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**WHEN OLD MEETS NEW:  
Civil Remedies in the Criminal Context –  
A New Proposal for Compensating Victims of Crime**

**JEAN-PIERRE A. LAPORTE,  
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**RÉSUMÉ**

L'article suggère que des modifications soient apportées au Code pénal et aux procédures provinciales pour permettre aux victimes de certains crimes de recevoir des réparations civiles, advenant l'obtention d'une condamnation au procès criminel. Les délits civils pour lesquels des dommages et intérêts seraient établis à l'issue de la poursuite au criminel seraient ceux qui comportent des caractéristiques semblables aux infractions pénales exemplaires (délit civil d'acte de violence, délit criminel de voies de fait). La réforme proposée cherche à maintenir les caractéristiques idéales du processus pénal en common law tout en favorisant une notion bien établie du droit civil. L'essai aborde certaines des critiques anticipées par les responsables et fournit une justification pour le dépôt sur le bureau de cette nouvelle procédure au Canada.

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## I. INTRODUCTION

In Canada, victims of a crime frequently have to enter the legal system twice: first, as a witness to ensure that the crime committed against them is prosecuted and a conviction attained; and second, to request an award for damages sustained from the same facts.<sup>1</sup> This duplication results in financial waste, poor resource allocation and lengthy delays. It can also be said to “revictimize” these victims.<sup>2</sup>

A successful criminal prosecution requires proof of the criminal act<sup>3</sup> beyond a reasonable doubt, a much higher standard than that found in our civil courts, where the balance of probabilities is determinative. Since a number of criminal offenses found in the *Criminal Code*<sup>4</sup> (CCC) have parallel equivalents in the law of torts (sister torts),<sup>5</sup> where the offender is found responsible for these offences under the higher criminal standard, the victim should be entitled to ask that same court for a finding of responsibility in tort.

This paper proposes the implementation of a Supplementary Civil Procedure (SCP) designed to help expedite the damage recovery process for a victim of certain crimes with sister torts. This paper will (a) demonstrate the current need for reform, (b) detail how the proposed SCP is designed to work within the current parameters of both the criminal and civil systems, (c) delineate the main advantages of the proposed SCP, and (d) allay many of the concerns surrounding the implementation of the SCP.

## II. PROPOSED SUPPLEMENTARY CIVIL PROCEDURE

### (a) The Need for Reform

Victims suffer in the first instance as a result of the crime(s) committed against them. Then, serving as the proverbial salt to these wounds, victims are often subject to lengthy, and frequently traumatic, criminal trials where their character is scrutinized and the veracity of their recount of the incident is vigorously contested. At the end of

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1. “Innocent victims” can also make a request to their provincial criminal injuries compensation boards. In Ontario the administrative tribunal administering the *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24 is called the Criminal Injuries Compensation Board. In those cases, the victim might have to deal with the justice system a third time. Alternatively, the Court may make an award of restitution to the victim, either by its own motion or by application of the Attorney General under s. 738(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (see note 4 below). The award of restitution is dealt with later in the paper.
  2. The literature on “re-victimization” is extensive and has led in Ontario to the enactment of the *Victims’ Bill of Rights 1995*, S.O. 1995, c. 6. On re-victimization see N. West, “Rape in the Criminal Law and the Victim’s Tort Alternative: A Feminist Analysis” (1992) 50 U.T. Fac. L. Rev. 96, W.A. Wiegiers, “Compensation for Wife Abuse: Empowering Victims?” (1994) 28 U.B.C. L. Rev. 247 and C.M. Kristiansen, “Bearing Witness to the Patriarchal Revictimization of Survivors” (1993) 20 SWAP Newsletter 7-16.
  3. Many criminal offences, other than the negligence offences, require proof beyond a reasonable doubt of the *mens rea* or intent.
  4. R.S.C. 1985, c. C-46.
  5. Examples of “sister torts” include: wrongful death (homicide s. 222), battery (assault s.265), conversion (theft s. 322), etc.

this daunting process, the victim is left no closer to her/his original economic or emotional position. If the victim seeks to be compensated for her/his injuries, s/he must bring a separate civil action. In so doing, the victim must again endure a costly and lengthy legal battle where s/he will likely have his/her character and motivation subjected to intense scrutiny.<sup>6</sup>

A second trial consisting of the same witnesses and the same evidence not only impedes and delays the recovery process for the victim, but also unnecessarily congests already backlogged courtrooms. Justice in this instance is anything but swift.

Under the current system, several attempts have been made to alleviate some of these duplications. For instance, the doctrine of *res judicata*, where a party cannot re-litigate a lawsuit finally decided, requires the parties in each of the proceedings to be identical. However, this doctrine does not preclude the re-litigation of a sister tort since the parties are not the same: the Crown is a party in the criminal proceedings and not in the civil proceedings.<sup>7</sup>

Under s. 738 of the *CCC*, the court, by its own motion, or the Attorney General, may request a sentence that includes an order to make restitution to the victim. While an award of restitution may alleviate the need to bring a separate civil action, such an award has limitations. First, the victim cannot bring a request for restitution of his/her own accord, but must rely on the court or the Attorney General to make the motion. Second, these awards are only available where the monetary damages are “readily ascertainable”<sup>8</sup> and s. 738 is not appropriate where there is any dispute contesting the quantum of the financial loss or where experts, accountants or actuaries may be required to testify.<sup>9</sup> Finally, any awards as to costs, interest, and other legal fees are not proper under the *CCC*.<sup>10</sup>

Simply put, something needs to be done to expedite the damage recovery process for victims of crime. This paper proposes a SCP similar to that in Germany and France, where victims of a sister tort can piggyback their civil action onto criminal proceedings.

### **(b) How the SCP Works**

Essentially, the proposed SCP would work as follows:

- Prior to the commencement of a criminal trial, a victim of an alleged crime may, through an *ex parte* motion, file with the court a “Request to be Added as a Civil

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6. The Law Society’s acceptance of contingency fees will certainly take a great deal of this financial pressure off the victim. However, it does force the victim to bargain with their counsel for a percentage of their damage award.

7. See for example *R v. Devgan* (1999) 44 O.R. (3d) 161, 136 C.C.C. (3d) 238 (C.A.) leave to appeal to the S.C.C. refused, [1999] S.C.C.A. No. 518 (QL).

8. Sections 738(1)(a), (b), (c).

9. *R. v. Zelensky*, [1978] 2 S.C.R. 940, 41 C.C.C. (2d) 97; *supra* note 7.

10. *Supra* note 7.

Party to the Prosecution".<sup>11</sup> The motion document must also be served on the accused to ensure that s/he is fully aware of the potential civil consequences and so that s/he may make arrangements to retain independent counsel for the SCP, if necessary.

- Subsequent to the filing of the Request, a written application asserting the claim may be filed at any time prior to the commencement of the hearing. Filing an application has the same effect as bringing a civil litigation action. The application must specify the subject of and the grounds for the sister tort claim, and should set forth the evidence. The application must be filed with the court and served on the accused prior to the sentencing hearing, but may be withdrawn at any time prior thereto. If the application is made before the main hearing begins, the applicant must be notified of the place and time of the main hearing.
- Upon the conviction of the accused and following the imposition of a criminal sentence, the court considers whether or not the sister tort alleged in the application was made out on the facts. At this point, the convicted defendant would be able to raise any defense available to her/him under tort law.<sup>12</sup> The defendant would have a right to call witnesses of his or her own and to cross-examine the victim.<sup>13</sup> The presiding judge would consider the record and, having heard all of the evidence, determine if on a balance of probabilities the tort has been made out.
- If the presiding judge feels s/he does not have the requisite evidence or expertise to make a civil finding, s/he can either call for such evidence to be heard or reserve judgment and have the issue sent to a regular civil trial.
- The SCP finding would have the same effect as a regular civil judgment. Therefore, the decision would not be contestable except through the appeal process. Similarly, a victim cannot lose on a SCP and then bring a regular civil action.
- If the court grants the application, the defendant may contest the decision through an appellate remedy that would otherwise be admissible, without contesting that part of the judgment concerning the criminal offense.
- If the conviction is quashed on appeal and the defendant is found not guilty of a criminal offense, the decision granting the SCP application would likewise be quashed, even if the judgment has not been contested in this respect.
- A regular civil action could be commenced subsequent to a SCP judgment only if the SCP judgment could not be upheld because the corresponding criminal conviction was quashed.

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11. The necessity of the *ex parte* is simply to avoid information leaks that may taint the judgement of a jury.

12. Disclosure of information would have already taken place as part of the Crown's obligation to divulge the Crown's case against the accused.

13. Assuming that such pertinent cross-examination has not already taken place during the criminal proceedings.

- All SCP judgments would be subject to the condition that all monies paid to the victim must be repaid in the event that the SCP finding (a) is overturned on appeal, or (b) cannot be upheld because the corresponding criminal conviction has been quashed.
- The Crown prosecutor may, at his/her discretion, allow the victim's counsel to assist in the preparatory work, a relationship the Crown may sever at any time. The accused/defendant would also be entitled to independent counsel for the purposes of the SCP.<sup>14</sup>
- An accused that chooses not to take the stand in the criminal trial may elect to take the stand for the purposes of the SCP.
- The SCP would not apply to plea bargains or to victims of young offenders.

The design of this proposed SCP is not novel. In fact, many of the above provisions parallel those set out in s. 404 (Application by the Aggrieved Person) and section 406a (Appellate Remedy) of the German *Civil Procedure Code*.

### III. MAIN ADVANTAGES OF THE SCP

The following details the numerous advantages to the implementation of this proposed SCP.

#### (a) Reduction in Frivolous Actions

It is anticipated that the introduction of the SCP would lead to a dramatic reduction in the number of duplicate civil actions. The necessity of proving one's case beyond a reasonable doubt at the criminal stage of the proceedings would do away with vexatious or frivolous actions. In a manner of speaking, the criminal court would act as a filter for civil suits. Victims who lost in criminal court would however retain the right to sue in civil court, as is presently the case.

#### (b) Greater Access to Justice

Victims of crime who could not sue in tort for lack of financial resources could piggy back on the existing legal resources maintained by the state. Crown attorneys and provincial enforcement services are already funded and established by the state. The SCP reform would not require an additional investment of the public purse. Countless victims of crime, currently left destitute through the crime they have suffered, would suddenly find a helping hand from the Crown attorneys that prosecute on their behalf. Both victims and defendants would be spared the expense of hiring counsel for a civil trial.

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14. Given the economies of scale produced by this reform, Legal Aid Ontario may extend coverage of accused persons to encompass the SCP, thereby fulfilling its mandate of providing equal access to justice for poor people in Ontario.

### **(c) Enhancing the Office of the Crown**

By providing Crown attorneys with the ability to offer victims immediate compensation for the crime suffered, the SCP would help to enhance the Crown's prestige. The state would be in the enviable position of acquiring the profile of a caring institution without incurring the costs, since those would be borne by the defendant.<sup>15</sup>

The introduction of private counsel-Crown attorney cooperation would also enhance the office of public prosecutor and soften the impact of any increase in workloads due to the SCP. A form of cross-subsidization of rich victims in favour of poorer ones may even result, whereby the help provided to the Crown by well-off victims may increase the amount of time available to the Crown to deal with "poorer" victims whose SCP claim goes underrepresented. In an era of tight fiscal planning, this kind of public-private partnership may prove to be tremendously economical.<sup>16</sup> To summarize, victims would be provided with swift access to their damage awards, at a reduced financial cost and without the fear of being re-victimized by a long and expensive second (or third) foray into the inhospitable legal system.

### **(d) Increased Perception of Justice**

Civic approval of the legal system legitimizes the legal process. For instance, the recent O.J. Simpson cases of murder and wrongful death angered many lay observers who simply could not reconcile how a man could be acquitted of essentially the same criminal act for which he was deemed civilly responsible. The legal system was therefore perceived as being flawed. This example demonstrates that public perception of justice being done is almost as important as justice actually being done. The SCP would not only provide greater access to justice, but would increase the perception of justice.

## **IV. DEALING WITH POTENTIAL CONCERNS**

As with any new idea, a number of objections are anticipated. In this section, we will attempt to address the common objections and demonstrate why none of them is serious enough to discard the reform advocated in this paper.

**Objection No. 1:** The separation of tort and penal law is a time honoured tradition in Anglo-Canadian law and ought not be disturbed.

One can quickly grasp the reason why the prosecution of tort actions ought not rest with the state. The state's resources are finite and the Crown should not be used to settle differences among private interests. However, the SCP reform would be limited to sister torts and would only become available upon a successful criminal conviction *after* the imposition of the criminal sentence. In reality, penal and tort law are not

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15. Of course, any award monies collected from a civil judgment would most likely have to be deducted from a possible CICB award (see *supra* note 1).

16. Also, the additional experience acquired by Crown attorneys may even enhance their own personal stock of human capital should they decide to follow different career paths later on in life.

polluting each other's conceptual spheres, the former simply precedes the latter, thus deriving more value for the resources expended by the state during the criminal trial.

**Objection No. 2:** The graft of civil procedure onto the penal body of law is untidy, conceptually flawed and bound to complicate rather than simplify matters.

It should be remembered that the SCP has a narrow field of application: it is limited to instances where crimes that have sister torts have been proven beyond a reasonable doubt. All of the elements of our Canadian criminal system are retained: plea bargaining, adversarial system, *Charter of Rights* protections, etc. The SCP's role would be to avoid the needless and costly duplication of legal procedures in the limited circumstances where there is a criminal conviction involving a sister tort that has caused damages. It would not abolish civil courts or tort actions. Separate civil tort actions would continue to be filed if, for example, the defendant is found not guilty or if no sister tort exists for the crime in question. Furthermore, the SCP procedure would be voluntary. The proposal explicitly states that "...a victim of an alleged crime may ... file with the Court". Nothing would prevent someone from suing in a civil court. Because its field of application is very narrow, the SCP does not make the process more complex. It simply makes better use of fixed assets (judge's time, courts, Crown attorneys) already present in the judicial system.<sup>17</sup>

Some readers may feel that the grafting of the SCP onto criminal prosecutions is intellectually untidy and confusing. Again, one must remember that such a procedure is a standard feature of various mature civilian judicial systems<sup>18</sup> and that unlike its continental counterparts, the Ontario SCP would be reserved exclusively for the sentencing phase of the criminal case.

**Objection No. 3:** The current victim compensation schemes already adequately address the needs of victims, thereby making the SCP reform superfluous.

First and foremost, awareness of victim compensation schemes is underdeveloped. Those that do file an application with the Criminal Injuries Compensation Board (CICB) must show that the crime was *violent*, and that they did not contribute to their own misfortune. For example, in *Re A.L. v. The Crimes Compensation Board (Sask.)*,<sup>19</sup> a woman living in an abusive relationship filed a claim for compensation following an assault which left her handicapped and resulted in the criminal conviction of her husband. The Board denied her claim on the basis that she "authored her own misfortune" by failing to report the violence to the authorities soon enough and by continuing to have sexual relations with him.<sup>20</sup> This case illustrates two of the shortcomings of compensation boards which the SCP seeks to remedy: (1) they require

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17. Some may see the SCP as a glorified tort equivalent to s. 738 of the *Criminal Code* (the Restitution Provisions).

18. In France for example, see Arts.85-91 C. proc. pén.

19. (11 September 1989), Saskatoon 508 (Q.B.).

20. Rosanna Langer, "Battered Women and the Criminal Injuries Compensation Board: Re A.L." (1991) 55 Sask. L. Rev. 453.

the victims to go on trial again to demonstrate their innocence, and (2) they pass judgment on people who have already had to suffer the trauma of being a victim.<sup>21</sup> The SCP could address these shortcomings by providing for contributory negligence rules (thus averting “all or nothing” awards) as found in the application to the CICB. The creation of an SCP would not eliminate recourse to the CICB. In certain cases, the defendant cannot be brought to justice and victims can always apply to obtain compensation in the absence of a successful trial.

**Objection No. 4:** By subsidizing the cost of private litigation, the SCP will encourage a flurry of actions.

At first glance, the floodgate argument is compelling. After all, if a victim has nothing to lose (since the Crown pays for the cost of legal representation for the SCP) there might be an incentive to turn away from the civil court and proceed by way of SCP in criminal court. This might lead to delays in criminal court, in direct violation of s.11 (b) of the *Charter*,<sup>22</sup> and have the potential of impeding the swift administration of justice.

Prior to Ontario’s adoption of contingency fees, this argument may have been more persuasive. However, Ontario’s recent evolution into the realm of the contingency fee clearly demonstrates that access to justice outweighs any concerns relating to champerty and/or maintenance.

Also, oddly enough, in spite of the courts’ overcrowded dockets, Crown attorneys and police departments often lament the fact that too few victims of certain crimes ever step forward and press charges, especially in the sensitive fields of sexual abuse and telephone fraud. One way to give victims an added incentive to press charges would be to give them a financial incentive to proceed with a prosecution. For example, a victim who witnesses a convicted assault perpetrator released on probation has very little incentive to speak out. A substantial civil judgment may however bring about some level of justice to the victim. Early detection of criminals via greater victim participation may also send a message that crime is unacceptable behaviour and will not be condoned by society.

The fear of increased frivolous prosecutions is unwarranted. The filtering concept provided by the higher burden of proof has already been mentioned. To further control spending, security for costs may also be required of victims for the extra preparation time required by the SCP. When one looks at the judicial system as a whole (criminal and civil streams), it becomes obvious that savings generated by the reduction of cases in civil courts could be passed on to subsidize their criminal counterparts.

**Objection No. 5:** The proposed SCP punishes offenders twice and compounds the injustice they would suffer in cases of wrongful convictions.

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21. Other disadvantages include: monetary caps and one year limitation periods.

22. *Canadian Charter of Rights and Freedoms*, s. 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11. Also see *R. v. Askov*, [1990] 2 S.C.R. 1199, 75 O.R. (2d) 673 and *R. v. Morin*, [1992] 1 S.C.R. 771, 71 CCC (3d) 1.

If a criminal conviction, followed by an SCP award in damages, both flow from a single set of facts are we not punishing the offender twice? The current legal system has no qualms about first sentencing an accused, and then forcing him/her to become a judgment-debtor. The SCP reform would not change the *status quo*. The possibility that an SCP award would compound the injustice created by a wrongful conviction is, however, a very legitimate concern. One could conceivably argue that the long delays inherent to civil actions give defendants “breathing room” and more opportunities to establish their innocence. Such breathing room is absent from the SCP scheme (notwithstanding the appeal process).

Aside from the fact that wrongful convictions of the *Marshall-Morin*<sup>23</sup> kind appear to be isolated occurrences in Canada,<sup>24</sup> there is nothing which would prevent a defendant/judgment debtor to pay his or her monies into court under the express condition that monies so paid are done so under duress and are prima facie recoverable under well established restitutionary doctrines.<sup>25</sup> Then, if the conviction was overturned, the funds disbursed to the original victim could be returned to the acquitted party, giving the Crown a subrogated right to recover the funds expended.

Also, all SCP judgments would be subject to an express condition that all monies paid to the victim must be repaid in the event that the SCP finding (a) is overturned on appeal, or (b) cannot be upheld because the corresponding criminal conviction has been quashed.

**Objection No. 6:** We should not squander precious Crown time attempting to get SCP awards from judgment-proof criminals.

This argument is, in part, based on the fact that victims face no cost under the SCP and may therefore be tempted to initiate proceedings against an offender whose financial resources would, under normal circumstances, discourage the launch of a lawsuit.<sup>26</sup>

While it may be true that a number of offenders may be judgment-proof, this ought not to deny victims access to future streams of income, such as income generated during incarceration, future employment streams, proceeds of life insurance payable to the estate of the offender, *etc.* Moreover, it is a gross overgeneralization to assume that all criminals are without financial resources. Drug dealers, phone scam operators and mob leaders, to name but a few, often accumulate substantial assets prior to arrest. When one looks to a crime which cuts across socio-economic categories, such as spousal abuse, it is fair to estimate that many of those offenders own some sort of

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23. *R. v. Morin*, [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193. Other well publicized cases involve P. Milgaard, Rubin Carter, Roland Cruz, Patrick McGuire, Rick Norriss and Joyce Ann Brown.

24. Although this is debatable and unfortunately virtually impossible to prove or disprove.

25. *Ex p. Simmonds; Re Carnac* (1885), 16 Q.B.D. 308 (C.A.); *Re Brown; Dixon v. Brown* (1886), 32 Ch. D. 597, *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.). See more generally Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990).

26. Cynics might even go so far as to say that the SCP is an extra form of harassment reserved for the indigent.

equity interest in real estate, whether it is a home, cottage or otherwise. The wealth locked into those assets should be made available to the victims of crimes.

Finally, the ability of victims to potentially reach into the pocket books of their aggressors has a certain deterrent value which should not be underestimated. The SCP drives up the price of criminal behaviour. The spectre of having one's wages garnished (due to an SCP award) may serve as a calming influence.

**Objection No. 7:** The SCP could potentially create a situation where the offender and the victim must participate in a long term debtor-creditor relationship.

It is quite conceivable that victims of crimes, especially violent crimes against the person, may not want to maintain a long term debtor-creditor relationship. To solve this problem, victims would be allowed to assign their interest to a third party (bank, collection agency, sheriff, *etc.*) who would act as an intermediary between victim and aggressor.<sup>27</sup> Incidentally, the long-term financial pressure created by the SCP on the offender may also have another positive side-effect: it may serve as a constant reminder of the gravity and seriousness of their actions.

**Objection No. 8:** Crown attorneys are not sufficiently qualified to serve as quasi-civil litigators.

As specialists in criminal law, Crown attorneys may be considered by some as ill suited to the task of advocating their client's case in the context of a SCP. Likewise, the defense bench may or may not feel adequately prepared to represent their clients in both criminal and civil proceedings. The proposed SCP rules alleviate these concerns not only by allowing the Crown to be assisted by private counsel, but also by allowing each party to hire independent counsel for the SCP.

## V. CONCLUSION

The reform advocated in this paper is long overdue. Countries of civil law tradition such as France and Germany have a long tradition of allowing victims to add themselves as civil parties to a public prosecution.

By advocating for the application of the SCP at the sentencing stage only, this proposed reform maintains the positive common law features of our criminal justice system. The SCP also holds the promise of opening the justice system to the destitute and embellishing the office of the Crown.

The potential benefits derived from the implementation of this SCP, including the overall perception of increased justice, are immeasurable and in no way impede the impartial application of penal law or place undue strain on the public purse.

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27. As a chose-in-action, a SCP award would have all of the characteristics of any other judgment from a civil court.