STATUTE LAW, INJURY AND COMPENSATION

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I Introduction

COMPENSATION IS a recurring theme in legislative and judicial law-making. Set in situations where physical harm and injury acquire a systemic character, or where compulsory appropriation of land or damage to property occurs, compensation assumes a range of guises depending on the role allotted to it. There is the element of replacement of losses that is immanent in compensation, although the irreplaceability of losses such as that caused by death or irremediable injury limits it. It has an instrumental existence, by which it may lend legitimacy, and a morality, when activities that cause injury or generate loss are tolerated, or promoted. There are times when it may merely represent a response, when one more appropriate or accessible is not sighted. It has developed sporadically, largely in response to situations of harm and injury associated with human activity, both legal (as in industrial operations) and illegal (such as crime). The Bhopal Gas Disaster, with the complex of questions it raised, showed up the uncertainties and tentativeness of the law making imperative an enquiry into the possibilities present in extant law. Compensation has been a dominant theme in the legal actions around the Bhopal gas disaster, and safety has been a critical sub-theme. This essay is the result of a survey of statute law to locate the places where compensation is situated, and, incidentally, notices where it is absent where it may have been expected to be.

II The Backdrop: the Bhopal Gas Disaster

The Bhopal gas disaster threw the law and its practitioners into turmoil. The range of matters that had been beyond the law's contemplation or serious concern were brought into bold relief, and the many incapabilities of the law and the judicial process stood demonstrated. Attempts to seal the loopholes in the law led to statutory changes as in the 1987 amendment to the Factories Act, 1948[1] the

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1. Chapter IV A, particularly. But s.7B (5), and the amendment to s.96, for instance, created a fresh set of inadequacies.

Public Liability Insurance Act, 1991 as amended in 1992, the Hazardous Wastes (Management and Handling) Rules, 1989, the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 and the Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996. The judiciary, in *M.C. Mehta* v. *Union of India*[2] introduced the doctrine of absolute liability, pronounced a deterrence doctrine of enterprise liability, and explored the deep pocket principle. In the same set of decisions, workers' right to participate in safety management was set out, and relocation of hazardous industry was mooted.[3] The February 1989 settlement-order of the Supreme Court in the Bhopal gas disaster case[4] cut short the opportunity to enunciate principles that may have dealt with risk and safety in industrial operations, established systems of liability and settled norms for computing losses and determining compensation.[5]

In the 20 years since the disaster in December 1984, there have been changes made to statute law which

- acknowledge the hazardous potential of industrial activity;[6]
- forge a link between industrial activity and the environment;[7]
- recognise enhanced risk of population residing around factories which hold or use hazardous substances or employ hazardous processes;[8]
- provide for immediate, even if minimal, compensation to those affected by 'accidents'.

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2. (1987) 1 SCC 395 (*Oleum Gas Leak* case).

3. *MC Mehta* v. *Union of India,* (1986) 2 SCC 176 and (1986) 2 SCC 325.

4. *Union Carbide Corporation* v. *Union of India,* (1989) 1 SCC 674.

5. It was also premised on a woeful underestimation of the numbers of those felled by the disaster, giving rise to serious consequences of under compensation, which is now under contest, and of corporate impunity to the extent of underpayment. The order dated 5.4.1989 of the Supreme Court in *Union Carbide Corporation* v. *Union of India,* AIR 1990 SC 273, explaining the reasoning on which it had ordered the settlement, was based on a figure of 3000 persons dead and a total of 2,02,000 persons variously affected by it. For more details see S. Muralidhar, *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims' Twenty Years of Courtroom Struggles for Justice*, (monograph), Fact Finding Mission on Bhopal, 2004, at 17-18.

6. Chapter IV A, Factories Act, 1948 as amended in 1987; Public Liability Insurance Act, 1991; the Hazardous Wastes (Management and Handling) Rules, 1989; the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 and the Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996.

7. Environment (Protection) Act, 1986.

8. Chapter IV A, Factories Act 1948 as amended in 1987.

The judiciary has (other than in the *Oleum Gas Leak* case,[9]) also forged responses to hazards, especially environmental pollution. This has included the imposition of pollution fine, and the enunciation of the 'polluter pays' principle, is an effort at effecting deterrence and at reducing free riding by industries.[10]

An inconclusive debate that continues to rage around the Bhopal gas disaster is set around compensation. Perceptions of incapacity of Indian courts to adjudicate 'mass torts' and to make Union Carbide Corporation, a transnational corporation, pay, led the Indian government to petition the US courts. Union Carbide protested, citing, among other reasons, the impossibility of an American jury envisioning the extent of poverty in which the Indian victims of the disaster lived, therefore being unequipped to judge the sum that would compensate them. The district court directed the payment of Rs 350 crores as interim relief, and the high court, on a different legal basis, reduced the sum to Rs. 250 crores;[11] and the Supreme Court settled the total claim at US $ 470 million.[12] The inadequacy of the amount, and the question of liability that it offset, remain unresolved by Indian law. The possibility of "multinational enterprise liability"[13] which could account for the inexpensive lives of third world citizens not being put at added risk has not been explored.

The law of compensation is situated in statute law and in judicial decisions. The importance of exploring the place that compensation has in law, has been enhanced by the inadequacy of the jurisprudential basis that could provide the link between harm and compensation for damage. The judiciary has found an answer, even if partial, in compensation as a response to harm and damage. Since the development of 'constitutional tort' in Indian law, particularly, the judiciary's use of compensation as a remedy has struck root.[14] Even earlier, in the late seventies and early

9. *Supra* note 2.

10. Joel Bakan would lend the appellation "Externalising Machine' to the free-riding corporation: Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power*, Constable, London, 2004, chapter 3.

11. The lawyer for the UCC, Fali Nariman, has since gone on record to say that the decision of the Madhya Pradesh High Court ordering Rs 250 crores as interim relief was correct, and he was wrong to have challenged it: Fali Nariman, "Some Reflections" *Seminar* 25 at 27 (vol. 544, Dec 2004).

12. Fali Nariman asserts, in a recent communication, that "it is on this very principle (polluter pays principle) that the settlement of 470 million US dollars was fashioned, and agreed to by the Union of India through its Attorney General…" Communication from Fali Nariman, *Seminar* 81 at 85 vol. 546 (Feb 2005).

13. Upendra Baxi, "Introduction" in Upendra Baxi and Thomas Paul, *Mass Disasters and Multinational Liability* (1986).

14. *Rudul Sah* v. *State of Bihar,* (1983) 4 SCC 141; *Nilabati Behera* v. *State of Orissa,* (1993) 2 SCC 746. See also the introduction of this remedy in NHRC's functioning: *Annual Reports of the NHRC* from 1993-94 onwards.

eighties, various benches of the Supreme Court had urged Parliament to introduce the notion of no-fault liability into law by which a sum could be paid to a victim of a motor vehicle accident, in the nature of immediate relief.[15] This was enacted into law in 1982.[16] Over a period of time compensation for death and harm arising out of negligence has been extended to encompass situations where a number of persons suffer injury and harm[17] and the quantum has sometimes edged, sometimes leapt, upwards.[18]

III Statute Law

Statute law is an arena in which an aspect of legal reality is sited. In its character as the codified and definitive statement of the law, statute law affects the processes which result in victim-creation, determines the dimensions of compensation, and reflects the priority accorded or denied to a victim. Attempting to unravel the complexity of the law's recognition and treatment of the victim begins by considering the generality of statutes, even as attention is transferred to laws which deal directly and obviously with victim compensation.

Risk and injury are central to the development of the law of compensation. There are situations where the risk, and the persons at risk, are recognised.[19] But, increasingly, especially since the advent of the automobile, and later with the growth of the chemical industry, the constituency at risk has become more amorphous. Involuntary risk bearers, choicelessness of risk and mass injury and death have become the province of the law. In reaction, there has been the rationalising in computing compensation, tribunalisation, and simplifying the procedure for the recovery of compensation. There has also been the significant movement from fault to no-fault, the provision of minimum sums as immediate compensation or relief, and an increasing reliance on insurance as a social security measure. The emergence of victimology in the domain of criminal law, which has been spurred on by the crisis in performance of the criminal justice system, and where the victim has over time become

15. *Manjushri Raha* v. *BL Gupta,* (1977) 2 SCC 174 at 175; *State of Haryana* v. *Darshana Devi,* (1979) 2 SCC 236 at 237; *Bishan Devi* v. *Sirbaksh Singh,* (1980) 1 SCC 273; *NKV Bros. P.Ltd.* v. *M.Karumai Ammal,* (1980) 3 SCC 457 at 458; *Motor Owner's Insurance Co. Ltd.* v. *Jadavji Keshavji Modi,* (1981) 4 SCC 660 at 673.

16. Chapter VII A, Motor Vehicles Act, 1939 as introduced by Act 47 of 1982.

17. *Association of Victims of Uphaar Tragedy* v. *Union of India,* (2000) 86 DLT 246; *Lata Wadhwa* v. *State of Bihar,* (2001) 8 SCC 197.

18. See, for e.g., *Klaus Mittelbachert* v. *East India Hotels Ltd.,* AIR 1997 Del 201, where the Delhi High Court ordered compensation of Rs 50 lakhs. Also see *Annual Survey of Indian Law* for the years 1994 to 2001.

19. See for example, the Workman's Compensation Act,1923 (WCA)

a bearer of loss without a remedy, has given compensation an added dimension.

There are over 175 legislations[20] which hold relevance while constructing the meaning that the law imparts to concepts such as costs, computability, loss-bearing, loss-spreading and deep-pocket, no-fault liability, no-fault compensation, insurance, state power, state responsibility and accountability. The enactment of priorities – of 'development', of 'national security', of law and order, are instances – emerging from this process. Recognition of the presumptions of victim-creation and the scarcity of spaces for questioning the necessity, justice, risk, danger, hazards and the choicelessness that often accompanies them, is made possible by a scrutiny that spreads its sights beyond the limits set by doctrinal discourse[21] on the law of compensation.

The legislations surveyed span a 140 year period, from the Fatal Accidents Act, 1855 (hereafter FAA 1855), before the advent of methyl isocyanate (MIC) and the motor car, to the National Environment Tribunal Act, 1995 (NETA 1995) enacted by the Indian Parliament in the age of mass tort and evolving hazard jurisprudence.

IV Mapping the Terrain : Personal Injury and Compensation

In mapping the terrain, the statutes are spread across a variety of concerns and interests. Of immediate and obvious relevance are statutes which deal directly with compensation for personal injury. Firstly, one could begin with an acknowledgement of the laws affecting labour and the workforce,[22] expressing, as they do, a concern with disease, disability, death and compensation.

Secondly, accidents and mishaps are perceived as inevitable in operating transport systems. Incidents of injury, disability and death connected with rail,[23] air,[24] sea and river travel[25] are recognised in the law, and compensation is no stranger to these laws. Motor vehicles have uniquely, and significantly, affected the growth of the law of personal

20. For a listing of the legislations, see Usha Ramanathan, "A Critical Analysis of the laws relating to Compensation for Personal Injury", Ph.D. Thesis submitted to the University of Delhi (2001), Appendix.

21. The Workmen's Compensation Act, 1923 and the Motor Vehicles Acts of 1939 and 1988 are the standard points of reference.

22. For e.g., WCA, Employees State Insurance Act, 1948 (ESI Act), PLIA, which, in s.4, excludes the workman as defined in the WCA from its operation.

23. Railways Act, 1989.

24. Carriage by Air Act, 1972.

25. Marine Insurance Act, 1963; Inland Vessels Act, 1917.

injury, and of compensation.[26] The escalating rate and severity of accidents have prompted changes in the law of compensation in motor vehicle accidents, including a recent legislative experiment involving the provision of a schedule of compensation in the interests of expediency.[27] The inflated role that motor vehicles have assumed in the economy and in spatial mobility, and the absence of a viable replacement for the motor vehicle, have influenced the direction of changes in the law.

Thirdly, there are the victims created in the exercise of state power. Army[28] and naval[29] exercises which dislocate people are recognised as potentially victim-creating, and a process is prescribed in the law for compensation.

Fourthly, there has been some widening of concern for victims of crime.[30] The criminal justice system, with its sight set on conviction and punishment, has an interest, however marginal, on compensating the victim of crime.

Fifthly, the presumptions of 'development' have found statutory tolerance for mass tort which may kill, maim and traumatise large numbers of people. Legislating 'hazard' is in the process of evolution. Till a more imaginative response emerges, compensation occupies centrestage in this arena of anxious activity.[31]

Sixthly, insurance as an approach to victim-caring has begun to appear sporadically, impacting on the nature and meaning of compensation.[32]

Seventhly, statutes set up or recognise funds which may constitute a resource for compensation.[33] The existence of a statutory fund could find the administration in a relative state of preparedness to deal with the immediacy of relief for victims. It could also have the effect of delinking liability and compensation. It could convert the process into an administrative exercise from the essentially judicial determination of liability, and of the individual's right to compensation that is otherwise within the law's ken. These effects that funds have on the meaning,

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26. Motor Vehicles Act, 1939 (hereafter MVA 1939) which has been replaced by the MVA, 1988.

27. Motor Vehicles (Amendment) Act, 1994, second schedule.

28. Manoeuvres, Field Firing and Artillery Practice Act, 1938.

29. Seaward Artillery Practice Act, 1949.

30. Criminal Procedure Code, 1973, (hereafter CrPC) s.357.

31. PLIA, NETA. See also the 1987 amendment to the Factories Act, 1948.

32. ESI Act, PLIA, MVA. See also *M.C. Mehta* v. *State of Tamil Nadu*, (1991) 1 SCC 283.

33. Juvenile Justice Act 1986, s.52 [replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000, s.61], PLIA 1991, s.7A, Central Excises and Customs Laws (Amendment) Act, 1991, s.6.

effectiveness and the justice component of compensation are dependent on concomitant changes in the law's treatment of causation.[34] It may, however, need to be considered that the unchanged status of the burden on the victim to establish the causal connection between a cause and the victim[35] may thwart the anticipated advantages of the device of the Fund.

Eighthly, the treatment of compensation in 'emergency' situations, as in wartime,[36] is expressive of the relationship between the priorities of the state, the purpose it envisages for compensation, and the importance it attaches to the compensating of victims.

Ninthly, the emerging institutions – as in the *Lok Adalats*[37] which are purportedly to enable speedy and inexpensive justice, and the Human Rights Commissions[38] which is the state's answer to the violation of human rights by agents of state – have an effect on perception of the victim, and of compensation.

Potential harm but no provision for compensation

A second string of legislations gain their significance from their *recognition of harm and the creation of victims*, even while they *statutorily ignore* the right of a victim to compensation. The Insecticides Act, 1968 exemplifies a class of statute which owes its existence to

34. "Causation" requires it to be demonstrated that an event caused or resulted in the death or injury of the victim: Hart and Honore, *Causation in the Law* 9 (1985: 2nd edn.). While a fund provides a resource for compensating the victim, it does not do away with the onus on the victim to establish causation. Epidemiological inferences in the area of mass tort, or issues of pre-existing condition, aggravation and causation are only yet in the margins of the law. It is, perhaps, conceivable that the distance that the Fund places between the person liable and the victim may reduce the adversarial vigour in challenging the victim's victim status.

35. In the era of mass tort involving hazardous substances, and despite the need the law sees for introducing no-fault compensation, the PLIA [s.3(1)] and the NETA [s.3(1)], for instance, have made no departure from the established requirement to demonstrate causal connection.

36. Personal Injuries (Emergency Provisions) Act, 1962, Statements of Objects and Reasons (hereafter SOR), enacted "for grant of relief in respect of – (*a*) personal injuries sustained by gainfully occupied persons and by persons of such other classes as may be specified; and (*b*) personal service injuries sustained by civil defence volunteers"; Personal Injuries (Compensation Insurance) Act, 1963 enacted to require employers to insure with the government, and to ensure that the injured workman is paid the entitlement under the WCA or the ESI Act. These legislations are concerned only with the "gainfully occupied person" [s. 2(4)] and during a "period of emergency". They were extended to cover the emergency declared in 1971.

37. The Legal Services Authorities Act, 1987 formalises this institution.

38. Protection of Human Rights Act, 1993.

large-scale victim-creation.[39] The statute asserts state authority in regulation and prosecution; the victim is left in a zone of opacity within which concern is voiced, but rights do not penetrate.[40]

The distinct presence of the victim, and the unmistakable denial of any statutory right to the victim to question or prevent processes which result in victim-creation, is frequently accompanied by the careful screening out of a right to compensation following victim-creation. Adulteration of food,[41] drugs and cosmetics[42] constitute instances. The regulation of processes of manufacture and sale, may be followed by prosecution where the norms set by statute are breached;[43] compensation is not even suggested. The threats inhering in atomic energy,[44] in petroleum installations[45] and in the manufacture of explosives[46] are met, exclusively, by the regulatory and monitoring regime of the law.[47] The neglect of compensation in these laws is noticeable in the Petroleum Act, 1934, for instance, which recognises victim-causing as a result of an explosion,[48] but makes the regulation for safety the sole concern of the law;[49] the victim finds no remedy within this statute.

Problems of public health[50] including epidemics,[51] witness statutes which give state instrumentalities blanket power,[52] and state action may actually *cause* individuals to fall victim to, for instance, an epidemic.[53]

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39. *Infra*.

40. The SOR of the Act acknowledges the existence of victims, and the possibility of future victims; but there are no victim's rights in the statute. See further *ibid*.

41. Prevention of Food Adulteration Act, 1954.

42. Drugs and Cosmetics Act, 1940.

43. See, for e.g., *id*. s.9A read with s.13; s.26 r/w s.29 of the Insecticides Act, 1968; s.16 of the Prevention of Food Adulteration Act, 1954.

44. See, for e.g., Atomic Energy Act, 1962: "3. Subject to the provisions of this Act, the Central Government shall have power - …. (*e*) to provide for control over radioactive substances or radiation generating plant in order to – (*i*) prevent radiation hazards; (*ii*) secure public safety and safety of persons handling radioactive substances or radiation generating plant; and (*iii*) ensure safe disposal of radioactive wastes."

The exclusion of an "accident…. by reason only of war or radioactivity" from the purview of the NETA [s.2(*a*)] emphasises the exclusion.

45. Petroleum Act 1934, s.28 "Inquiries into serious accidents with petroleum".

46. Explosives Act, 1884, s.8 "Notice of accidents", s.9A "Inquiry into more serious accidents".

47. For e.g., *id*. s.5; Atomic Energy Act, 1962, ss.14, 16 and 17.

48. *Supra* note 45, s.27.

49. For e.g., s.28 *id*. See also, the Inflammable Substances Act 1952.

50. For e.g., the Vaccination Act, 1880 which was enacted to effect small pox control.

51. Epidemic Diseases Act, 1897.

52. *Id*., s.2.

53. *Is Plague Over? A Citizen's Report on the Plague Epidemic* (mimeo: 1994) 11-12.

Not only is statute seen to be providing a protective shield to state action,[54] but the victim is left without any discernible remedy.[55]

The Armed Forces (Special Powers) Act, 1958 could be cited as one instance of state power which may extend 'even to the causing of death',[56] or the statute may acknowledge the victim-creation of 'innocents'[57] without providing for any right of a victim to a remedy within the law. The conservation[58] and environment[59] ethic, with its policing and punishing prescriptions imbedded in statutes, leaves out compensation where personal injury occurs.

There is evidently a dependence, which is not explained by experience, on the policing and regulation skills, and the commitment and capacity of state authorities to prevent victim-creation.[60] In other circumstances, there appears to be an abiding faith in the restraint and caution in the exercise of the power of violence which is legitimated by statute.[61] It is not unknown for these absences in the law of compensation

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54. The "good faith" clause is a regular feature in statute law, e.g., Epidemic Diseases Act, 1897: "4. Protection to persons acting under Act.– No suit or other legal proceeding shall lie against any person for anything done or in good faith intended to be done under this Act."

55. There is no "remedy" of compensation in the law; prosecution and punishment of the "public servant" (s.21, IPC) responsible for the victim-creation is hemmed in by the need to secure sanction to prosecute (s.197 CrPC); and, in the first instance, "obstructing public servant in discharge of public functions" (s.186 IPC) is a penal offence. See, generally, Upendra Baxi, *Liberty and Corruption* (1988).

56. S.4(*a*). Similar provisions are found in the Chandigarh Disturbed Areas Act, 1983, s.4; J&K Disturbed Areas Act, 1992, s.4; Armed Forces (J&K) Special Powers Act, 1990, s.4(*a*); Punjab Disturbed Areas Act, 1983, s.4.

It is also of interest that statutes incorporate the Nuremberg defence of acting under orders from a superior: see the National Security Guard Act, 1986, s.138, Central Industrial Security Force Act, 1968, s.21. It may be recalled that the defence was rejected at the Nuremberg and Tokyo trials: Minear, *Victor's Justice: The Tokyo War Crimes Trials* 43-44 (1971).

57. Terrorist and Disruptive Activities (Prevention) Act, 1985, SOR: "terrorists have expanded their activities ..... as a result of which several innocent lives have been lost and many suffered serious injuries". This also constitutes the justification for the state acquiring extraordinary powers, which legitimate the causing of a range of victims: *ibid*.

58. Wildlife Protection Act, 1972, s.11.

59. Environment Protection Act, 1986.

60. For e.g., the incidents of death by explosion in fireworks factories, including among its victims child labour, though the law prohibits the employment of children in the fireworks industry. See also, Usha Ramanathan, "On engaging with the law: Revisiting child labour" in 40 *JILI* (1998) 263. See further, Usha Ramanathan, "Law of Torts" in *Annual Survey of Indian Law* for the years 1994 to 2001, for the concept of "culpable inaction" of the police.

61. The wide, extraordinary powers given under the laws in *supra* note 56, and the expectation of judicious use of these powers may be contrasted with documented cases of police and army excesses: see, for e.g., *Annual Reports of the NHRC*.

to be remedied by policy: the schemes for paying compensation to victims of militant violence[62] exhibit an awareness of the statement of solace that compensation represents. Executive largesse too may substitute and sometimes supplement, statutory compensation.[63] It needs to be stated that the presence of compensation within the policy – or largesse — domain of state action does not render unto the victim a right to compensation, affecting the relationship between the victim, the state and the statute, and expanding the arena for administrative and political discretion.

Analogous law in non-personal injury contexts

A third strand of statutes cast their reflection on compensation for personal injury, though they belong to other regions in law.[64] Acquisition – permanent,[65] temporary[66] or partial[67] — of land, and intrusions into privately held properties[68] have seen the evolution of a meaning for compensation.[69] The ecological imperatives of preservation of the

62. See, for e.g., *Sri Lakshmi Agencies* v. *Government of Andhra Pradesh*, (1994) 1 Andh LT 341.

63. In *PUDR* v. *State of Bihar*, (1987) 1 SCC 265, the Supreme Court went a step further, to devise a "working principle" for payment of compensation to families of victims of police firing.

64. For instance, laws relating to compensation in circumstances other than personal injury, e.g. acquisition of land, or damage to property or the environment; laws recognising disability; taxation laws and laws affecting internal refugees, e.g., those displaced during the partition. See, for e.g., the postponement of proceedings initiated against soldiers before civil and revenue courts, and the deduction from periods of limitation while a soldier is serving under war conditions, could be considered to test their relevance to victims, including those who are victims of natural disasters, as part of a compensation scheme: see Soldiers (Litigation) Act, 1925.

65. Land Acquisition Act, 1894; Railways Act, 1989, s.11; Airports Authority of India Act, 1994, s.19. See also Usha Ramanathan, "Displacement and the Law" *EPW* 1486 (1996 Vol. 24). Some legislations straddle the two stools of compensation for land and recognition of personal injury, e.g., Wildlife Protection Act, 1972, ss.19,24,25 and 11; Atomic Energy Act, 1962, ss.21 and 17.

66. Manoeuvres, Field Firing and Artillery Practice Act, 1938, s.9; Seaward Artillery Practice Act, 1949, s.5. These legislations provide for compensation for land, damage to property and damage to person.

67. Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act 1962, s.10.

68. *Ibid.*

69. The development of the standard of "market value" in land acquisition law may be compared with the "earning capacity" standard that dominates personal injury compensation. There is no recognisable synonym in the law of compensation for personal injury for "solatium", found in land acquisition law, which is described

environment[70] while leaving the paradigms of development unchallenged, and the conservation of wildlife[71] and forests[72] have given rise to situations, including the displacement of peoples' abodes,[73] and of their continued use of resources,[74] which look to compensation to provide it at least partial popular legitimacy.

Statutes in response to the trauma, the economic and property dislocation, of internal refugees;[75] taxation laws which provide for deductions in the income of disabled persons[76] or excludes compensation amounts from being subjected to tax;[77] laws which encourage a manner of eugenics,[78] even as the creation of disability, and the imperfection that is its companion, is accepted in the working of the rest of the system, as unavoidable;[79] the priority given to claims of workmen while effecting a change in the legal character and ownership of an establishment, company or organisation,[80] are instances of laws that may be cited in a study of the relationship between statute law and compensation.

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as "a conciliatory measure for the compulsory acquisition of the land of the citizen": *Narain Das Jain* v. *Agra Nagar Mahapalika,* (1991) 4 SCC 212.

70. Environment Protection Act, 1986; Air (Prevention and Control of Pollution) Act, 1981; Water (Prevention and Control of Pollution) Act, 1974.

71. Wildlife (Protection) Act, 1972.

72. Forest Conservation Act, 1980; Forest Act, 1927.

73. *Supra* note 71, s.35.

74. Forest Act, 1927, s.16. For an exception carved out by statute, see Wildlife (Protection) Act, 1972, s.65 "Rights of Scheduled Tribes to be protected".

75. Displaced Persons (Compensation and Rehabilitation) Act, 1954; Displaced Persons (Debts Adjustment) Act, 1951; Rehabilitation Finance Administration Act 1948.

76. Income Tax Act, 1961, s. 80 U.

77. *Id.* s. 10 (10BB) re "payments made under the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 and any scheme framed thereunder except.... to the extent such assessee has been allowed deduction under this Act on account of any losses or damage caused to him by such disaster".

78. Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, s.4(2) and (3).

79. It is one thing to say, with Calabresi that it is a myth that "our society wants to avoid accidents at all costs": Guido Calabresi, *The costs of accidents* 17 (1971). It is altogether another to use state made law to suppress the costs of accidents *to the tortfeasor* to such a level that it rationalises victim-creation, and disability.

80. Dalmia Dadri Cement Ltd. (Acquisition and Transfer of Undertakings) Act 1981, s.18 read with Schedule; Hind Cycles Ltd. and Sen-Raleigh Ltd. (Nationalisation) Act 1980, s.19 read with Schedule; Gresham and Craven of India (P) Ltd. (Acquisition and Transfer of Undertakings) Act 1977, s.18 read with Schedule.

V Dominant Legislation[80a]

The Fatal Accidents Act, 1855

The *Fatal Accidents Act, 1855* (hereafter FAA 1855) is the oldest surviving central legislation which details the right to recover for loss occasioned by the death of a person caused by an actionable wrong.[81] The extent of recovery is to be determined by computing the loss sustained including, specifically, "loss to estate".[82] The rule contained in the maxim *actio personalis moritur cum persona* is displaced by this Act,[83] giving the family of the victim, or the legal representatives, the right to pursue a civil remedy which, by virtue of the Act, survives the death of the victim. This Act is, therefore, concerned only with situations where the victim dies. It is a matter of interest, when considering the effect that the language of the law has on perceptions of the victim and of compensation, that the Act speaks of fatal "accidents", though it is of relevance where the loss to estate is occasioned by an "actionable wrong". The language of accidents, it may bear mention, has persisted.[84] The Act has provided the basis for challenge where a diverse range of occurrences has caused death – from electrocution,[85] to collapse of a culvert,[86] to violent crime[87] where death results.

Criminal law

Criminal law is a manifestation of the monopoly of control over

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80a. This section is an illustrative exercise in locating the development of the concept of compensation, and of the various components of compensation, in legislation.

81. Long title to the Act.

82. FAA 1855, s.2

83. *Manjulagaori* v. *Gowardhandas Harjiwandas Rawal,* AIR 1956 Nag 86.

84. Explosives Act, 1884, s.8; Factories Act, 1948, s.88; Plantations Labour Act, 1951, s.16A. The WCA, s.3(2) deems an "occupational disease" to be "an injury by accident".

The National Environment Tribunal Act, 1995 defines an "accident" to be "an accident involving a *fortuitous or sudden or unintended occurrence* while handling any hazardous substance resulting in continuous or intermittent or repeated exposure to death of, or injury to, any person or damage to any property or environment but *does not include an accident by reason only of war or radioactivity*" (emphasis added). The Act provides for strict liability of the owner to pay compensation, dispensing with the requirement to establish fault.

85. *Macdowell* v. *FMC [Meat] Ltd,* 1968 Lab IC 1095.

86. *S.Vedantacharya* v. *Highways Department of South Arcot,* (1987) 3 SCC 400.

87. *Jagannath Singh* v. *Pragi Kunwar,* AIR 1949 All 448.

violence that vests with the state.[88] The involvement of an individual in acts of violence is governed by the law,[89] one aspect of which deals with punishment. Legal imagination has not succeeded in breaking away, in any significant manner, from the dual punitive prescriptions of imprisonment and fine.[90] In the relationship that the Penal Code, 1860, for instance, establishes between the state and the offence, it is the offender and the punishment which are the focus of the law. The victim is relegated to a part in the evidence.[91]

The deployment of the fine imposed as punishment in compensating the victim of the crime has held the attention of the law but marginally.[92] Therefore, the law cautions that the fine imposed should not be disproportionate as punishment,[93] a statement with which there can be little quarrel; if it is recovered, *some portion* of it may be tendered to the victim as compensation, as judicial discretion may dictate.[94] It is only since 1974 that a provision enabling the recovery of compensation, where fine is not imposed as punishment, was introduced into the law. Though this is a concession made in the interest of the victim,

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88. The Arms Act, 1959, Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereafter TADA), the Civil Defence Act, 1968, the Criminal Procedure Code, 1973, the Maneouvres, Field Firing and Artillery Practice Act, 1938, the Central Industrial Security Force Act, 1968 and the Indian Penal Code, 1860 are expressions of this aspect of state power.

Rather more subtle is the violence endorsed in adopting a model of development that unfailingly creates victims. See, the discussion on the cost of victim-creation to the "owner" of hazardous substances, *infra*. In it one may find an implicit endorsement of the varying magnitudes of violence it represents.

See also Roscoe Pound, *Social Control through Law* 49 (1942: 1968 Rep.) : "Many today say that law is power, where we used to think of it as a restraint upon power."

89. *Ibid.*

90. Forfeiture, externment (in police Acts which are state laws) are instances of other prescribed sanctions in the law. Whipping, though it continues to inhabit the Prisons Act, 1894, ss.46(12) and 53, was outlawed by the Whipping Act, 1955. The death penalty, despite repeated challenges to its constitutionality continues to be handed down with undiminished vigour: See, S.Muralidhar, "Hang them now, hang them not: India's travails with the death penalty" 40 *JILI* 143 (1998).

91. The exception is where the victim may participate in the compounding of offences, Cr.PC 1973, s.320 and while awarding compensation under Cr.PC 1973, s.357. See generally, K.N. Chandrasekharan Pillai (revised), *R.V. Kelkar's Criminal Procedure* (1993:3rd edn.) for the general neglect of victims' rights in criminal law. This could perhaps be explained by the attitude in the law that: "A crime is essentially a wrong against the society and the state". (Kelkar at 315). The victim is conspicuously absent.

92. Cr.PC 1973, s.357(2) and (3).

93. Penal Code, s.63.

94. S.357 (1) (b), (c) and (3).

compensation is dependent on conviction, and on the capacity of the offender to pay the determined amount. The right to compensation through the criminal justice system remains illusive,[95] even as the possibility of compensation is only an ancillary presence in the law.

Workplace injury

Compensation for *employment injury*,[96] on the other hand, has more directly engaged the law's attention. It has been suggested that it was pressure from British industry, which found the competitiveness in the market weighed against them at least partly due to the low burden of safety imposed on Indian industry, which resulted in the induction of a range of workplace related laws.[97] The statement of objects and reasons offers an explanation for its enactment. The 'complexity' and 'danger' of industry, the 'poverty' of workmen and the 'hardship' employment injuries cause, are reasons offered for inducting workmen's compensation into the sphere of legislated law.[98] The possibility that the losses represented by compensation may induce employers to adopt safety devices, reducing the extent and severity of victim-creation is suggested. Importantly, the 'benefits'[99] which this Act confers on the workman, "added to increased sense of security which he will enjoy, should," the legislature hoped, "render industrial life more attractive and *thus increase the available supply of labour*."

The relevance of this reasoning when waged labour is the norm, and unemployment is a cause for concern, has, it may be considered, naturally given place to the social security interests of a welfare state. It may also be considered that the merger of workmen's compensation with the contributory scheme in the ESI Act wherever possible has definitively relegated safety and prevention of victim-creation to a subsidiary position.[100]

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95. *Supra* note 1, chapter VI.

96. The WCA, ESI Act, provisions in the Dangerous Machines (Regulation) Act, 1983, Interstate Migrant Workmen Act, 1979, and the Apprentices Act, 1961 linking it to the WCA.

97. M.R.Anderson, "Work construed: Idealogical origins of labour law in British India to 1918" in Peter Robb (ed.) *Dalit Movements and the Meanings of Labour in India* 87-120 at 115 (1993).

98. SOR is an expression of the intention of the movers of the Bill; it is, however, not debated in Parliament. While this may detract from its value as an aid to interpretation of the statute, it assists in furthering an understanding of the context, intent and temporal relevance of the statute.

99. The language of "benefits" pervades law legislated for labour e.g., Maternity "Benefit" Act, 1961. The ESI Act actually speaks of "disablement benefit" (s.51) and "sickness benefit" (s.49).

100. See Bartrip and Burman, *The Wounded Soldiers of Industry* 3 (1983).

The WCA 1923 is an instance of the limiting of liability that the statute could impose.[101] *Firstly*, it confines its application to workmen who fulfil two criteria: that they are in organised industry, and that the occupation is hazardous.[102] *Secondly*, it fixes a ceiling on the wages to be taken as the basis for computing compensation, artificially restricting the earning capacity.[103] *Thirdly*, it does not compensate for injury, only for disability and death, and there is a link that the law establishes between death, disability and earning capacity.[104] *Fourthly*, it treats injury and disability as linear factors, not laterally inclusive and not accounting for the many victims that may be present in one victim-person (victimage).[105] *Fifthly*, the loss sustained, where it does not extend beyond three days, by reason of an employment injury and disability are left to be borne by the victim-workman.[106] And *sixthly*, drastic reductions are effected in the multiplicand as a set-off to lumpsum payments of compensation.[107]

An aspect of the WCA 1923 which has influenced the laws of compensation that have followed is found in the factors enunciated therein for computing compensation. Age,[108] wages,[109] extent of disability[110] and the multiplier specified in the Act,[111] along with the existence of dependants[112] constitute the components of compensation. The percentage of deduction while making lumpsum payments which is

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101. See *infra*, for a discussion on the nature of statute law.

102. WCA, 1923, SOR

103. *Id.* s.4 (1) explanation II.

104. *Id.* s.4.

105. The concept of "victimage" has been introduced into Indian legal discourse via the *Bhopal Gas leak Disaster* case, but is yet to penetrate either the statutory, or judicial arena: see Upendra Baxi **"**Introduction**"** in Upendra Baxi and Amita Dhanda, *Valiant Victims and Lethal Litigation xii* and *liii-lvi* (1990).

In contrast, see WCA 1923, s.4(1)(*c*) explanation I: "Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries." Income replacement, and the limiting of compensation, are reflected in this provision.

106. It is called the "waiting period": WCA, ss.3(1) proviso (*a*) and 4(2)(*ii*).

107. *Id.* s.4(1). The multiplicand is "the quantity to be multiplied" correlated with the multiplier, which is "the quantity by which another (the multiplicand) is multiplied": *The Shorter Oxford English Dictionary on Historical Principles*, Vol.II, 1371.

108. *Id. s*chedule IV.

109. *Id. r*ead with s.2 (1) (*m*).

110. *Id. s*chedule I.

111. *Id.*, schedule IV.

112. *Id.*, s.8 (4) read with S.2 (1) (*d*).

detailed in the Act is a feature that has entrenched itself in the law.[113] *A priori* structuring of the extent of disability that various injuries and losses signify attempts to simplify the exercise, assisted by medical testimony.[114] The listing of occupational diseases,[115] and deeming them to be employment injuries,[116] is a work of legal fiction intended to bring the disability[117] it generates within the formula spelt out in the Act, even as it restrains the development of the law within the boundaries of statutory language.[118] The Act, in this process, stresses on *precision* in its attempt at pragmatism.[119]

A change it makes from the FAA 1855 is in its treatment of dependency. While the FAA 1855 concerns itself with loss to estate, and speaks of the 'family' of the victim,[120] the WCA 1923 spells its categories of 'dependants' differently. [121] Where the Commissioner appointed under the Act is satisfied after inquiry that no dependant exists, the compensation amount – other than funeral expenses which is to be paid to the person who bore the cost – shall be *repaid* to the employer.[122] Where death results from an employment injury, the fact of dependency, then, has a centrality which is accorded by the FAA 1855 to the loss borne by the estate.

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113. *Supra* note 20 chapter V.

114. WCA, s.4 (1) (*c*) and (*d*) read with schedule I and schedule II.

115. *Id.*, schedule III.

116. *Id..*, s.3 (2).

117. The term adopted by the statute is " disablement", e.g., at s.4 (1) (*b*).

118. The clubbing together of employment injury and occupational disease denies the difference. Questions of causation, which are particularly relevant to occupational diseases; the perception of risk where an employment is recognised as holding the potential to cause a disease; the absence of a right beyond compensation for disablement, to a shift to a less hazardous occupation – these are subscribed in the language of employment injury.

See also, Jane Stapleton**,** *Disease and the Compensation Debate***,** 1 (1986).

119. Pragmatism here refers to an improved reality: see Usha Ramanathan *supra* note 60 at 279. Defining the contours of compensation could be seen as increasing the possibility of workmen receiving a reasonable sum in compensation.

120. FAA 1855, s.1A where the "action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused".

121. WCA, s.2(1)(*d*), where dependants include "a minor legitimate son, an unmarried legitimate daughter, or a widowed mother", thus qualifying the right of the family to receive the compensation. If "wholly dependent on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm". And "if wholly or in part dependent on the earnings of the workman at the time of his death", the dependants include "a widower", "a minor child of a pre-deceased son", "a minor illegitimate son", "a widowed daughter-in-law", among others.

Presumed relevancies of dependency, and of morality, are evident in this classification.

Harm, injury and the activities of the state

Another facet of statutory compensation involves the *state as the agency causing harm and injury*. It is unusual to find the state admitting, in a statute, to causing compensatable injury or death. The Manoeuvres, Field Firing and Artillery Practice Act, 1938 is one exception. The priority of defence is the justification[123] for the death and injury that is acknowledged as resulting from state action. The prelude to the legislation bespeaks compensation for the inconvenience of temporary displacement of the people from an area declared to be a danger zone, as well as for "any *damage*[124] to person or property or interference with rights or privileges arising from such manoeuvres including expenses reasonably incurred in protecting person, property, rights or privileges.[125]

Having admitted to the right to compensation, however, the process adopted in the law for acquiring rights over land predominates. The collector of the district is to depute one or more revenue officers (RO) to accompany the forces engaged in the manoeuvres for determining compensation.[126] The RO is given the authority to consider all claims, conduct local investigation, give a hearing to the claimant, and determine the amount to be paid.[127] The compensation is then to be disbursed "on the spot to the claimant".[128] A dissatisfied claimant may get a hearing before a commission consisting of the collector, a nominee of the officer commanding the forces and two persons nominated by the district board.[129]

The statute declares that the decision of the commission be final, and that "no suit shall lie in any civil court in respect of any matter decided by the commission".[130] This ouster of jurisdiction of courts,[131]

122. *Id. s.*8(4). This further limits the costs to the person liable.

123. Manoeuvres, Field Firing and Artillery Practice Act, 1938, SOR.

124. The use of the term "damage" and not "injury" could be seen as an indication that the emphasis on damage to property is more pronounced than on injury to the person.

However, for an occasional statute which uses the language of "injury" to property, see the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962, s.10(3)(*iii*).

125. Manoeuvres Act, 1938, SOR.

126. *Id.*, s.6 (1).

127. *Id.*, s.6 (2).

128. *Ibid.*

129. *Id.*, s.6 (4).

130. *Id.*, s.6 (6).

131. The ouster of jurisdiction of civil courts cannot, however, displace constitutional remedies under Article 226: see the discussion on ouster clauses in Jain and Jain, *Principles of Administrative Law* 642 *et seq* (1986: 4th edn.).; C.K. Thakker, *Administrative Law* 226-28 (1992).

combining with the absence of norms for computing compensation, emphasises the administrative nature of the exercise. The unequal bargaining positions of the persons and authorities involved in this negotiation doubtless has an impact on compensation.[132] Compensation as a right is further eroded in the Manoeuvres Act when a provision therein which deals with "offences" is considered.[133] Any person who enters or remains in the danger zone "without due authority" when such presence is prohibited by notification under the Act, is punishable. The fine is a relatively small sum – Rs.10.[134] Yet, the person seeking the remedy in compensation may have to admit to having committed a breach of the law – a definite factor of dissuasion.

The defence exercises, which this Act endorses require large stretches of open country "under conditions similar to those of war."[135] Experience has shown the particular vulnerability of tribal populations.[136] Yet, even as the Constitution promises protection to tribal populations,[137] the whittling away of their rights continues from the pre-Constitution era.[138] The ouster clause has effectively contained the osmotic evolution of the statute in its encounters with the judicial mind.[139] The provision for compensation, then, has neither evolved within the confines of the statute, nor has it influenced the development of the law on the subject generally.

There are two features of compensation provided in the Railways Act, 1989 which are of especial interest. First, the Act prescribes a maximum extent to the compensation payable.[140] The ceiling on the

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132. The neglect of the issue of compensation for the 81 persons recorded as killed in firing at Balliapal is a demonstrated instance. Not even the Supreme Court thought it necessary to address this issue: *Sudip Majumdar* v. *State of Madhya Pradesh,* 1994 Supp 2 SCC 327.

133. Manoeuvres Act, 1938, s.12.

134. *Ibid.*

135. *Id.,* SOR.

136. See for e.g., *Sudip Mazumdar, supra* note 132.

137. Constitution of India, part X articles 244, 244 A.

138. Represented, *inter alia,* in the Manoeuvres Act, 1938.

139. The evolution of meanings of a statute through the processes of interpretation, clarification, extrapolation, expansion and constitutional testing are denied where it is not agitated in a court. Manoeuvres Act, 1938, as reported in the *AIR Manual* (4th edn: 1984), for instance, cites no case which has passed through the courts.

140. Railways Act, 1989, s.124 read with Railway Accidents and Untoward Incidents (Compensation) Rules 1997, R.4 which declares that the total compensation "shall in no case exceed Rs.4 lakh in respect of any one person". The 1990 rules had provided for a ceiling of Rs.2 lakhs. Railway (Compensation) Rules 1989 which were superseded by the Railway (Compensation) Rules, 1990, prescribed compensation at half the amounts fixed by the 1990 rules. Compensation for death caused in a railway accident was at Rs.1 lakh in 1989; by 1990, it had doubled to Rs.2 lakhs. The loss of a thumb which would have cost the Railways Rs.30,000 under the 1989 Rules, was valued at Rs.60,000 in 1990, and Rs.1,20,000 in 1997.

quantum of compensation is balanced against the *presumption of liability*.[141] The second aspect is the description and treatment of what the law terms an "untoward incident".[142] This term represents an amalgam of concerns, including in its ambit the commission of terrorist acts.[143]

The movement towards no-fault compensation[144] may offer one explanation for the presumption of liability that is the underlying principle in the Railways Act. The reduction of transaction costs,[145] and the balance of probability which makes it reasonable to assume that a passenger involved in a train accident would be entitled to receive compensation may be reasons too. Therefore, where an accident occurs, by collision, derailment or otherwise, involving a train carrying passengers, the Act statutorily recognises a right to compensation "whether or not there has been any wrongful act, neglect or default on the part of the railway administration."[146] The assumption of responsibility is, however, statutorily restricted to the "passenger"[147] – *i.e.*, to "a person travelling with a valid pass or ticket" or a railway servant on duty. Also, while the law prescribes a statutory maximum, compensation is to account "for loss occasioned by the death of a passenger dying as a result of such accident, and for physical injury sustained as a result of such accident".[148]

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141. The Carriage by Air Act, 1972, SOR, gives this explanation: "The [Warsaw] Convention [1929] balances the imposition of a presumption of liability on the carrier by limiting his liability for each passenger to....".

142. Railways Act 1989, s.123(*c*), inserted by the Railways (Amendment) Act 1994.

143. *Ibid.*

144. The movement of the law towards the no-fault principle is witnessed in the laws discussed *infra*, including the MVA, the PLIA and the NETA.

145. The costs of the transaction for determining liability, the extent of the loss and the computing of compensation, which includes the costs of adversarial litigation and of individual determination of loss and compensation, are reduced by (1) not combating the existence of liability; (2) pre-determining the value of each loss; (3) non-recognition of losses which are difficult to compute and (4) providing a tribunal whose task is to deal with claims arising against the railways.

146. Railways Act 1989, s.124.

147. *Id.*, s.2(20) read with s.124 explanation. s.124-A which deals with compensation for untoward incidents, in its definition of a 'passenger' for the purposes of compensation alters the general definition in s.2(29), and includes ".....(*ii*) a person who has purchased a valid ticket for travelling, by a train carrying passengers, on any date or a valid platform ticket and becomes a *victim* of an untoward incident." This is the introduction of the "victim" to the law.

See also, for instance, MVA, 1988 as amended in 1994, s.163 A(1).

148. Railways Act, s.124.

Subordinate legislation,[149] explicating the method of determining compensation, does refer to the reduced capacity to do work[150] and to a reliance on medical evidence,[151] which to that extent is synonymous with the WCA 1923. With this significant difference: while the WCA 1923 is concerned with the *percentage loss of earning capacity*[152] that various injuries entail, compensation for railway accidents are quantified according to the *injury caused*.[153] The equalising that this scheme of compensation effects, which shifts the focus from earning capacity to the injury sustained, is a feature that distinguishes it from the WCA 1923.

"Pain and suffering",[154] and non-scheduled "injuries" are also within the recognition of the law, as the claims tribunal, set up specifically to deal with claims arising under the Railways Act, may determine to be "reasonable".[155]

The presumption of liability, the ceiling on compensation, the acknowledgement of a relationship of responsibility only with a passenger, and the specificity with which compensation is defined in subordinate legislation have the effect of *restricting* the persons to whom compensation may be paid, even as it limits the extent of compensation. The notion of *full compensation*[156] is left unexplored here, as in all

149. The Railways Act 1989, merely mentions compensation for an injured passenger. It leaves the task of detailing the extent of the compensation to subordinate legislation, in the form of the Railway Accidents and Untoward Incidents (Compensation) Rules, 1997.

150. Railway Accidents and Untoward Incidents (Compensation) Rules 1997, r.3.

151. *Id.*, r.3 (3).

152. WCA, s.4 read with Schedule I.

153. Railway Accidents and Untoward Incidents (Compensation) Rules, schedule. The loss of a thumb would represent a 30 per cent loss of earning capacity under the WCA, while it would be valued at Rs.1,20,000 under the Railway Accidents and Untoward Incidents (Compensation) Rules, regardless of earning capacity.

154. This head of compensation has been a consideration in judicial determination of compensation. It now finds place in two statutes: the Railways Accident and Untoward Incidents (Compensation) Rules, 1997, R.3(3) under the Railways Act, and the MVA 1988 by amendment in 1994. Its absence from the heads of claim set out in the NETA is, however, conspicuous.

155. Railway Accidents and Untoward Incidents (Compensation) Rules, r.3(3).

156. There is no denying that detailing the components of "full compensation", or even achieving conceptual clarity, is a difficult task. The quantification of secondary costs is not easily achieved with any degree of precision. The monetising of compensation, and the impossibility of retrieval or replacement of that which is lost, only adds to the complexity.

Yet, the non-consideration of that which cannot be quantified negates the existence of these losses, and places a premium on that which can be computed and compensated. Neither deterrence in victim-creation, nor care of the victim, is fostered by the neglect, in the law, of these costs.

other existing statutes.[157]

The assumption of responsibility for compensation has been extended by the introduction into the law of a category of occurrences which may cause injury or death – what the law terms "untoward incidents".[158] It is clear from the definition of the phrase – which includes terrorist acts, robbery and rioting, as it does the accidental falling from a train of a passenger[159] - that this provision extends beyond the contractual relationship between the passenger (including here a person holding a valid platform ticket) and the railway administration. The acquisition of the status of a passenger appears to provide a manner of insurance for a range of incidents that may occur while the person remains a 'passenger'.

This assumption of responsibility for an act over which the railway administration has no direct control, and which is not an incident of the activity it is involved in, is a significant departure from the law so far legislated. It is also of particular interest that this is the first, and so far only, statute which provides for compensation to persons killed or injured in terrorist acts; though the violence and bloodshed that is the character of terrorism is alluded to with remarkable regularity while statutorily aggrandising state power.[160]

It may be observed that the Railways Act recognises the imminence of the need for compensation which may result from an accident, or untoward incident. It provides for an administrative exercise where the victim applies for, and the railway administration may grant, *interim relief* to an extent not greater than the amount of compensation that would be paid.[161] The capacity for waiting for the compensation to be computed and paid is enhanced by this payment.[162] The relative lack of complexity in determining issues of causation, and of assessing the extent of compensation that may become payable, makes this a workable

157. The Electricity Act, 1910, s.19 is an unusual provision which requires a licensee to "make full compensation for any damage, detriment or inconvenience caused....". This, of course, is not in the region of personal injury.

158. Railways Act, 1989 as amended in 1994, s.124A.

159. *Supra* note 143.

160. The Chandigarh Disturbed Areas Act, 1983, SOR; ".....secessionist elements.... have been indulging in violent activities, terrorist methods....."; the National Security Guard Act, 1986, SOR: "For some time past, terrorism has been steadily assuming menacing proportions in the country. These elements have been indulging in wanton killings, arson, looting and other heinous crimes such as hijacking, mass murders, etc...."; the TADA (Prevention) Amendment Act, 1991, SOR: "....terrorist violence still continued unabated, it was decided to further extend the said Act". [TADA lapsed on May 23, 1995.] These are instances of laws which invoke the reason of extremist violence to consolidate state power; the victims are not cited in the text of the statutes.

161. Railways Act, 1989, s.126.

162. See *infra* on the PLIA.

proposition, a contrast being witnessed in the Public Liability Insurance Act, 1991.[163]

Vehicular accidents

The mounting victims of *vehicular traffic* have been the cause of rising concern.[164] From the Stage Carriages Act, 1861 to the Motor Vehicles Act, 1988 (hereafter MVA 1988) has been a long journey. Faster, burgeoning numbers of vehicles, of various sizes, shapes, speeds and uses have been a spur to accidents, often resulting in fatalities or severe injury. Unlike the WCA 1923 and the Railways Act, 1989, for instance, the victim of a motor accident has no prior relationship with the owner, driver or insurer of a vehicle.[165] The question of risk bearing, and whether a victim is an inferior or superior risk bearer,[166] is therefore, not of particular relevance in the context.

The MVA, 1988 is an exercise in classification, regulation, standard-setting and compensation. Drawing apart from its predecessor – the FAA 1855 which covered the field of fatal vehicular accidents too – it has experimented with a variety of devices, including in the area of compensation. *First*, it has inducted the principle of no-fault compensation.[167] The injustice of letting the costs lie where they fall,[168] and making the victim bear the entire loss, where proving fault is the primary requirement of the law, perhaps justifies the shift. Yet, to transfer the entire costs to the individual driver or the owner regardless of fault, would not account for the secondary effects such liability would generate

163. *Ibid.*

164. MVA 1988, SOR. See also, *119th Report of the Law Commission on access to exclusive forum for victims of motor accidents under the Motor Vehicles Act 1939* (1987); *85th Report of the Law Commission on claims and compensation under chapter 8 of the Motor Vehicles Act 1939* (1980); *51st Report of the Law Commission on compensation for injuries caused by automobiles in hit-and-run cases* (1972).

165. *Calabresi* at 90: "In theory, drivers might seek out all the pedestrians whom they could conceivably injure, offer them an amount of money in exchange for taking the risk, receive counteroffers from them, and ultimately strike bargains establishing market values for the car-pedestrian accidents. But such bargains are inconceivable in reality."

166. Richard Posner, *An Economic Analysis of Law* 127 (1977: 2nd edn.). See, generally, Mary Douglas, *Risk Acceptability According to the Social Sciences* (1986) particularly on risk-taking, risk acceptability and risk and choice.

167. MVA 1988, s.140.

168. This notion has been adapted from *Calabresi* at 133, where he refers to "leaving accident burdens where they happen to fall". As adapted, it is a reference to the losses and costs to the victim generated by the accident.

to the person made to bear the costs.[169] While reckless and negligent driving has acquired the legal character of a crime,[170] the law's treatment of motor vehicle accidents as an incident of civilised living is of relevance in understanding the nature of compensation law in this field.

The law strikes a balance when it requires that a sum specified by statute be paid to the victim of a motor vehicle accident without having to demonstrate fault, where death or permanent disablement results.[171] This does not preclude the remedy a victim may have in pursuing a claim for a greater amount in compensation.[172] This arrangement provides a minimum remedy for the victim while yet not altogether dislocating the owner or driver.

Secondly, compulsory insurance, and cover for third party risks,[173] have been the means adopted by the law to spread the costs both intertemporally[174] and interspatially,[175] providing a means to compensate a victim without having to resort to deep pocket[176] remedies which may draw totally on the resources of the owner/driver.

Thirdly, the compensation for victims of hit-and-run accidents, where death or grievous hurt[177] occurs, is provided in the law.[178] It is the existence of insurance which makes this compensation possible. With no person identified and charged with having caused death or grievous hurt, with the vehicle which caused such hurt or death remaining untraced, the MVA 1988 mandates the formulation of a scheme involving

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169. The social and economic dislocations that this may entail where the cost-bearer has to resort to deep-pocket remedies would keep the costs of the accident high, even where the cost to the victim may be lessened: *Calabresi* at 40.

170. IPC, s.304 A.

171. MVA 1988, s.140, as amended by the Motor Vehicles (Amendment) Act, 1994 quantifies no-fault compensation at Rs.50,000 in cases of death and Rs.25,000 in cases of permanent disablement. No-fault compensation does not extend to other categories of disablement or injury. Contributory negligence or fault of the victim is no ground for reducing this compensation, *id.* s.140(4).

172. *Id.* s.141 (1).

173. *Id.*, s.146.

174. Spread over time: *Calabresi* at 21.

175. Spread over people: *ibid.*

176. In contrast with loss spreading and risk distribution, deep pocket delves into the resources of some person(s) to recover the costs generated by an accident. See *Calabresi* at 28.

177. Instancing definition by statutory induction, the MVA 1988, s.161(1)(*a*), imports the meaning given to "grievous hurt" in the IPC, into this statute.

178. MVA 1988, s.161. This provision was prompted by the decision of the Supreme Court in *M.K. Kunhimohammed v. P.A. Ahmedkutty*, (1987) 4 SCC 284. As with no-fault compensation, the statutorily prescribed quantum of compensation was raised from Rs.8500 for cases of death and Rs.2000 in cases of grievous hurt in 1988 to Rs.25,000 and Rs.12,500 in 1994.

those carrying on general insurance business in India in providing for the payment of compensation "in respect of the death of, or grievous hurt to, persons resulting from hit-and-run accidents."[179] The spreading of costs, as the law envisages it, could spill over beyond the insured community of motor vehicle users/owners, and into the broader categories of the insured. The amounts to be paid to victims is fixed by the statute, requiring it to be incorporated into the scheme.

The *fourth* component of compensation in the law was introduced into the statute by amendment in 1994. It is what the law terms "payment of compensation on *structured formula basis*".[180] A schedule appended to the MVA 1988 details the compensation to be paid for "third party fatal accidents/injury cases claims".[181] The schedule is riddled with errors, is lacking in clarity, and contains internal inconsistencies.[182] Also, the newly introduced provision leaves vague the relationships between the claims for compensation on the structured formula basis where no fault need be proved, and where the victim bases the claim on fault liability.[183] It will need judicial experience, or legislative amendment, to explain the meaning to be accorded to these provisions.

What is immediately evident is the entrenching of income replacement as the dominant consideration. The schedule undertakes identification of factors other than income replacement which are to be considered in computing compensation – including funeral expenses, loss of consortium, loss to estate, medical expenses and pain and suffering (which is a factor not accounted for where death results).[184] It quantifies

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179. *Id.* s.161 (2).

180. *Id.* as amended in 1994, s.163-A.

181. *Id.* second schedule.

182. The Supreme Court commented on this in *UPSRTC v. Trilok Chandra*, (1996) 4 SCC 362. In *Paspati Singh v. Suresh Prasad Sah*, (2002) 10 SCC 562, the Supreme Court recorded the Union of India's statement that major amendments to set right the anamolies in the second schedule were underway, but that the process would take some time. In *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.*, (2004) 5 SCC 385, while holding that proceedings under section 163A of the MVA 1988 determined rights and liabilities finally, and that it was based on the principle of no-fault, the Supreme Court did not consider it "necessary to go into the purported discrepancies existing in the Second Schedule of the Act". Yet, since s.163A was introduced in 1994, and the "executive authority of the Central Government has the requisite jurisdiction to amend the Second Schedule from time to time[, h]aving regard to the inflation and fall in the rate of bank interest, it is desirable that the Central Government bestows serious consideration to this aspect of the matter." *Id.* at 408.

183. MVA 1988, ss. 163A and 166.

184. The exclusion of this non-pecuniary head of compensation where the victim dies as a result of the accident does not account for the pain and suffering the victim may experience between the accident and the time of death. See generally *McGregor on Damages* 831 (1980: 14th edn.).

the extent of loss in each of these categories. And places a limit on the amount that may be reimbursed as medical expenses leaving any expenses above the ceiling figure (of Rs.15,000) to lie with the victim.

Income replacement poses a problem where the victim is a non-earning person, and this is attempted to be met in the schedule by introducing the concept of "notional income."[185] A non-earning person will, therefore, be notionally valued as earning Rs.15,000 per annum. Yet, the schedule begins its computation at an annual income of Rs.3000. While the death of a child worker (below 15 years), earning between Rs.3000 and Rs.12,000 per annum will, therefore, be computed for lost income for an amount between Rs.60,000 and Rs.2,40,000[186] which will form the primary figure in calculating compensation, the lost earnings of a non-earning person will be valued at Rs. 3,60,000.[187] This apparent anamoly remains unexplained.

With a change in the procedure, which requires the officer-in-charge of the police station which records and prepares a report of the accident to forward the information to the claims tribunal within 30 days,[188] and with the tribunal being required to treat such information as an application for compensation,[189] the provision prescribing a limitation of six months for filing for compensation[190] has been rendered redundant, and has been omitted.

The expansive use of the principle of no-fault, the structured formula basis for compensation, and the reorganisation of procedure are evidence of the general acceptance in the law that once the involvement in an accident of a motor vehicle is established, it is just that compensation be the norm – matters of evidence, and of contributory factors, adding to the adjudicative load of the tribunal, with the potential to leave undistributed losses with the victim.

Another noticeable feature of compensation in the MVA 1988 is the adapted induction of the various elements present in its predecessor statutes and in judicial decisions. The loss to estate from the FAA 1855, the disablement parameters from the WCA, and the acknowledgement of loss of consortium and pain and suffering in judgments have been incorporated.

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185. MVA 1988 as amended in 1994, second schedule, clause 6.

186. This is the figure *before* making the deductions and additions specified in the schedule.

187. The schedule skips the annual incomes between Rs.12,000 and Rs.18,000, presumably placing Rs.15,000 in the Rs.18,000 column – which is quantified at Rs.3,60,000 for a child up to 15 years.

188. *Supra* note 185, s.158(6).

189. *Id.*, s.166 (4).

190. *Id.*, s.166(3) before its amendment in 1994.

The device of insurance, the statutory mandating of compulsory insurance, and the induction of general insurance into the motor vehicle accident arena, with its loss-spreading potential has enabled statutory experimentation.[191] The absence of the manufacturer from the compensation arena is conspicuous, and transfers the entire focus to human error, granting an unjustified infallibility to the machine. This, it is suggested, leaves unquestioned one player who could be most effective in reducing the extent of severity of motor vehicle accidents.[192]

Harm, injury and the Disability Act

The disability caused to workmen and by motor vehicle accidents has not been acknowledged except by a sideways glance in the passage of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.[193]

In urging research into areas of disability, the Persons with Disabilities Act tentatively tests the fringes of concerns about the social costs generated by disability, even as it links disability research with manpower development.[194] Perhaps because this Act was a response to the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region held at Beijing between 1 and 5 December, 1992,[195] disability is the point of reference, and the rights of persons with disability is the express concern of the law; prevention remains a subsidiary theme. The invocation of insurance as a measure of social security could be viewed as a borrowing from mainstream trends of risk-spreading remedies, where yet the scope of risk is unidentified.[196]

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191. For e.g., the provision of compensation for hit-and-run accidents.

192. See generally, Ralph Nader, *Unsafe at any Speed* (1965).

193. See, for e.g., s. 25 "within the limits of their economic capacity and development, the appropriate government and the local authorities, with a view to preventing the occurrence of disabilities, shall – (a) undertake or cause to be undertaken surveys, investigations and research concerning the cause of occurrence of disabilities;…" S. 47: "Non-discrimination in government employment – (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service" .

194. Chapter IX of the Persons with Disabilities Act. S. 48 "Research – The appropriate governments and local authorities shall promote and sponsor research, inter alia, in the following areas: (a) prevention of disability; (b) rehabilitation including community based rehabilitation; (c) development of assistive devices including their psycho-social aspects…"

195. See preambulatory statement following the long title to the Act.

196. S. 67 (1) The appropriate government shall by notification frame an insurance scheme for the benefit of its employers with disabilities. It is difficult to ascertain what event or incident of loss is to be insured.

The WCA and MVA 1988 continue in their respective, disconnected, spheres, unaffected still by this enactment of a recognition of the rights of persons with disability or those who acquire disability, from situations of assumed, contracted or involuntary risk.

Hazard and the law

The emergence of a distinct branch of *hazard jurisprudence* owes its genesis to the Bhopal gas leak disaster. The multitude of ill-tended legal issues that dogged the Bhopal litigation has resulted in patchy attempts at damage limitation through law.[197] The large number of dead, disabled, injured and ill, the damage to the environment, and the effects on property and the animal population that the MIC left in its wake was met with a vacuum in the law, permitting at best a splintered treatment of the issue. Administrative and medical unpreparedness, legislative aridity, the Union Carbide Corporation's self-serving interpretation of "damage limitation",[198] and the difficulties of pursuing a litigation which had numerous litigants with little staying power – both in terms of care and relief after the disaster, and in the legal battle – in confrontation with a megalithic transnational corporation produced their range of possibilities of injustice to the victim. With the Bhopal Gas Leak Disaster, the age of mass torts had arrived.

Compensation dominated the legal response to the disaster.[199] It is only when the criminal proceedings were dropped as a trade-off in settling on a compensation figure, that the illegality and injustice of endorsing the buying off of criminal culpability reached the fore.[200] While the Bhopal litigation and its aftermath is subject for another study,[201] statutory acceptance of mass torts arising out of hazardous incidents contained in legislations mirroring compromise may be identified here.

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197. See, the Bhopal Trilogy comprising Upendra Baxi and Thomas Paul, *Mass Disasters and Multinational Liability* (1986), Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe* (1986) and Upendra Baxi and Amita Dhanda, *Valiant Victims and Lethal Litigation* (1990).

198. For e.g., *Valiant Victims* at 33-107.

199. The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 and the Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985 were *ex post facto*, processual legal instruments, concerned essentially with the claims of the victims to compensation. The issue of interim compensation traversed the hierarchy of the judiciary, and while in the Supreme Court, culminated in the signing away of all concerns other than the lumpsum quantum arrived at in what the court termed an "order for settlement". *Union Carbide Corporation* v. *Union of India,* (1989) 3 SCC 38 at 41; also see (1989) 1 SCC 674.

200. This was reviewed, and criminal proceedings were revived: *Union Carbide Corporation* v. *Union of India* (1991) 4 SCC 584.

201. See *supra* note 20 chapter VII.

The legal debate that succeeded the Bhopal gas leak disaster cogitated on issues of deterrence of the tortfeasor and others of the potentially offending community;[202] the irrelevance in such extreme situations, of criteria that the law had recognised thus far in computing compensation;[203] the identification, and acceptance of the identity, of the victim;[204] and the restraining of the unchecked pursuit of profit and power that multinational corporations represent,[205] to name a few. With the immense capacity to create victims, industry dealing with hazardous substances faced the prospect of unlimited compensation awards.[206] The victims of the disaster, in the meantime, continued in their suffering.[207]

PLIA 1991 and NETA 1995

The Public Liability Insurance Act, 1991 (PLIA) and the National Environment Tribunal Act, 1995 (NETA) represent legislative response to hazardous occurrences. These two Acts are concerned with compensation in the event of "accidents" which occur while handling hazardous substances.[208] While the PLIA makes provision for interim relief,[209] the NETA provides a procedure, and a tribunal, for settling all claims arising out of accidents. The former seeks recourse in insurance to provide the resource for interim relief;[210] the latter leaves it to the

202. See *M.C.Mehta* v. *Union of India,* (1987) 1 SCC 375 at 419-21; *Union Carbide Corporation* v.*Union of India,* (1991) 4 SCC 584.

203. *Union Carbide Corporation* v.*Union of India,* (1989) 3 SCC 38.

204. The Bhopal Claims Scheme, *supra* note 199 and the problems that persist in the identification of the victim and the determination of the compensation, see the *Report of the three member committee* appointed by the Supreme Court in the matter of *Krishna Mohan Shukla* v. *Union of India,* writ petition (C) No.66 of 1995.

205. For e.g., Upendra Baxi," Introduction**"** in *Mass Disasters.*

206. See discussion *infra* on the import of the refusal of insurance companies to insure industry dealing with hazardous substances for unlimited amounts.

207. See, for e.g., *supra* note 185.

208. PLIA, S.2(*a*); NETA, S.2(*a*). Ten years after its passage through Parliament, it is an Act that is yet to be brought into effect. In personal communication with the officers in the Environment Ministry, it would appear that the Act will not be notified: the two reasons most commonly cited are that there has been a long running dispute about the sum that should be paid to the judicial officer who is to be appointed under the Act; and that, since there has been very little that has emerged in the past ten years in the nature of cases that could be dealt with by the tribunal set up under this Act, may be it could be merged with another little used tribunal – the National Environment Appellate Tribunal under a 1997 Act. The reasons for the sparse use of these provisions in law, including the extent of awareness and procedural barriers, have not been seriously investigated.

209. The PLIA does not use the term "interim relief"; in its long title, it adopts the phrase "immediate relief", and elsewhere, as in s.3, "relief".

210. *Id.* s.4.

owner to find the means.

The PLIA, which sets upper limits on relief,[211] offers a limited reimbursement of medical expenses,[212] a sum specified as relief in the event of death[213] or total permanent disability,[214] a monthly relief of up to three months where temporary partial disability results from the accident,[215] and some relief for damage to private property.[216] The NETA sets out unqualified heads of claims which include death, injury, disability and sickness as it does losses to property, cattle, environment and to government.[217] The "accident",[218] the tribunal set up under NETA,[219] the accounting for interim relief while ordering payment of final compensation,[220] and the environmental relief fund[221] are evidence of the intermeshing of the PLIA and the NETA.

The PLIA is prefaced by an acceptance of the growth of "hazardous industries, processes and operations" and the "growing risks from accidents" to workmen and "innocent members of the public" alike.[222] "Very often", the law-makers observe, "the majority of the people affected are from the economically weaker sections and suffer great hardships because of delayed relief and compensation."[223] The reluctance of industry to compensate the victims they cause, and the inability of some to find the resources for providing even minimum relief[224] has

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211. *Id.* schedule.

212. Up to a maximum of Rs 12,500 in each case; PLIA, schedule clause (*i*).

213. Rs 25,000: PLIA 1991, Schedule clause (*ii*).

214. Rs 25,000; and, "for permanent partial disability or other injury or sickness" a cash relief on the basis of percentage of disablement as certified by an authorised physician: *Id.* Schedule clause (v).

215. PLIA 1991, Schedule clause (*iv*).

216. Up to Rs.6,000, depending on the actual damage: PLIA 1991, Schedule clause (*v*).

217. There is no provision for priority of claims recognised by the statute, and the victims' losses, government's expenses and environmental damage are treated equally in the schedule. That the owner in NETA has to find deep pocket resources, unlike the PLIA where insurance and the fund steps in to cover at least a portion of the relief (see *infra*), and that relatively little (in comparison with the total compensation dues, that is) may have to go a long way, lends an added significance to this parity of claims: NETA, schedule.

For priority of claims, see, for e.g., Amritsar Oil Works (Acquisition and Transfer of Undertakings) Act, 1982, s.16; Ganesh Flour Mills Co. Ltd. (Acquisition and Transfer of Undertakings) Act, 1982, s.16 read with the schedule.

218. PLIA, s.2 (*a*); NETA, s.2 (*a*).

219. NETA, s.4(3) provides that a claimant for compensation before the tribunal may also apply to it for relief under the PLIA 1991.

220. *Id.*, s.7.

221. See *infra.*

222. PLIA, SOR.

223. *Ibid.*

224. *Ibid.*

lent logic to a scheme of compulsory insurance. Expressly, the insurance is expected to provide cover to industry which is faced with having to settle large claims, as much as it is to provide minimum relief to the victims.[225]

The NETA is an attempt to statutorily manage the imponderables of hazardous occurrences. The dimensions of the Bhopal gas leak disaster is an index of the complexity of victimage,[226] and of victim compensation, and is an inevitable point of reference in considering any legislative endeavours in this area.

It is an instance of a statute that uses the language of "relief" and "compensation" to the victims, and of expedition in the disposal of claims.[227] What the law does, however, is to restrict the understanding of what constitutes a victim. To that effect the Act specifies the "heads" of claim.[228] There is a renegotiation of the meaning of "injury" which "includes" sickness,[229] with disasters involving hazardous substances taking sickness and disease beyond the "occupational disease" that was acknowledged as a possibility among workmen. The unquestioned acceptance of the general public as potential victims of hazards, besides representing the priorities of the state, is also a statement of the choicelessness of risk.[230]

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225. *Ibid.*

226. *Supra* note 105.

227. NETA, long title to the Act.

228. *Id.*, Schedule

229. *Id.*, s. 3(2) Explanation (*ii*) and schedule clauses (*b*) and (*d*).

230. Information, which is an essential requirement in making choices, has for the first time been given a place in the Factories Act, 1948 as amended in 1987, s.41-B, which requires "compulsory disclosure of information by the occupier" of every factory handling hazardous substances, among others, to the workers and to the *general public in the vicinity*. The dangers, including health hazards, the measures to overcome the hazards of exposure or in the handling of the materials, the quantity, specifications and other characteristics of wastes and the manner of their disposal are, for instance, to constitute the information. Also, the measures laid down by the occupier, with the approval of the Chief Inspector, for the handling, usage, transportation and storage of hazardous substances inside the factory premises, and the *disposal of such substances outside the factory premises* are to be publicised, in the manner prescribed, among the workers and the general public living in the vicinity.

The helplessness of the workman in opting out of risk is stark in, for e.g., *M.K. Sharma* v. *Bharat Electronics Ltd.,* (1987) 3 SCC 231 and *CERC* v. *Union of India,* (1995) 3 SCC 42, both cases merging the perceptions, and probability, of risk to the health of the workman, and the right to health, with a provision for compensation. (Between 1987 and 1995, the quantum remained unchanged at Rs.1 lakh). There is no right to risk avoidance that is recognised by statute, or by the court in these cases.

The enlarged deployment of the 'no-fault' principle in the PLIA[231] and the NETA[232] (as also in the MVA 1988)[233] is balanced against the limiting, and pre-determined, categorisation of compensation.[234] The delinking of compensation and fault effectively reduces the victim to the status of a *claimant.* The presumptions of victim-creation, the limited understanding of the victim as a claimant, and the irrelevance of fault at any stage where the victim has a right to be involved, make the victim into a mere *cost*. In the "social engineering"[235] that has resulted in the PLIA and NETA, the power and presence of the interests of industry is much in evidence.

Compulsory, statutory insurance is adopted by the PLIA.[236] The loss-spreading that insurance effects, and the intermediate distance that it places between the alleged tortfeasor – the "owner" in the PLIA[237] - and the victim, converts the nature of the hazardous event: from a position of responsibility and answerability for having caused the death, injury and sickness to masses of people, it becomes a unidimensional concern about the determination and payment of compensation. The seriousness of proceedings to determine the existence of fault, negligence or recklessness has been ignored by the law,[238] further reinforcing the law's image as providing compensation to victims, while being marginally concerned, if that, with deterring victim-creation. It is left to the general criminal law to deal with this unfamiliar, and technologically complex, branch of crime; and this continues as the weak link in law.

A change in the law necessitated by the fears of the insurance industry is revealing of the probability of victim-creation, both in terms

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231. PLIA, s.3.

232. NETA, s.3.

233. MVA, s.140.

234. PLIA, schedule; NETA, schedule; MVA 1988, s.140.

235. Pound, *Social Control through Law supra* note 88 at 64-65.

236. See s.4.

237. *Id.*, s.2 (*g*) defines "owner" as "a person who has control over handling any hazardous substance".

238. IPC, s.304-A, is an instance of the law's concern to deter victim-creation by punishing reckless or negligent victim-creating conduct. Yet, the persons within an enterprise who determine policy and the parameters of profit-seeking may well attempt to slip out of accepting liability by the scapegoating that is a part of, for instance, the Factories Act, 1948 which pins responsibility on the "occupier" [s.2(1)(*n*)]. A presumption that proximity to the premises and daily control determines safety, rather than overall control over policy, profits and enterprise priorities is, however, a restricted reading of conduct and control, and could dilute enterprise accountability and the deterrent and punitive effect the IPC seeks to achieve. The 1987 amendment to s.2(*n*) of the Factories Act, however, has redefined the `occupier' to place the onus higher in the chain of command; in the case of a company, for instance, the occupier has to be a director of the company.

of the severity of the effect on the victims, and of the multitudes that may be affected. The PLIA, as originally enacted, required every person who had control over handling any hazardous substance to take out policies of insurance "whereby he is insured against liability to give relief" under the Act.[239] The implementing of this provision met with an obstacle in the insurance companies who were not agreeable to enter into insurance contracts for "unlimited liability of the owners".[240] An amendment to the PLIA in 1992, therefore, provided for limiting the liability of insurance companies to an amount specified in each insurance policy.[241] An environmental relief fund (ERF) was created,[242] into which an amount equal to the premium payable by the owner would be credited by the owner under the Act.[243]

The Act therefore designed a three-level interim compensation scheme. In the first instance, the insurance company would be required to pay to the extent of its liability as expressed in the contract and the rules/scheme framed under the Act.[244] The compensation that remained due would be drawn out of the ERF.[245] When the resources in the ERF are depleted, the owner may be called upon to cover the compensation still unpaid.[246] The refusal of the insurance companies to undertake the risk of unlimited liability is an unmistakable indication of the simmering potential for victim-creation.

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239. PLIA, s.4(1).

240. Public Liability Insurance (Amendment) Act, 1992, SOR.

241. PLIA as amended in 1992, s.4(2A) and (2B) r/w Public Liability Insurance Rules, 1991 as amended in 1992, r.10.

242. *Id.*, s.7-A..

243. *Id.*, s.4(2-C) read with Public Liability Insurance Rules, 1991 as amended in 1992, r.11.

244. *Supra* note 241.

245. PLIA as amended in 1992, s.7-A read with r.10(3).

246. *Ibid.* The figures of collection and disbursement of sums under the PLIA, however, suggest an extreme underutilisation of the law. In official figures presented at a "One Day Workshop on the Public Liability Insurance Act and the Environment Relief Fund" organised by the Indian Law Institute on January 12, 2002, the total premia collected in the years since 1992 was Rs 56.56 crores; a like amount was collected towards the Environment Relief Fund; interest earned on the ERF was Rs 22.76 crores; relief claims made was Rs 228.17 lakhs; relief claims paid was Rs 46.45 lakhs and the relief claims to be paid was Rs 181.92 lakhs. This has been during a period when there has been regular reporting in the press of chemical related incidents where harm has resulted, and when pollution and its effects have been acknowledged in other fora, including in cases before the Supreme Court, and when the polluter pays principle and pollution fine were brought into law through cases to deter polluters. The underutilisation of the law has not been investigated sufficiently to draw more than a hypothesis from the circumstances.

Heads of compensation

Compensation as understood in the NETA encompasses a range of losses or damage: to environment, property, or person, as well as the expenses that may be incurred by government and its agencies in dealing with the "accident".[247] However, it is cryptic in its statement of what the loss is that the heads of compensation represents. To cite an instance: "permanent, temporary, total or partial disability or other injury or sickness"[248] is one category of claim, followed by "loss of wages due to total or partial disability or permanent or temporary disability".[249] Disability has grown in the law essentially in terms of income replacement. If there is a change in understanding which is intended to be effected in the law – and the carving of the two distinct heads suggests that it is so intended - there is no indication of the import of the change.

The heads of recovery[250] under which government may reimburse itself for direct and indirect losses and costs of transactions and events generated by the "accident" is a novel phenomenon. The generality of the costs generated – including damage to, or loss of, environment and fauna, and the administrative costs of relief and rehabilitation – have been reckoned. The legally recognised cost of the accident, then, is more comprehensive than previously attempted by law. It is victim compensation that has suffered retardation. For there is no priority of claim[251] that the victim may assert; the victim shares the right to compensation equally with the other heads of claims. The willingness of the statute to evolve criteria to make good the loss to the state, and its reluctance to reach out to fuller, elucidated, compensation for the victim is indicative of the absence of legal imagination[252] in addressing victim compensation.

It is inevitable that the confining of compensation within pre-determined criteria will leave costs to be borne by the victim, particularly where the hazards from hazardous substances are only incompletely known and not capable of statutory enumeration.[253] Hazardous processes

247. NETA, schedule.
248. *Id.*, clause (*b*).
249. *Id.*, clause (*c*).
250. NETA, schedule.
251. See *supra* note 217.
252. Alan Watson, *Failures of the Legal Imagination* (1988).
253. Wikeley offers another explanation: he calls it the "corporate cover-up". "The delay in the recognition of the carcinogenic nature of asbestos was in part caused by the asbestos industry itself..... Information obtained through legal proceedings in the US has shown that the asbestos industry actively suppressed the release of industry-sponsored research which demonstrated that asbestos fibres were carcinogenic": Wikeley, *Compensation for Industrial Disease* 116 (1993).

and substances are, then, subsidised *by the victim*. It may be observed that the victims of hazardous occurrences are not a pre-determined class of persons who are marked out as particularly susceptible to become victims.[254]

A person then enters the category of persons concerned with a compensation statute *after* being made a victim. It may be essayed that where a victim quantifies the injury and damage caused, as may be seen in claims for compensation, it is evident that the apparently non-computable costs – including pain and suffering and loss of consortium – do have a price. There is, however, a fallacy in this perception.[255] The options before the victim, *once a victim*, are not many. Compensation offers a means to reduce the loss, and the sense of loss. It acts as a palliative when the irreplaceable is lost. The attribution of a value to a loss cannot be interpreted as a price at which the victim would have been willing to become the victim if there was a choice.

The exclusion of workmen

A word here about the *distinctive status of workmen* in compensation law. The exclusion of workmen from the evolving concerns of the law of compensation, including incidents of disasters involving hazardous technology, lends an added dimension to the significance of the WCA.[256] It is within the law's experience that the WCA has provided the basis for establishing norms for interpreting death, disability and injury.[257] Laws which concern events with distinctive characteristics, as in the case of the NETA and the particular nature of disasters or incidents involving hazardous substances may, however, build in an understanding of some added dimensions that are their characteristic; the separation of the categories of disability,[258] and loss of earnings occasioned by

254. To the extent that there is a defined class, the Factories Act, reckons workmen and the general public living in the vicinity within it: see, *supra* note 230.

255. See the discussion in *Calabresi* at 220-21, on the uncertainties inherent in anticipated pre-determined costs of pain and suffering, or other personal losses including psychological injury and sentimental losses.

256. The PLIA, s.3, for instance, excludes a workman, as defined in the WCA from its purview. So does the NETA, s.3.

257. For e.g., the MVA 1988, schedule relies on the WCA to derive percentages of loss of earning capacity in computing permanent total disablement and permanent partial disablement. The link between extent of disability, loss of wages and compensation are imported into the PLIA from the WCA via the Public Liability Insurance Rules, 1991, r.4. See also, for e.g., *Union Carbide Corporation* v. *Union of India,* (1989) 3 SCC 38 at 47 where permanent total disability and permanent partial disability were the criteria adopted by the Supreme Court and not, for instance, injury as it is considered in the Railways Act, 1989.

258. NETA, schedule clause (*b*).

disability[259] is one instance; the recognition of "sickness" is another.[260] Laws may induct judicial experience, and widen the sphere of compensation: the compensation for loss of consortium and pain and suffering that are a part of the structured formula in the MVA 1988 is an instance.[261] Yet, the stress on the identity of the workman as a workman, and not as a victim, denies to the workman-victim the possibility of upgraded concern of victim care that may be fostered by the law. Even the choice between alternative remedies that was offered in earlier legislations is being gradually, but surely, eroded in more recent legislative forays.[262]

VI Three Approaches in Law

In the arena of statute law which concerns itself with the victim and compensation, then, *three approaches* are discernible. The *first* establishes a direct relationship between the person liable in law or in fact and the victim. It describes the right, and the extent of the right, of the victim to recover compensation from such liable person. The employer in the WCA, the owner in NETA and the state in the Manoeuvres Act would fall within this category. This is apparently a deep pocket remedy, though NETA does provide for setting off the interim compensation under PLIA and the ERF when paying the computed compensation, and the state, paying under the Manoeuvres Act, spreads the cost of compensation through its taxing structure. Also, though there is no statutorily mandated insurance, risk spreading through insurance is not prohibited by the law, and may be used to reduce deep pocket problems. The non-exclusion of risk - and cost-spreading devices being adopted where a statute appears to place the onus of compensation on the person liable must mean that the law is concerned, in these instances, with the person who may be called upon to pay; the resource upon which the person may depend for effecting the payment is not the concern of the law.

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259. *Id.*, schedule clause (*c*).

The unexplained differences between clauses (*b*) and (*c*) have been noticed earlier in the chapter.

260. *Id.*, s.3(1) Explanation (*ii*).

The undefined contours of sickness caused by hazardous substances, the problems of causation, and the suffering it causes quite apart from the disablement is witnessed among the victims of the Bhopal gas leak disaster: see *supra* note 20, chapter VII.

261. *Supra* note 20, chapter V.

262. Contrast between MVA 1988, s.167 which carries on the tradition set in place by MVA 1939, s.110AA, and the exclusion of workmen in PLIA and NETA. The MVA 1988, in fact, expressly extends the no-fault principle in s.140 to workmen (s.143).

The *second* approach is focussed on compensation to the victim, and questions of fault and liability are relegated to a subordinate interest in the law. This necessitates a wide distribution of costs, and the creation of resources to meet the needs of victim compensation. The growth of no-fault compensation is closely associated with the growth of cost-spreading mechanisms endorsed by statute. It is this approach that provides for compensation to victims of hit-and-run accidents, as well as to those who qualify for the benevolence of the PLIA. The emphasis on victim compensation has, however, provided an unstated justification for getting the victim to share the losses incurred as a result of the accidents.

The *third* approach may require the established offender to pay an amount, part of which may be disbursed to the victim, as judicial discretion may dictate. The fines collected under the Cr PC, upon conviction for an offence under the penal code, is a case in point.[263]

VII The Nature of the Statute

The making of legislation[264] is a prerogative of the state.[265] Statute law contains an exposition of the concerns and priorities of the state.[266] Rights, power, responsibility, accountability, causation, liability and costs acquire content from the statute. The identity of the victim and the losses the victim suffers depend on the statute for their legal import. The language of the statute influences the law's vision: so it is that a disaster becomes an accident;[267] injury to be legally recognised is to be synonymous with disablement;[268] and risk finds occasional mention,[269] relevant for regulation alone, while it is placed on the back burner while considering victim compensation.[270]

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263. *Supra* note 20, chapter VI.

264. As distinct from "law": see B.de Sousa Santos "The Postmodern Transition: Law and Politics" in Freeman, *Lloyd's Introduction to Jurisprudence* 1212 (1994: 6th edn.).

265. See, generally, Jeremy Bentham, *Theory of Legislation* (1996: revised edn.) which is in the nature of a manual for legislators.

266. The extent to which compensation is used to displace or defer decisions on the desirability, necessity or justice of continuing certain activities or the recurrence of certain events which cause victims would be a barometer in measuring the relative priorities of the state.

267. For e.g., NETA, s.2(*a*).

268. For e.g., WCA.

269. For e.g., Drugs and Cosmetics Act, 1940, s.10A; Insecticides Act, 1968, s.27.

270. *Ibid.*

The dominant statutory approach to compensation is contained in the legislations considered in this part.[271] Statute law, being an accessible statement of the law, has a defining quality: that is, it defines the boundaries of legal consideration, rights, remedies, sanctions and the persons relevant to the process of law. It influences judicial consciousness on the matters which it addresses, as it moulds the conscience of the justicing system. In turn, judicial decisions, the process and the concerns of the justicing system seek spaces in, and are adopted by, statute.[272] Between them, they determine one dimension of the nature of legal reality.[273]

On the one hand, statute law may be seen as providing a right to compensation. The provision of a statutory status for compensation as a remedy where a process, an activity, a person or a substance causes injury, disablement or death recognises a right to compensation in the victim. Also, statute law could effect substantial changes in the relationship between incidents, persons and products so advancing the cause of the victim. Deeming provisions,[274] the entrenchment of the principle of no-fault, the distribution of liability over a wider population,[275] the shifting emphasis regarding onus of proof,[276] and the simplification of the process for receiving compensation[277] are instances

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271. FAA 1855, WCA, Manoeuvres Act, 1938, Railways Act, 1989, MVA 1988, PLIA, NETA.

272. The Supreme Court's advocacy of environment tribunals in *M.C. Mehta* v. *Union of India*, (1987) 1 SCC 395 and in *Charan Lal Sahu* v. *Union of India* (1990) 1 SCC 613 at 713 urged the government to move towards having the NETA enacted. It must, however, be clarified that the NETA is engaged with environmental matters only to the extent that a disaster may make it compensatable. The Supreme Court's dictum in *M.K. Kunhimohammed* v. *P.A. Ahmedkutty*, (1987) 4 SCC 284 is acknowledged in the SOR of the Motor Vehicles Act 1988, as having influenced the raising of the limit of compensation while applying the no-fault principle and in hit-and-run accidents.

273. Legal reality is here envisioned as a concept distinct, for instance, from social reality. The perceptions, capacities, instinct for survival and experience of the judicial institution are factors which determine the meaning and evolution of rights, sanctions, remedies, power, institutional arrangements, participation, for instance. So too the perceptions, priorities, language, interests emerging in legislation.

274. For e.g., WCA, s.3(2) where an occupational disease peculiar to an employment "shall be deemed to be an injury by accident within the meaning of this section". For a critique of occupational disease, see Stapleton, *supra* note 118.

275. For e.g., cost-spreading through insurance.

276. No-fault liability, for instance, effects changes in the demonstration of causation, loss and fault – fault, which is the most adversarial of three elements in a litigation, not being required to be proved.

277. As essayed in tribunalisation, and in the attempt at rationalising the process in the MVA 1988 as amended in 1994, s.158(6).

of the areas where statute law could be seen to work to reduce the trauma for the victim.

That, however, is only on the one hand. On the other, statute law may be seen to be *limiting*, *reductionist*, as *externalising losses and costs* and as treating the victim as a *cost.*

From the FAA to the NETA, statute law both expresses the right to compensation, and delineates what constitutes compensation. The limiting effect of the statute is evident in both functional contexts. Asserting the right to recover for losses which are occasioned by actionable wrong resulting in death, the FAA, for instance, makes loss to estate compensatable. The WCA provides for income replacement where employment injury occurs – and employment injury includes occupational diseases. The NETA, while apparently aware of the imponderables in hazardous substance related injury, yet feels equipped to specify the heads of damages under which a claim may be made where an "accident" occurs – while excluding accidents which occur "by reason only of war or radioactivity". Ignoring the experience of manifestation of symptoms long years after an incident – a situation that has been given judicial credence in the Bhopal case – the NETA limits the period within which the application for compensation should be made to five years.[278]

This limiting of compensation is patent in the MVA 1988 too. After its amendment which was prompted by the growing numbers of victims, the judicial time taken in individual assessment of compensation and the variations that judicial discretion may witness while attributing value to the range of losses, the MVA 1988 now sports a structured formula.[279] While it accords statutory status to pain and suffering and loss of consortium, to name two, it predetermines the maximum value that may be attributed to the loss. There is even a limit enacted on medical expenses that may be reimbursed,[280] even where it may be demonstrably higher.

The law of torts has been concerned about placing "too great a burden upon defendants".[281] "Some limits", it has been said, "must be imposed".[282] The limiting evidenced in the law of compensation could perhaps be attributed to an adoption of this dictum. The effect is to place the burden of the cost of the activity or product on the victim.

278. NETA, s. 4(6).
279. MVA 1988, second schedule.
280. Rs.15,000.
281. *McGregor on Damages* 55 (1980:14th edn.).
282. *Ibid.*

A reductionist role for law

In its *reductionist*[283] portfolio, statute law reduces the problem to a language, and a computation, that can be accommodated within it. Every disaster, mishap, incident, reckless action, or sabotage for instance, becomes an "accident" within the NETA.[284] The non-recognition of a range of losses,[285] and the emphasis on income replacement, has the effect of reducing the complex of events which leads to victim creation to a calculation of costs on pre-determined terms. While *this reduces the victim to a mere cost*, it also *externalises* many elements of the actual cost. Mental distress, social discredit, loss of society of a parent or a child or of any other person, the actuality of dependency, the loss of amenities, loss of expectation of life, physical inconvenience and discomfort[286] — the emphasis on expediency externalises these costs.

Pragmatism

It is possible to find an explanation for these phenomena (of limiting by law, reductionism, seeing the victim as a cost and the externalising of costs) in *pragmatism*. Pragmatism does not offer a perfect solution, only an improved situation.[287] The acknowledgement of the victim, the definition of the loss, and the right to receive a compensation which is judicially manageable may restore to the victim more than could be assured without the aid of the statute.

Costs on the victim

Yet, there are two factors that give one pause, deserving particular attention. *First*, the limiting of the recognition of the victim and the computation of costs in statute law may have the effect of keeping the cost of the accident artificially depressed. Externalising costs, letting the victim bear the cost, bartering away costs in the interest of expediency, and excluding costs that are not capable of convenient

283. Reductionism is a Cartesian method where "involved and observed propositions" are reduced "step by step to those that are simpler, and then starting with the intuitive apprehension of all those that are absolutely simple, attempt to ascend to the knowledge of all other precisely similar steps". Descartes, "A Discourse on Method" (1981 Everyman edn.) xv quoted in Vandana Shiva, "Reductionist Science as Epistemological Violence" in Ashis Nandy (ed.) *Science, Hegemony and Violence: A Requiem for Modernity* 235 (1988).

284. NETA, s.2(*a*).

285. See, for e.g., *supra* note 105.

286. *McGregor on Damages* especially 830-40 (1980:14th edn.).

287. *Supra* note 60.

computation, distorts the costs of the activity or substance concerned. It also ignores the actuality of disability to a victim: for instance, in categorising "amputation of one foot resulting in end-bearing stump" as resulting in a 30 per cent loss of earning capacity, the manual worker's dependence on physical wholeness is ignored.[288] The spreading of costs through insurance, funds and by the sharing of costs by the distribution of the cost of the accident/event among the victim, the person liable in law, the state and others similarly placed as the person liable hides the costs that are generated. No fault compensation is a further explanation for "rationalising"[289] the recognised costs. The problem is compounded in situations where proceedings which assess compensation to the victim conclude, in law, the computation of costs.

It needs to be recognised that, statutes being deliberate statements of priority, policy and power, the assignment of value, and the denial of costs are, equally, deliberate. While statutes which provide a remedy in compensation do assert the right to compensation, the effect of externalising losses and costs does deserve scrutiny.

Impoverishment

Secondly, the limiting of costs has the potential to impoverish the victim. The possibility of *impoverishment*[290] is accentuated where the subsistence capacity of the victim is low even prior to the incident which causes victimity. The dominant position that income replacement has acquired places the low-income, or no-income, victim at a distinct disadvantage. There are support systems that may come to the aid of a non-poor victim – for instance, insurance to cover medical expenses on personal injury cover, or the access to facilities – which help cope with the disability. These are, it may be safely assumed, not available in the lives of those already leading economically marginal lives. The change in status from a subsistence survivor, for instance, to a victim could plunge the person into irremediable poverty. The law, however, appears to neglect the implications that victim-creation has to those less equipped to deal with disaster.

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288. See *Kaveri* v. *K. Ramasami,* SLP (C) 7613 of 1993 (SC).

289. Motor Vehicles (Amendment) Act, 1994, SOR: "The Bill *inter alia* provides for - ..... (*k*) a predetermined formula for payment of compensation to road accident victims on the basis of age, income, which is more liberal and rational".

290. For a distinction between impoverishment and poverty, see Upendra Baxi, "Introduction" in Upendra Baxi (ed), *Law and Poverty* vi (1988): "The words 'poverty' and 'poor' tend to *normalise* what ought to be centrally *problematic*... [P]eople are not naturally poor but are made poor, that *impoverishment is a dynamic process of public decision-making in which it is considered just, right and fair that some people may become, or stay impoverished*" (emphasis in original). See also the impoverishment chart in Usha Ramanathan, *supra* note 65.

The poignancy of impoverishment is aggravated by the *choicelessness of risk*. The generality of the persons who may be made victims – in motor vehicles accidents or in incidents involving hazardous substances – lends a further dimension to the choicelessness. The immediate helplessness of the least advantaged is a prescription for impoverishment that the law does not guard against.

VIII Conclusion

The nature of statute law, and the content of legislation, have a profound effect on the identity and treatment of the victim, and that has been the focus of this essay. The resources that the law relies on in meeting the costs of compensating the victim, the institutional arrangements it makes while dealing with compensation, the law's routines on limitation and the price of access to justice, and the qualitative connection between regulation, safety and punishment and compensation are themes that are derived from this experience with the law.