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COMPENSATION AND RESTITUTION IN CANADA

address by

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COMPENSATION AND RESTITUTION IN CANADA

"No! No! Sentence first - verdict afterwards"
Alice in Wonderland, Lewis Carroll.

Just a little over two weeks ago, I noticed an article in our local newspaper recounting the sentencing of the Mayor of Welland for his part in a bingo theft scheme. The article referred to the fact that the presiding judge had refused to make an order for restitution of more than $83,000.00 "because the amount of missing funds was in dispute". The article went on to report that the trial judge said that "the two charities involved should go to civil court for restitution because criminal law has no means to decide what amount should be repaid". Apparently the accused along with a Catholic Priest had been convicted of stealing money raised at charity bingo games during 1982 and 1983. The report went on to indicate that the lawyer for the Roman Catholic Diocese of St. Catharines said that restitution would not be sought because "the matter has been before the courts long enough".

I was struck by the article not because I felt that the trial judge erred in law in his conclusion. Indeed, he was only expressing the prevailing view. What struck me was the frustration that the public must feel with our system of justice when persons who are convicted of crimes are not ordered by the court that convicted them to make restitution even though they may have the means to do so. Victims are expected to institute civil proceedings with the attendant costs, delay and in the end a "nulla bona" return because the accused has either disposed of his

assets or put them beyond the reach of the sheriff.

There are essentially four reasons why compensation and restitution to victims has played a very minor role in our criminal law. They are:

(a) The historical development of the criminal law process;

(b) Judicial attitudes;

(c) Constitutional restrictions;

(d) Statutory limitations.

In this article I propose to explore these four developments.

(a) THE HISTORICAL DEVELOPMENT OF THE CRIMINAL LAW PROCESS

When the Normans arrived in 1066, they found a system of justice based on compensation to the victim or his blood relatives for injury to him or damage to his property. Each person in the community had a value put upon him according to his rank. This was called the wer. If he was killed, his assailant had to pay his wer to his relations. If he was convicted of theft, he sometimes had to pay the amount of his wer to his lord or to the King. If, on the other hand, he was only injured or his goods were stolen or destroyed, then the offender or thief had to pay compensation called the bot. This might be at either a fixed rate or at the market price of the goods stolen or damaged. Although initially, the victim and his relatives were entitled to reject

acceptance of the wer or bot and to pursue the offender and carry out a summary form of justice, in time it became obligatory to accept pecuniary compensation. At the time of the Conquest, there had also developed the concept that not only must a wrong be atoned by payment of the wer or bot to the injured man or his relatives but also by payment of a fine to the King called a wite. This later development really is the seed of the concept that a wrong is not only a matter between the parties directly involved but also a matter that affects all of the community. In short, there has been a breach of the tranquility of the community or what was later called the King's Peace. (W.F. Holdsworth, History of English Law, Vol. 2, 3rd edition, p. 1923; Stephen, History of the Criminal Law of England, vol. 1, pages 59 - 61).

After the Conquest in 1066, the Crown began to assume more influence in the administration of local justice, as it sought to bring under its control the various communities that it had conquered. By the middle of the twelfth century, English monarchs were no longer satisfied with the old procedure of private accusation. In 1166, the Assize of Clarenden set up the machinery for discovering possible crime in the community through the jury of inquest - the later grand jury. At the same time, new crimes were created by statute and developed by the courts which could not be settled by way of compensation. It was particularly during the reign of Henry II (1154 - 1189) that the State would no longer permit a private settlement of a criminal case. During the next century, it was the

Crown that took over the initiative of ferreting out crime in the community. The system of the private accuser settling his claim directly with the wrong doer and without the intervention of the State soon fell into disuse.

What were the reasons for this? There is some suggestion that an important factor was the influence of the church which was closely related to the State. It taught men that the King was the representative of law and order and the fountain of justice and equity. Another cause suggested is the fact that as the Norman Kings began to tighten their controls on the State it would necessarily follow that they would naturally begin to take on the role of prosecuting criminal offences.

I suspect however that the real reason was the fact that the prosecution of crime was a source of revenue for the Crown. In an age when the main sport of Kings was war, the Crown was constantly faced with the problem of raising revenues in order to support its standing armies. The Crown now had the opportunity of increasing its coffers by forfeiture and resale of the lands and goods of convicted felons or through fines. As one author notes,

> "Thus, it is reasonably clear that Royal Courts in England took jurisdiction over more and more offences from local courts, largely but not exclusively, because the pursuit of crime was a source of revenue. The King's justice was more efficient justice but it was not particularly concerned with the victim. For example, stolen goods were forfeited to the Crown until the reign of Henry VIII, when a practice of awarding restitution to the victim began. Before that the victim had to

> pursue the offender by an appeal of felony in order to get his goods back."

(P.J.T. O'Hearn, Restitution and Compensation and Fines, 7 Ottawa Law Revue 309)

Although common law continued to recognise certain remedies to an injured party such as the appeal of felony and deodands,[1] these remedies soon fell into disuse. It was during the age of enlightenment that the victim's role in criminal justice reached its lowest ebb. Authors such as Beccaria and Bentham writing in the 18th and 19th centuries argued that criminal law should serve the interests of society rather than the individual victim. The purpose of punishment was not to redress private damages but to deter the criminal and others. The victim should play no direct role in the criminal justice system because crime was against society and the State controlled both prosecution and punishment of criminals. The views expressed by Beccaria and Bentham have continued to survive into the 20th century.

(b) JUDICIAL ATTITUDES

Whether the reasons are historical or pragmatic, the courts generally frown upon any attempt to make compensation or restitution a central consideration in sentencing. A number of expressions of judicial opinion may illustrate that view.

In Stewart (1968) 4 C.C.C. (2d.) 54. McFarlane J.A. delivering the judgment of the British Columbia Court of Appeal wrote (at page 57):-

> "It must be remembered, however, that it

> is most important that the sanctions of the criminal law and its administration should not be used, or be permitted to appear to be used, for the purpose of enforcing civil obligations."

Those words were echoed by Maclean J.A. in Dashner (1974) 15 C.C.C. (2d.) 139 and by Matas J.A. in Zelensky (1977) 33 C.C.C. (2d.)

Two reasons have been advanced for this view. The first is that if a criminal court engages in a consideration of the ability of the offender to compensate his victim for the injuries sustained, it may undermine the integrity of the criminal trial process. In Leclair (1956) 115 C.C.C. 297, McKay, J.A. was concerned that the criminal court could be used as the collection agency for victims of crime. He wrote (at p. 302):-

> "It is a reasonable assumption that the complainant, by threatening prosecution, endeavoured to obtain payment of the debt. There is no doubt that this amounted to an abuse of the process of the Court. The criminal law was not enacted for the assistance of persons seeking to collect civil debts. It seems to be clear that a Court of competent jurisdiction has inherent power to prevent the abuse of its process by staying or dismissing the action. This jurisdiction ought to be exercised very sparingly and only in very exceptional cases:..."

The second concern of the courts is a more pragmatic one. As Ian Maclean expressed it in an article entitled "Compensation and Restitution Orders", (1973) Crim. L.R. 3:-

> "The criminal courts, busier now than they have ever been, have neither the time nor in many cases the expertise for assessing the measure of damages or complicated issues in respect of title, and the civil courts may be said to be

> the proper forum to claim reparation for civil wrongs."

However, he went on to point out,

> "Nevertheless, there is clearly a vital necessity for a summary remedy to deal with cases where the victim is in need. Such cases arise in an acute form in the magistrate's court. The elderly widow or disabled pensioner can ill afford to lose her item of jewellery or the television set which is her only comfort in the winter evenings, and she will probably have neither the means, nor the courage, to pursue the thief in the county Court; nor is it any consolation to her that the thief receives a stiff sentence of imprisonment. Again, as happens so frequently, a push or a blow from a violent hooligan results in his victim being off work, or confined to the house, requiring extra expenditure, and much pain and suffering. A criminal court needs some form of summary remedy to alleviate the position in cases such as these."

The Law Reform Commission of Canada, Working Paper 5, October, 1974 has recognised the need for compensation to the victims of crime. (At pp. 7-8)

> "Recognition of the victim's needs underlines at the same time the larger social interest inherent in the individual victim's loss. Thus, social values are reaffirmed through restitution to victims. Society gains from restitution in other ways as well. To the extent that restitution works towards self-correction, and prevents or at least discourages the offender's committal to a life of crime, the community enjoys a measure of protection, security and savings. Depriving offenders of the fruits of their crimes or ensuring that offenders assist in compensating their victims for their losses should assist in discouraging criminal activity. Finally, to the extent that restitution encourages society to perceive crime in a more realistic way, as a form of social interaction, it should lead to more productive responses not

> only by Parliament, the courts, police, and correctional officials but also by ordinary citizens and potential victims.
>
> The offender, too, benefits in a practical way from a sentencing policy that emphasizes restitution. He is treated as a responsible human being; his dignity, personality and capacity to engage in constructive social activity are recognised and encouraged. Rather than being further isolated from social and economic intercourse he is invited to reconci liation with the community. While he is not permitted to escape responsibility for his crime, his positive ties with family, friends and the community are encouraged, as are opportunities for him to do useful work."
>
> (See also Kenneth Chasse "Restitution in Canadian Criminal Law" Vol. 36 C.R.N.S. 201)

(c) CONSTITUTIONAL RESTRICTIONS

In Zelensky (reported in the Manitoba Court of Appeal, 33 C.C.C. (2d.) 147 and in the Supreme Court of Canada 41 C.C.C. (2d.) 97) the provisions of the Criminal Code dealing with compensation and restitution were attacked on the basis that they were in pith and substance legislation in relation to property and civil rights and thus within the exclusive jurisdiction of the province rather than in relation to the criminal law and procedure. It was argued that section 653(1) authorising the court to order compensation for loss of property was "a serious deprivation of an accused right to defend himself against allegations of loss or damage to property". It was said that the effect of the section "may well effectively deprive an accused of the opportunity of making a full answer and defence".

A majority panel of the Manitoba Court of Appeal agreed with that submission and held that that section 653(1) was ultra vires Parliament. Matas J.A. who delivered one of the majority opinions went on to say (p. 167):-

> "During the course of a criminal trial it is not the aggrieved party who is in contest with the accused. It surely is the Crown, representing the public interest. In a criminal trial, there are no pleadings; there is no right to an affidavit on production of documents; in general, there is no organised system or procedure available to the accused. There is also the difficult question of whether the accused should testify; different considerations would govern civil as opposed to criminal cases."

O'Sullivan J.A. who agreed went on to say (p. 171):-

> "The vice of s. 653, in my opinion, is that it does not regard the payment of an amount equivalent to damage done by a criminal as part of a punishment which will vary within the circumstances of the offence and the offender. It seeks to confer directly on the victim of a crime a right to claim compensation from the wrong doer. The section, if valid, would confer on the victim of a crime an additional and alternative civil right to sue in a criminal Court for that for which he already has the right to sue in a civil Court. In my opinion, this constitutes an invasion of the field of property and civil rights and is beyond the powers of Parliament."

On further appeal to the Supreme Court of Canada, the court in a six to three majority decision disagreed with that view. Laskin, C.J.C. delivering the judgment of the majority wrote (p. 103):-

> "It appears to me that ss. 653, 654 and 655, historically and currently, reflect a scheme of criminal law administration under which property, taken or destroyed or damaged in the commission of a crime, is brought into account following the disposition of culpability, and may be ordered by the criminal Court to be returned to the victimized

> owner if it is under the control of the Court and its ownership is not in dispute or that reparation be made by the offender, either in whole or in part out of moeny found in his possession when arrested if it is indisputably his and otherwise under an order for compensation, where the property has been destroyed or damaged."

In his reasons, the late Chief Justice averted to the approach taken by Matas J.A. in assessing the constitutional viability of section 653 based on a comparison of the procedure in a civil action for damages as opposed to the position of an accused as a defendant in a criminal trial. He could not agree that that approach could be determinative of an issue which was essentially a question of what was the object of the impugned legislation. Nevertheless, he went on to indicate that the answer to the concern raised by Matas J.A. was dealt with in the dissenting reasons of Monnin J.A. where he said at pp. 152 - 153:-

> "In pith and substance, s. 653 is part and parcel of the sentencing process set out in the Criminal Code of Canada. If it were not, the hands of our Courts would be sadly tied and the victims of crimes would of necessity have to seek recovery of property or monies illegally taken away from them through civil Courts on the basis that one cannot mix that which is criminal with that which is civil and on the basis that provincially appointed Judges are not fit persons to deal with matters of civil law. Can one think of a more ridiculous proposition and one bound to bring the entire legal process - already badly challenged - in disrepute? Distinctions for the sake of distinctions have no place in Courts of law."

Although endorsing the federal government's authority to legislate provisions for compensation and restitution, Laskin C.J.C. cautioned that the provision

must be approached with caution: He suggested the following guidelines.

(1) The power to make a concurrent order for compensation as part of the sentencing process is discretionary.

(2) In exercising that discretion, the court should have regard to whether the victim is invoking the provisions to emphasise the sanctions against the offender as well as to benefit himself.

(3) A factor for consideration is whether civil proceedings have been taken and, if so, whether they are being pursued.

(4) Other factors for consideration are the means of the offender and whether the criminal court will be involved in a long process of assessment of the loss, although it does not require exact measurement.

(5) The court should not force agreement between the parties to enable it to make an order for empensation.

(6) An order for compensation should only be made with restraint and caution. It is not to be used in terrorem as a substitute for or a reinforcement of civil proceedings.

With these principles in mind, let us now turn to the statutory provisions and how they have been interpreted.

(d) STATUTORY LIMITATIONS

The relevant provisions of the Code are divided into what is generally called "compensation" and "restitution". Compensation is generally recognised as referring to a payment of a sum of money for the purposes of satisfying or making amends. Restitution on the other hand is generally regarded as referring

to the restoration of property. The relevant sections of the Code are as follows:-

COMPENSATION:

> 653(1) A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.
>
> (2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.
>
> (3) All or any part of an amount that is ordered to be paid under subsection (1) may, if the court making the order is satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the accused and the court so directs, be taken out of moneys found in the possession of the accused at the time of his arrest.
>
> 654() Where an accused is convicted of an indictable offence and any property obtained as a result of the commission of the offence has been sold to an innocent purchaser, the court may, upon the application of the purchaser after restitution of the property to its owner, order the accused to pay to the purchaser an amount not exceeding the amount paid by the purchaser for the property.
>
> (2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(3) All or any part of an amount that is ordered to be paid under subsection (1) may, if the court making the order is satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the accused and the court so directs, be taken out of moneys found in the possession of the accused at the time of his arrest.

663(2) The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do any one or more of the following things specified in the order, namely,

(e) make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof;

388(1) Every one who wilfully destroys or damages property is, where actual danger to life is not involved, guilty of an offence punishable on summary conviction if the alleged amount of destruction or damage does not exceed fifty dollars.

(2) Where an accused is convicted of an offence under subsection (1) the summary conviction court may, in addition to any punishment that is imposed, order the accused to pay to a person aggrieved an amount not exceeding fifty dollars that appears to the summary conviction court to be reasonable compensation for the destruction or damage.

(3) The summary conviction court may order that where an amount that is adjuged to be paid as compensation under subsection (2) is not paid forthwith or within the period that the summary conviction court appoints at the time of conviction, the accused shall be imprisoned for a term not exceeding two months.

(4) The summary conviction court may order that terms of imprisonment that are imposed under this section shall take effect one after the other.

RESTITUTION:

655(1) Where an accused is convicted of an indictable offence the court shall order that any property obtained by the commission of the offence shall be restored to the person entitled to it, if at the time of the trial the property is before the court or has been detained so that it can be immediately restored to that person under the order.

(2) Where an accused is tried for an indictable offence but is not convicted, and the court finds that an indictable offence has been committed, the court may order that any property obtained by the commission of the offence shall be restored to the person entitled to it, if at the time of the trial the property is before the court or has been detained, so that it can be immediately restored to that person under the order.

(3) An order shall not be made under this section in respect of

(a) property to which an innocent purchaser for value has acquired lawful title

(b) a valuable security that has been paid or discharged in good faith by a person who was liable to pay or discharge it,

(c) a negotiable instrument that has, in good faith, been taken or received by transfer or delivery for valuable consideration by a person who had no notice and no reasonable cause to suspect that an indictable offence had been committed, or

(d) property in respect of which there is a dispute as to ownership or right of possession by claimants other than the accused.

(4) An order may under this section shall be executed by the peace officers by whom the process of the court is ordinarily executed.

(5) This section does not apply to proceedings against a trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for an offence under section 290, 291 or 296.

Let us now turn to a closer analysis of those

sections.

(a) Jurisdiction of the Court

The first thing that most be noted is that in almost all cases, an accused must be first convicted before an order for compensation or restitution may be made. The sections talk about "a court that convicts an accused" (section 653) or "where an accused is convicted" of an offence (sections 388(2), 654(1), 655(1) and 663(1)). The only exception is 655(2) which authorises the court where the accused is not convicted but "the court finds that an indictable offence has been committed" to order the property obtained by the commission of the offence restored to the person entitled to it, "if at the time of the trial the property is before the court or has been detained, so that it can be immediately restored to the person under the order".

(b) The Nature of the Offence

Sections 653 to 655 only authorise the application to be made where the accused is convicted of an "indictable" offence. This means essentially that if the prosecutor elects to proceed by way of summary conviction on a charge of theft of $200.00 or less, the court has no jurisdiction to make an order for compensation or restitution under sections 653 - 655. The only way that it can do so is to graft on to a sentence a period of probation and to order restitution or reparation under section 663(2)(e). This means that the court is limited to suspending the passing of sentence and ordering a term of restitution as part of the probation order or to imposing a gaol term plus probation or a fine plus probation. It is

generally settled that a court has no power to order gaol plus a fine plus probation: See Blacquiere (1975), 24 C.C.C. (2d.) 168 Ont; Samuel (No. 2)(1982), 9 W.C.B. 117 (B.C.C.A.); Casey (1982), 26 C.R. (3d.) 332 (Alta. C.A.)

A similar restriction exists in relation to the offences of obtaining money or property by false pretences, possession of stolen property or fraud in relation to goods valued at $200.00 or less. If the Crown seeks to proceed by way of summary conviction, the court has no jurisdiction to make an order for restitution. It is regretable that the provisions do not apply to those instances where the victim, because of the small amount involved, could hardly institute proceedings in the civil courts. Nevertheless, it may be arguable that the enforcement of an order by way of probation is more effective than a compensation or restitution order filed in the superior court.

(c) Who May Apply:

The compensation sections, ss. 653(1) and 654(1) require an initiation by someone. In section 653(1) it is "upon the application of a person aggrieved" and in section 654(1) it is "upon the application of the purchaser after restitution of the property to its owner". Sections 655(1) and 388(2) authorise the court to make the order without intervention by anyone. Presumably, section 663(2) providing for restitution or reparation as part of a probation order does not require any intervention by the victim.

Strictly interpreted, sections 653() and 654(1) do not authorise the Crown to act on behalf of the victim.

That seems to be the view of an older English case Taylor (1969), 53 Cr. App. R. 357 which interpreted a provision under a similar English statute before it was amended by the Powers of Criminal Courts Act 1973. Section 35 of that Act now provides that the court may, "on application or otherwise" make a compensation order.

To require the victim or even his agent or counsel to initiate the proceedings effectively renders the provisions of little assistance to the average victim. Large corporations who have been defrauded or who have suffered financial injury will know enough to retain counsel who will make the appropriate and timely intervention. The average citizen, however, can neither afford counsel nor does he know of his rights. Rarely, will he even make a court appearance unless there is a plea of not guilty and he has been subpeonaed as a witness by the Crown. It is my experience that Crown counsel rarely seek an order for compensation unless it is raised by the trial judge who may enquire whether it is a factor to be considered in the sentencing of the accused. Even then, Crown counsel are often not in a position to prove the actual loss and will not press the matter if it will involve a delay in sentencing or the requirement to take active steps to prove the loss.

It is this attitude that generally militates against an effective use of the compensation and restitution provisions. To require only the "person aggrieved" or his counsel to initiate the application will mean that very few applications will be entertained by the court.

On the other hand, both sections 388(1) and (2) appear to impose on the court the obligation to order compensation

or restitution. The use of the word "shall" in section 655 as opposed to the use of "may" in section 653, 654 and 388 appears to impose the obligation upon the court to restore property to a person entitled to it if the conditions in the section are met.

(d) When May the Application be Brought:

Both section 653(1) and 388(2) contemplate that the order for compensation will be made "at the time sentence is imposed". Indeed section 653(1) uses those exact words. Section 388(2) on the other hand speaks of ordering compensation not exceeding $50.00 "in addition to any punishment that is imposed".

Section 654 appears to be dependent on section 655. Sections 655(1) and (2) provide that the court "shall" order property obtained by the commission of an indictable offence restored to the person entitled to it "if at the time of the trial the property is before the court or has been detained so that it can be immediately restored" to the owner. Section 654 relating to compensation of a bona fide purchaser of property authorises the court to order payment to such a person "upon the application of the purchaser after restitution of the property to its owner..."

(e) Procedure on the Application

The most difficult problem facing a trial judge in a jury trial is to interpret a verdict of a jury. A verdict of guilty to a charge of theft of $10,000.00 can mean that the jury found that the accused stole anywhere

from $200.00 to $10,000.00 or more. But since the jury is neither asked nor entitled to make a finding as to the amount lost, it places the trial judge in the position of having to speculate as to what was their finding. In the end, probably the best course for him to follow is to make his own determination of the facts based on the evidence he has heard and consistent with the verdict, giving the accused the benefit of the doubt. And, as was pointed out by Laskin C.J.C. in Zelensky, the court is not required to make an exact measurement of the loss.

If the trial is by judge alone, then the court has not only the opportunity but also the obligation to make findings of fact as to the loss based on the evidence presented. The real question, however, is whether the trial judge on sentencing is precluded from hearing additional evidence as to the exact loss. Although most courts are reluctant to enter upon this exercise, particularly Provincial Court judges who are constantly faced with a heavy work load, it is clear that the trial judge must not ignore this responsibility. In Ghislieri (1981), 56 C.C.C. (2d.) 4 (Alta. C.A.) the trial judge refused to consider an owner's application for an order for compensation under section 653 following the accused's plea of guilty to a charge of possession of a stolen motor cycle. When found by the police, the motor cycle had been damaged and valuable parts had been removed. The owner, who had previously provided Crown counsel with an estimate of the motor cycle's value at $595.00 stated, during the trial, that he had reviewed the damage and had receipts for $710.00. The accused, through his counsel, disputed the amount of compensation. The trial judge refused to consider

an order for compensation because the owner's claim was disputed and thus a civil adjudication was required. He believed that to hold an inquiry in the circumstances would impair the sentencing process.

Haddad J.A. for the Alberta Court of Appeal held that he erred in this approach. At pp. 11 and 12, he wrote,

> "The discrepancy between these two figures ought not to pose a difficulty. It is one for the trial judge to resolve within the guidelines enunciated by Chief Justice Laskin to the effect that s. 653 does not require"exact measurement..."
>
> "If, after embarking upon an inquiry, it should become apparent to the trial Judge that a determination of the damage claim cannot be disposed of expeditiously, or that it presented complications which would cause the sentencing process to lose its criminal character, he would be justified in bringing the inquiry to a halt and at that point exercise his discretion against a compensatory order."

It is clear therefore, from the authority of Ghislieri that the court is not restricted to the evidence taken at trial. Indeed, there appears to be a positive duty upon the court to conduct an inquiry and the most appropriate time for doing this is at the time of sentencing.

Where there is a plea of guilty and the amount lost is in dispute, the question arises as to how this issue can be resolved. In Zelensky, the accused was charged with theft of money in the amount of $18,000.00 more or less and merchandise in the amount of $7,000.00 more or less from her employer. After the plea was entered, Crown counsel indicated that counsel for the employer was present and was making an application for a compensation order. He then

went on to add that there was no agreement as to the amount of owed. Counsel for the accused then spoke indicating that although there was a plea of guilty, "in no way is that to be construed as an admission by the defendants that they are liable in the sum of $18,000.00 and $7,000.00. It is an amount of anywhere between $200.00 and $25,000.00 and it is something that is to be either worked out or it can be agreed upon or it can be adjudicated upon by this Court or the Court of Queen's Bench..." The Crown then recited a statement of facts including some details of the fraud and the matter was adjourned for a pre-sentence report. On the date for sentencing, the trial judge indicated that he was concerned because there had not been the degree of cooperation that should have existed in the particular matter and then went on to make an order for compensation in the sum of $18,000.00 and for an order for restitution of the recovered goods.

In the Manitoba Court of Appeal, Matas J.A. was concerned with whether a compensation hearing would deprive an accused of his opportunity for full answer and defence because he did not have a right of discovery. He disagreed with the views of Haines J. in Re Torek (1974) 15 C.C.C. (2d.) 296 where he said at p. 299,

> "I might also note that, in my opinion, the argument that the procedure set out in s. 653 deprives an accused of his right to make a full defence is not entirely correct. It should be noted that the section applies to indictable offences only, and therefore, unless the accused exercises his rights and elects a summary trial, he is entitled to a preliminary hearing. At this preliminary hearing he can get discovery as broad or broader than he could in a civil action, because he is entitled to cross-examine the complianant."

It was the view of Matas J.A. that,

> "An accused's right to make a full defence should not depend on the kind of trial he elects to have. He may have a very good reason for electing to have a summary trial. Having done so, he should not be left without any of the procedures now available to a defendant in a civil action to get at the basis of the plaintiff's claim."

It would appear that the practice adopted by the Crown in Zelensky at trial after the plea of guilty is incorrect since the decision of the Supreme Court of Canada in Gardiner (1982), 68 C.C.C. (2d.) at 477. There it was held by the Supreme Court of Canada that where the trial judge, upon a plea of guilty, was faced with conflicting evidence going to the gravity of the offence, the onus devolved upon the Crown to prove the material facts in aggravation beyond a reasonable doubt.

When defence counsel in Zelensky refused to admit the amount allegedly lost by the theft, Crown counsel should have called evidence to establish this amount. The defence would then have been given the opportunity to cross-examine the Crown witnesses and to call evidence to dispute that claim. The effect might have been to convert what was essentially a plea of guilty into a mini-trial. But since that obligation devolved upon the Crown as soon as the facts were disputed, it can be hardly be argued that this will increase the work load. A judge ought not to sentence on a plea of guilty until he is satisfied beyond a reasonable doubt (either by an admission of the defence or an inquiry based on evidence) of all of the facts to support the Crown's case.

It is only when such an inquiry is conducted that the concern of Matas, J.A. and echoed later by Laskin C.J.C. can be alleviated.

(f) Nature of the Order to be made:

In England, the courts power to order compensation is much wider in scope. Section 35 of the Powers of Criminal Courts Act 1973 authorises the court to order a person convicted of an offence "to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence". Thus English authorities must be read with caution.

The Canadian legislation is much narrower in scope. Section 653 authorises the court to order satisfaction or compensation "for loss of or damage to property suffered by the applicant as a result of the commission of the offence".

Section 654 authorises the court to order the accused to pay to an innocent purchaser of property obtained by the commission of an offence "an amount not exceeding the amount paid by the purchaser for the property".

Section 655 authorises the court to restore "any property obtained by the commission of the offence... to the person entitled to it".

Section 388 authorises the court to order one who has wilfully destroyed or damaged property to pay to a person aggrieved "an amount not exceeding $50.00".

The only section that appears to give the court some scope for development is section 663(2)(e) and (h). Subsection (2)(e) authorises the court to order payment "to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person". Subsection (2)(h) authorises the court to order that the accused "comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence...". In A (1974) 26 C.C.C. (2d.) 474 Haines J. concluded that these words were wide enough to order the accused to pay $1,000.00 reparation to the victim of an indecent assault. That view, however, was rejected by O'Driscoll J. in Groves (1978), 37 C.C.C. (2d.) 429. It was his view that the words "actual loss" limited the court's scope to what are relatively concrete and easily ascertainable in the nature of what would be special damages in a civil action.

In Dashner (1974) 15 C.C.C. (2d.) 139, the British Columbia Court of Appeal was faced with an order made under section 663(2)(e) for reparation to the victims of an assault in the sum of $500.00. On appeal, it was conceded that the trial judge had possessed a discretion in the matter but it was argued that his discretion had not been exercised judicially. McFarlane J.A. delivering the judgment of the Court felt that he "should resist the temptation to embark on a discussion which might tend to restrict or limit the discretion which Parliament has given to the Courts by s. 663". After repeating that the section only permitted loss for "actual loss or damage sustained", he struck down the probation order

on the basis that there was insufficient evidence of such actual loss or damage to support the order.

It is an attractive suggestion that the criminal courts should have authority to compensate victims who have received relatively minor personal injuries by the summary procedure available under the Code. Rarely are these people prepared to retain a solicitor at a cost that will often exceed the damages to be recovered. It is also unlikely that they will apply to the Criminal Injuries Compensation Tribunal of the Province if the amount expected to be recovered is modest. However, it is difficult not to agree with the suggestion of O'Driscoll J. that the use of the phrase "actual loss or damage" is probably intended to deal with out of pocket loss and not a claim for pain and suffering that would entail an assessment that is normally made in a civil court.

(g) The Factors which a Court should consider in exercising its discretion:

A number of factors have emerged from Canadian and English authorities which appear to be relevant to the question of when and how the discretion to order compensation should be exercised.

(i) Section 35(4) of the English Powers of Criminal Courts Act 1973 requires the court, in determining whether to make a compensation order against any person, to "have regard to his means so far as they appear or are known to the court". Although no similar requirement exists under the Canadian legislation, it is undoubtedly a factor that should be considered. As was pointed out by the English Court of

Criminal Appeal in Oddy (1974) 69 Cr. App.R. 66, a compensation order must be realistic and keep in mind the question of the rehabilitation of the offender. If it was counterproductive in the sense that the sum was far beyond what he could reasonably expect to be able to pay in the future, it might provide a temptation to him to commit further crimes in order to discharge his liability.

(ii) A compensation order should be imposed in addition to a sentence and not as an alternative. It was never intended to enable a convicted person to buy himself out of the penalties of crime: Inwood (1975) 60 Cr. App.R. 70.

(iii) Any order made by the judge should be precise as to the amount to be paid and the method of payment. There is no authority to delegate to a probation officer the discretion to determine how much and when the payment should be made: Shorten and Shorten (1975), 29 C.C.C. (2d.) 528 (B.C.C.A.) and Hudson (1982) 65 C.C.C. (2d.) 173 (Ont. C.A.). But it is of interest to note that in two earlier cases, Vandale and Maciejeski (1974), 21 C.C.C. (2d.) 250, Martin J.A. made an order that during the period of two years during which the accused was to be on probation he was to pay a sum of $250.00 by way of restoration at such times and in such amounts as his probation officer considered that he could reasonably make. Similarly in Stein (1974), 15 C.C.C. (2d.) 376, Martin J.A. made an order that during the period of probation the accused was to make "such payments by way of restitution from time to time as her probation officer considers that she is reasonably capable of making".

(iv) In those instances where an application is brought under section 655(2) for restitution of property and the court finds that an indictable offence has been committed but the accused is not convicted, the court should make specific findings as to which goods had been obtained by the commission of an indictable offence. It is improper for the judge to delegate to the police the responsibility of ascertaining which of the goods had been obtained by such commission, who were the rightful owners and to restore such goods to them. Beloff (1980), 50 C.C.C. (2d.) 416 (Ont. C.A.)

(v) If the offender's means are such that he is able to pay some compensation for the loss or damage but it is unrealistic to expect him to pay the full amount, then the court may order that he pay part of the amount.

(vi) Courts should encourage voluntary restitution prior to trial because it suggests that more severe sanctions may not be necessary to deter the accused from future crime. Often the trial judge will postpone sentence in order to give the accused the opportunity to make restitution. However, it is important that the court, when adjourning the case, not lead the accused to believe that if he complies with what the court has suggested, he will be put on probation otherwise he will go to prison. As was pointed out in Collins (1969), 53 Cr. App.R. 388, "it is undesirable that an implicit bargain of that sort should be made with the accused".

(vii) It is improper for the court to postpone sentence for a lengthy period of time in order to enable the accused to work or to raise the money for restitution. It is not the function

of the court to operate as a money collecting agency: West (1959) 43 Cr. App.R. 109.

(viii) Where two or more persons are jointly convicted the court should generally make an order requiring each of them to pay the amount awarded in equal proportions. The court should not draw a distinction between accused unless it is shown that one of them was more responsible than the other: Amey (1983) 1 All E.R. 865. If joint offenders make voluntary restitution before sentence in unequal amounts, it is improper for the court to impose a heavier sentence on the accused who has paid less to reflect the difference in the amount raised: Crosby and Hayes (1975) Crim. L.R. 247.

(ix) If several claimants for compensation establish claims against a convicted person and he has insufficient funds to meet each claim in full, the court should normally make orders which apportion the compensation on a pro-rata basis: Amey. (supra)

Postscript.

In my introduction to this paper I referred to the case of the Mayor of Welland who was convicted of stealing from charities. Apparently he attempted to dispose of his assets. On June 1st, 1984 before sentencing took place Galligan J. continued a restraining order upon application by the Attorney General preventing him from disposing of his investments. He held that the Attorney General as a representative of the public interest was entitled to seek injunctive relief in the civil courts. It was in the public interest that the victims of crime if possible be quickly and summarily repaid by the thief.

The Attorney General was acting in furtherance of the public interest when he sought to preserve the assets of the thief so that the sentencing judge could have the realistic possibility of seeing that the thief made restitution to his victim.

"The sun was shining on the sea,
Shining with all his might:
He did his very best to make
the billows smooth and bright -
And this was odd, because it was
The middle of the night."

The Walrus and the Carpenter, Lewis Carroll

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FOOTNOTE:

1. In Anglo Saxon times an object which contributed to the death of a person was handed over to the family of the man killed so that they could take vengeance upon it or was forfeited to the King. In the early days of Christianity, the church used this ancient superstition to argue that the deodand should be forfeited to the church so that it could be sold to purchase masses for the soul of the deceased. Matthew Hale suggests that the deodand did not apply to the death of an infant under 14 years of age because he was sinless. After the reformation, the money was usually handed to the poor or to the relations of the deceased.

This rule of law born in superstition was based on the belief that the thing which caused a death ought to be punished. Examples of items forfeited as a deodand were:-

The boat from which a man fell and was drowned,

A horse from which a man fell and was killed,

A horse which rode over a sleeping man,

A wheel of a cart which crushed a man,

A tree which fell upon a man.

There is a report of the Coroner's Jury of Yarmouth who in 1716 declared a stack of timber which had fallen on a child to be forfeited as a deodand. The owner of the stack paid 30 shillings which was then paid over to the child's father.

An old couplet ran,

"Whatever moved to do the deed
is deodand and forfeited,"

Apparently deodands fell into disuse and were suddenly revived with the arrival of the railway in England. In 1840, a jury fixed the value of a railway carriage as a deodand at £2,000.0.0d. after an accident on the London & Birmingham railway and in 1841, a Lord of the Manor took a railway carriage as a deodand after an accident on the Great Western Railway at Sonning. Undoubtedly, the English Parliament considered it propitious to abolish deodands and did so in 1846 (See Kenny's, Outlines of Criminal Law 17th edition, page 8).

Is the law of deodands still in existence in Canada? The common law of England was received in Ontario in 1774 and in the maritime provinces before this time. The effective reception date for the acceptance of the common law in Newfoundland was in 1833. British Columbia, however, did not receive English common law until November 19th, 1858 and the other provinces followed suit after that time.

I am not aware of any statute which has abolished deodands in those provinces which received English common law before 1846

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