim as soon as practicable.

The Criminal Justice Act 1985, like civil proceedings, does not provide an ideal model to replace ACC lump-sum compensation. The financial costs of rape for the victim are incurred shortly after the incident. Awaiting the trial and sentencing of an offender before any damages can be awarded is in reality likely to be a lengthy procedure.

The Criminal Justice Act was never intended as a replacement for ACC lump-sum payments. Instead, it was designed to provide additional financial aid to the victims whilst the Accident Compensation Act 1982 covered compensation under the lump-sum provision. Given that this ACC provision no longer exists, the current relationship between the two legislative schemes deserves to be examined by the courts.¹¹¹ With the removal of the lump-sum provision, the courts must address the possibility of extending the application of the Criminal Justice Act and the state must ensure that payments are more reliable. However, the focus of the Criminal Justice Act, like civil claims, is on the offender's financial ability to reimburse the victim. In situations where the offender is unable to pay, the Criminal Justice Act and civil proceedings do not provide an adequate safety net for victims who incur losses in excess of their accident compensation payments.

¹¹⁰ Above n 35, 139.

¹¹¹ Above n 27, 392.

VI. THE THEORY AND PRACTICE OF CRIMINAL INJURIES COMPENSATION

Under current law, victims of sexual assault receive financial assistance from three different sources: ACC, civil proceedings and the Criminal Justice Act 1985. With the removal of lump-sum awards, the state is gradually withdrawing from providing adequate compensation to victims. The focus for responsibility is shifting back towards the offender through civil action and reparation orders (Criminal Justice Act). However, for victims of sexual assault, this shift is less than ideal and fails to adequately address their needs. Delays in reporting the crime and a reluctance to involve the police ensure that any compensation which relies on the conviction of an offender or a limited time period in which to recover, will result in fewer victims receiving the assistance they require. Civil claims and the Criminal Justice Act are also dependent on the financial well-being of the offender.

State funding provides the safety net. However, the replacement of lump-sum compensation with a much reduced independence allowance and counselling assistance has failed to adequately provide victims with immediate resources to meet the costs associated with rape. For example, security in the home, change in residence or workplace and child care expenses. These needs incur immediate costs which the periodic payment of minimum compensation can not cover.

The withdrawal of the state also frustrates the recovery of the victim. Feelings of shame, guilt and blame, commonly associated with rape, are further reinforced by a lack of community support. The devastation of rape is ignored. It is categorised as an accident and treated on similar terms with a sporting injury.

This paper has outlined the difficulties associated with current compensation and reparation schemes for victims of sexual violation. However, is there a suitable alternative to replace the existing procedures?¹¹²

¹¹² Whilst these victims face specific difficulties in receiving compensation, the argument calling for separate criminal injuries legislation can be applied to all victims of violent crimes.

A. Theoretical Justification For State-Funded Compensation

Jurists have recently attempted to identify the underlying rationale which prompted the introduction of state sponsored victim compensation schemes.

Traditional theories involved the responsibility of the state towards the victim. The state was legally obliged to compensate because it either a) failed to protect the victim from crime and therefore breached its social contract or b) was responsible for the environment which created the offender. Alternative theories equated criminal injuries compensation with general insurance or social welfare schemes. Crime is an inevitable feature of society and therefore, it is reasonable that the costs of crime should be spread over society as a whole. Conversely, compensating victims of crime is merely a subset of general social welfare, such as the provision of housing and the unemployment benefit.¹¹³

Modern jurists have moved away from such analyses. Criminal injuries compensation (state funded as opposed to reparation from the offender) has usually been implemented as part of a political rather than social agenda. Most states that have instituted criminal victims compensation schemes explicitly limit compensation to victims of violent rather than property crime and do not acknowledge a binding duty on the state to compensate. Providing compensation has also proved to have no impact on the rate of criminal offending. Modern jurists therefore argue that the criterion for implementing compensation schemes rests more on the symbolic rather than legal obligations of the state.¹¹⁴

The modern jurist, Miers, provides a coherent summary of such a view. State funded compensation signifies society's concern regarding crime and its sympathy with the victim. As modern penal reform highlighted the need to rehabilitate the offender, the state was increasingly treating both the victim and the offender on the same level. Giving compensation to the victim provides a necessary distinction between the two. This is

¹¹³ Duff P, "Criminal Injuries Compensation: The Symbolic Dimension" [1995] *The Juridical Review* 102.

¹¹⁴ Jacob B "Reparation Or Restitution By The Criminal Offender To His Victim: Applicability Of An Ancient Concept In The Modern Correctional Process" (1970) 61 *Journal Of Criminal Law, Criminology And Political Science* 152, 153; Meiners R *Victim Compensation* (Lexington Books, Massachusetts, 1978) 1-5, 97-99.

evidenced by the emphasis in compensation schemes on reimbursing only the truly "deserving" victim and the exclusion of compensation for property crimes in Britain and the United States reflects society's need to sympathise against only the most horrifying crimes. Violent crimes are viewed as the criminal acts which most shake the confidence of society and therefore, are the ones that attract society's sympathy through compensation.¹¹⁵ This theory is illustrated in the British and American attempts to provide state-funded compensation to victims of crime.

In Britain, the state has not recognised any legal obligation to provide compensation to victims of crime. The Criminal Injuries Compensation Board is not a statutory body, however, it is charged to make payments to anyone who falls within the ambit of its scheme and failure to do so can be challenged in the courts.¹¹⁶ Coverage extends to any person, regardless of nationality, who is injured as a result of a crime in Britain and the injury must be physical (damage to property is not included within the scheme). Sexual assault is specifically classified as a physical injury whether or not actual bodily injury occurred, thereby allowing rape victims to recover for psychological injuries. The availability of compensation is subject to two conditions. Firstly, the injury must result from an act of criminal violence and secondly, a claim for compensation can be denied or reduced if the victim has directly contributed to the injuries or provoked the criminal act. Compensation is payable under a tariff system. Injuries have been classified into tariff bands, each attracting a different cap on the level of compensation available. Whilst claimants are free to claim damages in civil and criminal proceedings, the amount of compensation available from the state reduces accordingly.¹¹⁷

In the United States, criminal injuries compensation is administered at a state level, with limited federal guidance. Whilst the majority of states have provided a statutory basis for compensation, the emphasis is on the moral rather than legal duty of the state to provide such assistance. Similarity with the British system is evident in the limitation provisions on

¹¹⁵ Above n 113, 106-108, 110.

¹¹⁶ Report of an Interdepartmental Working Party *Criminal Injuries Compensation: A Statutory Scheme* (Her Majesty's Stationary Office, London, 1986): The scheme has been described as a "constitutional and legal oddity".

¹¹⁷ Greer D "A Transatlantic Perspective On The Compensation Of Crime Victims In The United States" (1994) 85 *The Journal Of Criminal Law & Criminology* 333-401.

personal physical injuries and violent offences. Some states, such as New Jersey, provide a schedule of relevant offences in the legislation. Sexual assault is, again, specifically acknowledged as a physical injury. All the states reimburse victims for lost earnings, medical expenses and other reasonable costs, and compensation can be provided as a lump-sum or periodic payment. Maximum caps on compensation have been instituted but these vary from state to state. One-third of the states also consider the financial eligibility of the applicant before making an award.¹¹⁸

The Criminal Injuries Compensation Act 1963 in New Zealand, also supported the above theoretical justification for state funded compensation for victims. As outlined earlier, the statute provided limited compensation for victims of violent crimes. The restrictions imposed suggested a symbolic gesture of societal sympathy rather than real recognition of the rights of victims to financial assistance. This is further reinforced by the opinion of the Secretary of Justice, when the Act was first introduced. The Act was viewed as a balance to recent penal reforms and as a response to the public's concerns regarding crime.¹¹⁹ However, the 1967 Royal Commission of Inquiry report shifted the emphasis of compensation and adopted the principle of community responsibility. Whilst this shift could have been a positive reform providing victims with compensatory rights against the state, the envelopment of victim compensation within a general accident insurance scheme has eroded rather than strengthened a victim's claim for economic relief. The Accident Rehabilitation and Compensation Insurance Act 1992, like its predecessors, is focussed primarily on workplace injuries. Although a greater range of injuries from criminal acts are now covered within the scheme, attention to the specific needs of victims has been neglected. The availability of the full range of compensation is dependant on the employment status of the individual and by including victims of crime within the same compensation scheme as those suffering injury through accident, the state has failed to highlight society's abhorrence of crime. The scheme does not significantly indicate the distinction between the offender and the victim. The present combination of accident and criminal injuries compensation therefore loses much of its symbolic significance.

¹¹⁸ Above n 117, 333-401.

¹¹⁹ Meiners R *Victim Compensation* (Lexington Books, Massachusetts, 1978) 9-10.

B. Criminal Injuries Compensation Reform

A separate criminal injuries compensation scheme would provide both a safety net for victims unable to recover from offenders and a specific focus on the needs of victims of crime. In doing so, it would also fulfil the promises contained in the UN Declaration of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power to which New Zealand was a state signatory. Article 12 of the Declaration imposes an obligation on the state to provide compensation to victims of crime where both mental and physical injuries have occurred. The Victims Task Force has recommended that this obligation would be most appropriately met by the establishment of a Criminal Injury Compensation Board, existing within the ACC structure.¹²⁰ However, although the Accident Rehabilitation and Compensation Insurance Corporation provides an already existing administrative vehicle in which to provide financial assistance to victims, the danger exists that criminal injuries, which do not account for the majority of claims, would continue to receive less than adequate attention. Victims of sexual assault require assistance which differs significantly from accidental injuries. It is therefore appropriate that their concerns and those of victims of other serious offences be recognised in separate legislation.

The ability of victims to recover directly from offenders should remain. No bar on civil proceedings would be necessary and the Criminal Justice Act could remain intact. This would allow victims to sue for compensatory as well as exemplary damages. State funded assistance could be capped or limited. Its object is to assist victims where no alternative economic resource exists. In allowing civil claims, state-funded aid would only be provided for reasonable assistance in recovery. It would not constitute an acceptance by the state to provide the compensatory and exemplary damages ordinarily owed by the offender. In order to avoid the possibility of double recovery, provisions should be enacted which permit the state to recover funds from the offender or in the event of a fine, reparation order or successful civil claim, from the victim. The state should provide immediate emergency relief. If the victim later recovers costs from the offender, the state-funded relief should be returned. Thereby, confirming the safety-net rather than primary responsibility approach of the state.

¹²⁰ Above n 35, 168-173.

The debate on limiting claims to personal injury arising from violent crimes is problematic. Sexual assault should be classified as a violent offence, regardless of whether physical injury occurred. Mental trauma should also be recognised to cover attempted sexual assault. But by providing a schedule of relevant offences, as in New Jersey and the former Criminal Injuries Compensation Act 1963, any compensation scheme can become inflexible. This method also focuses on the nature of the crime rather than its consequences. What if a crime not listed in the schedule and not usually associated with violence causes an innocent victim to suffer serious injuries? In Britain, the narrow approach has been favoured and compensation is limited to those injuries resulting from a crime that is violent in nature. There were concerns in Britain that any extension to this approach would push the compensation scheme beyond its boundaries. However, in the several American states that have adopted the "consequence" focus, there has been little or no apprehension expressed from the state governments that the definition is unmanageable.¹²¹ A "consequence" approach shifts the emphasis of the crime from the actions of the offender to the injury sustained by an individual victim. This reinforces society's expression of sympathy with the victim. An advantage of the current ACC legislation for victims of sexual assault is the "no fault" provisions. An offence does not have to be reported to the police or successfully prosecuted before a victim can apply for financial assistance. Instead, ACC relies on medical and psychiatric evaluations as evidence. In New Zealand, the majority of sexual assault cases are not reported to the police. There is no reason why a more stringent test than the one already in existence should be adopted. Delays in reporting sexual assault are also common and the ACC exception to its time limit requirement should be included in any reform.

Compensation should include both lump-sum and periodic payments depending on the injuries sustained by an individual victim. A single lump-sum payment allows a rape victim to gain immediate financial aid for costs that occur soon after the offence. It also ensures that the rape victim is not continually reminded of the ordeal. However, periodic payments should be considered for victims with permanent physical disabilities.

The compensation should be in recognition of the crime that occurred and the injury sustained. Income related compensation, therefore, should not be included. This will

¹²¹ Above n 117, 342.

ensure gender equity where the payment of relief for a similar offence does not vary significantly for victims. The award should also include counselling costs. This will allow the victim to establish an on-going relationship with one counsellor whom the victim has personally chosen.

The current ACC legislation does not provide adequate compensation for rape victims. Through the incorporation of victims of crime within the broad ACC framework, recognition of the specific needs of victims has been lost along the way. From its early beginnings in the Royal Commission of Inquiry, ACC was never designed as a criminal injuries compensation scheme. Its primary focus was and continues to be on accidents in the workplace. If society wishes to support victims and the state wishes to provide an adequate safety net for those victims unable to recover losses directly from offenders, then a separate legislative scheme is required.

VII. CONCLUSION

Victims of sexual violation represent a neglected section of society in relation to rehabilitation and compensation. Negative societal attitudes to rape have assisted in ensuring that the concerns of rape victims have been inadequately covered. Whilst this is now changing, debate must focus on the rights of victims to seek rehabilitation.

The crime of rape suffers from under-reporting to the police and while this continues, the justice system cannot provide an adequate solution for victim compensation. Civil proceedings do have the ability to supply victims with exemplary damages for the harm they have suffered. But the procedure is costly and issues such as time limitations and double jeopardy ensure that the majority of rape cases would not meet with success in the courts. Rape is a deeply personal violation of the self. For many victims, open discussion concerning the crime is difficult. It is further complicated where the crime was perpetrated by offenders known to the victim. Time delays in acknowledging the rape are, therefore, a feature of this crime and effectively, prohibit a majority of sexual assault cases being pursued through the legal system. Similar concerns ensure that provisions for reparations and fines in the Criminal Justice Act are also under-utilised. The Act is relevant only upon the conviction of an offender. Since convictions for rape do not match their actual

occurrence, a majority of victims would not receive any benefit from reparations or fines under this approach. The administrative difficulty in recovering fines from offenders even after they have been ordered by the courts to pay, also ensures that for the minority of victims who do report the crime and agree to undergo the trauma of a criminal trial redress is not guaranteed. Civil proceedings and the Criminal Justice Act rely on the financial ability of the offender to make amends for the crime. In situations where the offender has limited economic resources, the victim is left bearing the financial burden.

The Accident Rehabilitation and Compensation Insurance Act 1992 was originally designed to provide a safety net for victims who were unable to recover directly from the offenders. The Act has considerable merit in its "no fault" policy and recognition that police complaints are not necessary. It also provides compensation for the victim which is not dependent on the wealth of the offender. However, the new Act fails to adequately cover the needs of the victim. The removal of lump sum compensation for pain and suffering and its replacement with a smaller weekly independence allowance has resulted in a reduction of funds available to victims. Although earning-related compensation can provide relief to victims who are unable to return to work as a consequence of the injuries sustained, most rape victims do not exhibit tangible physical injuries which require time-off from employment. This also discriminates against victims who do not work and does not address the gender imbalance which exists in the pay-scale of many employment sectors. As a result, compensation for similar injuries will vary depending on the status of the victim.

ACC does provide counselling costs for all victims regardless of their employment status. However, although counselling is a fundamental necessity in the recovery of victims from the effects of rape, such compensation only addresses one aspect of the total cost for victims.

Rape victims suffer heavy immediate financial losses. The crime of rape infringes on a person's ability to feel secure in their environment. As a result of the crime, changes in residence and the work-place are common. Additional safety measures in the home and personal security devices such as the purchase of a car are often also required. These expenses, which necessitate an immediate lump-sum award, are currently unable to be afforded under the present accident compensation scheme. The small amount of compensation currently available through the weekly allowance also reinforces a victim's

impression of societal attitudes towards the crime of sexual violation. Feelings of guilt, shame and isolation are frequently experienced by the victim. The minimum compensation awards support these emotions by ignoring the victim's specific needs. Classifying the injury within a general accident scheme also blurs the distinction between rape and injuries sustained through non-criminal activities.

Reform in criminal injuries policy is therefore necessary. Separating victims of violent crime from the general accident scheme would highlight society's abhorrence of crime and provide appropriate relief specifically designed to meet victims' needs. Whilst the accident compensation scheme contains many positive features for victims of rape, it has never expressly focussed on the requirements of victims of crime. As the 1992 reforms sought to reduce the scheme's expenditure, its suitability for rape and other victims of violent crimes has further diminished. A separate compensation programme for victims of crime would alleviate many of the difficulties currently experienced in this area.

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