

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/370402147>

Right vs Entitlement: Criminal Victim Compensation in the UK

Method · February 2018

CITATIONS

0

READS

3

1 author:



[Damian Wayne Williams](#)
University College London

22 PUBLICATIONS 3 CITATIONS

SEE PROFILE

Right vs Entitlement: Criminal Victim Compensation in the UK

It is argued that when the state places burdensome conditionality on a right, it in effect changes the nature of the right into that of an entitlement.¹ The language of rights is associated with universality and unconditionality, whereas the language of entitlements is associated with distribution of aid to recipients who meet “compulsory duties or patterns of behaviour.”² The original scheme for compensating victims of crime was introduced as an entitlement, and later codified into law so as to establish a legal right. The result has been the opposite: qualification for compensation has been made so conditional, that a right enjoyed by victims has been made into a narrowly drawn entitlement. The following describes the prior scheme, the current statutory scheme, surveys unintended and quantitative effects the change has caused, and discusses how changes to the scheme have, in effect, changed a right into an entitlement.

The original compensation scheme was introduced in 1964, amidst concerted efforts to address “the inadequacy of restitution remedies,” and “the failure of the state to ensure the safety of its citizens.”³ It was non-statutory, *ex gratia*, and administered by a board made up entirely of barristers and solicitors appointed by the Secretary of State, in consultation with the Lord Chancellor.⁴ Determinations by legal professionals were considered more likely to be accepted by victims and their legal representatives than by lay persons or other civil servants.⁵ While compensation was made *ex gratia*, the scheme was said to have created an entitlement as opposed to charitable aid, as the system was funded by tax-revenue and administered as a form of support to the victims of crime.⁶ Despite this, its results were said to make no practical difference to victims who would otherwise pursue civil claims, save for an absence of appellate or ministerial review of awards.⁷ The board applied common-law principles in determining awards in a manner similar to negligence, including loss-of-earnings calculations, but without “exemplary or punitive damages”.⁸

While the burden for proving injury was by the balance of the probabilities, the board had wide discretion in making its determinations.⁹ This provided for awards to be made to any person within Great Britain, regardless of citizenship or domicile.¹⁰ There was a general requirement that an incident be reported without delay, but the board had discretion to waive the requirement where justified.¹¹ Applicants were not required to report crimes to law enforcement, but could have reported it to any person or agency deemed appropriate under the circumstances (i.e., a social worker, teacher, or the NHS).¹² In the event that a criminal prosecution ensued, the board was not required to adhere to any decisions made by the criminal courts in determining whether an applicant qualified.¹³ Similarly, an

¹ PJ Dwyer, 'Creeping conditionality in the UK: From welfare rights to conditional entitlements?' [2004] *The Canadian Journal of Sociology* 266, 276

² *ibid* 269.

³ A Samuels, 'Compensation for Criminal Injuries in Britain' [1967] *UTLJ* 20, 21

⁴ Home Affairs Section, *Criminal Injuries Compensation (Research Paper 95/64)* 10

⁵ *Ibid*.

⁶ Samuels (n 3) 21

⁷ *Ibid*.

⁸ Home Affairs Section (n 4) 5

⁹ Samuels (n 3) 25

¹⁰ *ibid* 22.

¹¹ *ibid* 23.

¹² N Sugarman, 'The Criminal Injuries Compensation Scheme 2012 and its impact on victims of crime' [2016] *JPIL* 231, 232

¹³ Samuels (n 3) 24

applicant could qualify even if there was no available recourse to a court for the injury.¹⁴ Also, prior offenses, unspent convictions, or bad character evidence by the victim would not absolutely bar an applicant from receiving compensation.¹⁵ The board could consider an applicant's history amongst all relevant circumstances. Although interest and legal costs were not recoverable, there was no upper award limit,¹⁶ and, funeral costs were recoverable, even by third-party payers.¹⁷

In the mid-1980s, proposals to codify a 'tariff' scheme in order to confer a right to compensation for victims of crime emerged.¹⁸ The result was the introduction of a statutory scheme in the Criminal Justice Act 1988,¹⁹ where the qualification was defined as a victim of *violent* criminal offenses.²⁰ This set a boundary to compensation, whereas in the previous scheme, a victim of any *criminal* act would qualify.²¹ The board would nevertheless make its determinations in the same fashion as the previous scheme. In 1996, efforts to further codify a right were fully realized through the introduction of the Criminal Injuries Compensation Act 1995, which was a complete overhaul in the administration of compensation. This included a "tariff sum of injuries" according to the types of criminal offenses plus provisions for loss earnings and "special expenses."²² The board model was abandoned for the role of 'claims officers' who administer claims,²³ and whose decisions are appealable to a first-tier tribunal.²⁴

While these changes were said to have created a right to compensation, several revisions to the scheme were introduced in 2012 amidst a period of "noted . . . governmental austerity".²⁵ The effect was a substantial reduction in the number of applicants to the scheme. Required conditions included that the act giving rise to injury be reported to the *police*,²⁶ that the victim cooperate fully with attempts to prosecute the perpetrator,²⁷ and that the victim be a British Citizen²⁸ with no prior history of offenses, unspent convictions, or bad character.²⁹ A two-year time limit to report was imposed, unless the victim was a child at the time of the act. If so, the crime has to be reported by the victim's twentieth birthday, or within two years from the act being reported, whichever is later.³⁰ The time-bar is waivable, but only if the delay is attributable to exceptional circumstances.³¹ For an extension to be allowed, a two-part test is employed: (1) whether there were exceptional circumstances that prevented the victim from reporting the incident earlier, and (2) whether an application for compensation could not have been reasonably submitted earlier.³² No compensation is payable for injuries resulting from intentional suicide, unintentional injury with a vehicle, unintentional injury from an animal attack, or for in utero injuries resulting from ingestion of harmful substances by

¹⁴ *ibid* 22.

¹⁵ *ibid* 35.

¹⁶ Sugarman (n 12) 231

¹⁷ Home Affairs Section (n 4) 6

¹⁸ *ibid* 1.

¹⁹ P Duff, 'Criminal Injuries Compensation: The Scope of the New Scheme' [1989] 518

²⁰ *ibid* 526.

²¹ *ibid* 518-519.

²² Sugarman (n 12) 231

²³ Criminal Injuries Compensation Act 1995, s. 3(4)(b)

²⁴ CICA 1995, s 5(1)

²⁵ Sugarman (n 12) 232

²⁶ Criminal Injuries Compensation Scheme 2012, para. 22

²⁷ CICS 2012, para. 23

²⁸ CICS 2012, para. 11

²⁹ CICS 2012, para. 25-27

³⁰ CICS 2012, para. 64

³¹ CICS 2012, paras. 88-89

³² Sugarman (n 12) 233

the mother.³³ Claims for mental injuries must be diagnosed as a 'disabling mental injury' by a qualified psychiatrist or clinical psychologist.³⁴ Gross award is now limited to £500,000,³⁵ and if loss earnings are claimed, the recoverable amount is equal to statutory sick pay (currently £89.35 per week).³⁶

The 2012 revisions were said to be "predicated on [the Government's] intention to do more for severely injured victims."³⁷ It was believed that conferring a narrowly drawn right to compensation would remove the 'entitlement' to compensation from victims who are less severely injured by a criminal act.³⁸ The consequences have been unintended: the time-bar and requirement that applicants assist with the prosecution of the assailant resulted in prosecutors sometimes having to dissuade victims from applying for compensation for fear that the application could be used as cross-examination evidence by defence counsel.³⁹ Given the complexity and potential for delay in a criminal trial, a victim may find themselves out-of-time to apply for compensation by the time proceedings are adjudicated.

In the first year (1996-97) of the 1995 scheme, there were 75,032 new applications submitted, 13,566 claims resolved, and 5,134 were denied—a rate of 38%. At the time, this was said to be consistent with the previous scheme. From 2011-12, the authority received 58,195 new applications, resolved 57,480 claims, and 30,219 were denied (52%). Cumulatively, this represented a 22% drop in new applications and a 14% increase in denied claims. From 2012-13, 47,889 new applications were received (a 17.7% difference), 53,821 claims resolved, and 25,455 were denied (47%). From 2013-14, there was a further 29.6% reduction in new applications (33,688), 42,859 resolved, and 28,307 denied (66%); a further 3.3% reduction in new applications (32,595) and 35,801 resolved, and 21,941 denied (61%) from 2014-2015; .5% reduction in new applications in 2015 (32,415), 28,512 resolved, and 16,722 denied (59%) from 2015-2016; and, a 2.6% reduction in new applications (31,563), 32,021 resolved, and 13,175 denied (41%) from 2016-2017.⁴⁰

Efforts to convert an entitlement to a legal right enjoyed by all citizens by virtue of a statutory scheme has had the opposite effect. Qualifying for compensation has been made so difficult, the right only applies to certain British victims of certain crimes who have no criminal history, have expeditiously assisted the state with prosecution, and are incapable of employment. Rather than redressing a failure of the state to protect its citizens, the administering body engages in an exercise of distributing tax-revenue to persons who narrowly qualify for the entitlement. This is the opposite of the intended effect. While the earlier scheme was labelled: *ex gratia*, access to compensation was enjoyed by far more applicants. The board had wide discretion to award compensation along common-law principles where the circumstances justified it. The conditions for qualification were situated in negligence: if the state failed its duty to protect its citizens, resultant damages were compensable. By acknowledging the state's duty to protect, victims of crime, in effect, enjoyed compensation on a footing equal to the enforcement of a legal right. While the current scheme is labelled a 'statutory right', the state has made it one that a citizen must qualify for under narrow conditions. This selectivity is inapposite to the function of a right enjoyed by all citizens and is more so on equal footing with an 'entitlement'.

³³ *ibid* 233-234.

³⁴ *ibid* 234.

³⁵ CICS 2012, para. 31

³⁶ CICS 2012, para. 47

³⁷ Sugarman (n 12) 232

³⁸ *ibid* 236.

³⁹ *ibid* 233.

⁴⁰ Criminal Injuries Compensation Authority, 'Annual Reports and Accounts' 1996-2017