

Policy Considerations that Could Justify the Enactment of a Crime Victim Compensation Fund in South Africa

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Abstract

It may be argued that the current legal position relating to crime victim compensation is unsatisfactory. It should therefore be asked whether there is a potential alternative for crime victim compensation. Many foreign jurisdictions have elected to enact a statutory compensation fund. In its report on the viability of enacting a similar type of fund for crime victims in South Africa, the South African Law Reform Commission stated that a justification for the establishment of a statutory crime victim compensation fund in South Africa remains absent. This article focusses on the justification issue. To determine whether a fund could be established in the South African context the following two-step approach has been outlined. First, a general theoretical framework must be advanced based on which future statutory reform of the law of delict may be justified. Elsewhere I have already done this by identifying policy considerations which the legislature has used to reform specific areas in the law of delict. These considerations include the risk of harm and the concomitant risk of receiving no compensation if the risk of harm materialises; the promotion of the right to social security and the evidentiary difficulties associated with proving fault (in the form of negligence). The second step towards justification is to establish whether these considerations could also justify the proposed development of the law through the enactment of a crime victim compensation scheme in South Africa.

Keywords

Crime victim compensation; law of delict; legal and public policy considerations; statutory compensation fund.

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1 Introduction

Violent crime has reached epidemic levels in South Africa.¹ With the possible exceptions of poverty, unemployment and the struggling economy, the statistics demonstrate that arguably no single issue of governance comes close to the levels of attention and concern associated with the problems of crime, criminality and victimisation.²

Despite the high frequency of violent crime and the accompanying high risk of falling victim to harm arising therefrom, a survey of the South African law reports provides remarkably few examples of instances where victims instituted delictual claims against the purported criminal to compensate for the harm that they suffered. This is because most South Africans who perpetrate violent crime are generally unable to compensate the victim.³ This appears also to be the position elsewhere, where "[u]ndoubtedly the greatest obstacle to routine compensation is the commonplace fact of the offender's limited means."⁴

There is an alternative to the institution of delictual claims in the form of sections 297 and 300 of the *Criminal Procedure Act 51 of 1977 (Criminal Procedure Act)*, which provide procedural assistance in obtaining compensation or restitution from a tried and convicted perpetrator as part of the criminal justice proceedings.⁵ However, due to the perpetrator's likely impecuniosity, this affords very little support in practice.⁶ In addition, it ought to be noted that a very small percentage of crimes reported to the police ultimately results in a conviction, which further indicates the practical limitations of the statutory mechanisms in the *Criminal Procedure Act*.⁷ An analysis of the recent annual reports by the South African Police Services

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¹ See the 2021-2022 crime statistics for South Africa, which are available from SAPS 2022 <https://www.saps.gov.za/services/crimestats.php>. For an overview of the 2020 statistics, see Africa Check 2020 <https://africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201920>.

² SALRC Report Project 82 9; Wessels *Developing the South African Law of Delict* 203.

³ SALRC Report Project 82 74; Wessels *Developing the South African Law of Delict* 222.

⁴ Miers 2014 *International Review of Victimology* 150.

⁵ Joubert *Criminal Procedure Handbook* 346; Wessels *Developing the South African Law of Delict* 112-117.

⁶ Von Bonde *Redress for Victims of Crime* 88.

⁷ SALRC Report Project 82 18, 281-282.

(SAPS) and the National Prosecuting Authority paints a similar picture.⁸ To illustrate: only approximately 20% of all reports of murder ultimately ended up in court in 2018-2019.⁹ Also, while 52,450 sexual offences were reported in the same period, the National Prosecuting Authority secured only 4,724 convictions during this time.¹⁰

To obtain compensation through the law of delict, victims therefore had to devise a different strategy. The approach that has since been adopted in South Africa is to institute a delictual claim against the state rather than the actual perpetrator. These claims are based on the argument that the state (i.e. the Minister of Police) should be held vicariously liable for the harm that the victim suffered due to crime. Essentially, those who adopt this tactic follow one of two routes. Most typically, victims argue that the state should be held vicariously liable where its employees (i.e. its police officers) have negligently and wrongfully failed to prevent the crime that caused the harm in question.¹¹ In other instances victims have successfully held the state vicariously liable where the crimes were actually committed by state employees (police officers) themselves – even where the crimes constituted intentionally-committed sexual offences like rape.¹² Despite various scholars commenting on the adverse effects that the implementation of this strategy may have on the doctrine of vicarious liability,¹³ courts have nevertheless allowed these claims on a regular basis.

While concerns about the theoretical implications of this development have been expressed, the practical and financial implications have largely been over-looked. Arguably, it is these implications that pose the greatest stumbling-blocks for the fight against crime and the desire to provide efficient compensation to crime victims. After all, as things stand now, taxpayers' money which is supposed to be used for performing basic police-

⁸ Versluis and De Lange 2019 <https://www.news24.com/citypress/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021>.

⁹ Versluis and De Lange 2019 <https://www.news24.com/citypress/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021>.

¹⁰ Versluis and De Lange 2019 <https://www.news24.com/citypress/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021>.

¹¹ Wessels *Developing the South African Law of Delict* 48-70; also see *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA).

¹² Wessels *Developing the South African Law of Delict* 71-104; also see *K v Minister of Safety and Security* 2005 3 SA 179 (SCA); *K v Minister of Safety and Security* 2005 6 SA 419 (CC); *Minister of Safety and Security v F* 2011 3 SA 487 (SCA); *F v Minister of Safety and Security* 2012 1 SA 536 (CC).

¹³ See generally Wagener *Assessment of the Normative Bases for the Doctrine of Vicarious Liability*; Fagan 2009 SALJ.

related tasks such as preventing crime and employing more police officers is increasingly being used to pay compensation to victims of crime or to settle civil litigation suits.¹⁴ Of course, this means that there is less money available to combat crime. In turn, this decreased financial ability to prevent crime only serves further to increase the likelihood of a higher crime rate and the accompanying litigation that may be instituted against the state on the basis that it failed to prevent crime. Ultimately, the South African law of delict appears to be caught in a vicious cycle of ever-expanding state delictual liability for harm arising from crime.

Against this background, it may be asked whether there are potential alternatives to deal with crime victim compensation. A popular solution in other jurisdictions appears to have been the enactment of a crime victim compensation fund.¹⁵ However, this solution is not without its challenges. Notably, proponents of this idea are confronted with a "fundamental problem"¹⁶ in this context, which is that "it is difficult to find a satisfactory rationale for singling out violent-crime victims from other groups of unfortunates for special treatment by the state".¹⁷ Some authors have gone so far as to argue that "[o]ften the rationale behind the setting up of a compensation scheme is, in itself, weak and unsubstantiated".¹⁸

This concern was also raised by the South African Law Reform Commission (SALRC), which investigated the viability of a statutory crime victim compensation scheme in South Africa in 2004. As discussed further below, the SALRC ultimately recommended that, primarily for financial and administrative reasons, the fund should not be set up. However, what is of central importance for the purpose of this article is the SALRC's statement that:

developing a motivation for the establishment of a [statutory compensation fund] in SA remains incomplete and must be completed if legislation is to be drafted, since no law should be passed without its objectives being clearly defined and costed.¹⁹

¹⁴ Wessels *Developing the South African Law of Delict* 17-18; Atiyah *Damages Lottery* 80-81.

¹⁵ See generally Greer *Compensating Crime Victims*; Miers 2014 *International Review of Victimology*.

¹⁶ SALRC *Report Project 82* 182-183.

¹⁷ SALRC *Report Project 82* 182.

¹⁸ SALRC *Report Project 82* 318; also see Cane *Atiyah's Accidents, Compensation and the Law* 30.

¹⁹ SALRC *Report Project 82* 318-319.

2 Justifying the enactment of a crime victim compensation fund in South Africa: a two-step strategy

This article concentrates on the apparent lack of justification for setting up a statutory crime victim compensation scheme in South Africa. The following two-step strategy has been identified to do so.²⁰ First, a theoretical framework must be developed to provide an outline for justifiable statutory reform of the law of delict insofar as the compensation of victims is generally concerned. Once this has been done, attention can be given to the more specific question, namely whether the potential enactment of a statutory crime victim compensation fund could fit into such a framework. Put differently: it must first be determined which considerations generally justify statutory reform of the law relating to compensation. Then it must be ascertained whether those considerations could also function to justify the enactment of a crime victim compensation fund.

The first step in this strategy was completed elsewhere²¹ and cannot be repeated here. For the present purposes it may be noted that it was done by examining the historical background and the various policy considerations that have justified the legislative development of the law of delict in the past, at least insofar as the compensation of specific categories of victims is concerned. In this regard the three most significant statutes are the *Compensation of Occupational Injuries and Diseases Act* 130 of 1993 (the COIDA), the *Road Accident Fund Act* 56 of 1996 (the RAF Act) and the *Consumer Protection Act* 68 of 2008 (the CPA). These statutes have improved the compensatory fate of victims of workplace injuries and diseases, motor vehicle accidents and defective products respectively. An analysis of these statutes has revealed the dominant general policy considerations that justified the statutory development of the law (i.e. the law aimed primarily at improving the victim's position regarding compensation) to be the following.

The first and arguably most important policy consideration that has justified the major legislative development of the law is the role played by the increased risk of harm and the associated risk of no recovery of compensation.²² This consideration was paramount in developing the law's compensatory response to victims of motor vehicle accidents, defective consumer products and occupational injuries and diseases, and would

²⁰ Wessels *Developing the South African Law of Delict* 130-134; Wessels 2019 *Fundamina* 203-205.

²¹ Wessels *Developing the South African Law of Delict* 130-186; Wessels 2019 *Fundamina* 199-255.

²² See generally Wessels *Developing the South African Law of Delict* 130-160; Wessels 2019 *Fundamina* 205-228.

ultimately contribute to the enactment of the RAF Act, the CPA and the COIDA. Although there is an undeniable utility associated with motor vehicle transportation, enlarged labour forces and a growing manufacturing sector, these benefits were accompanied by a substantial increase in the risk of harm arising from those sectors. This required the South African legislature to produce a solution in which these activities were permitted, but only on the condition that the most appropriate enterprise should be saddled with the cost of the risks they produced. Ultimately it decided that the compensatory mechanism would have to be reconfigured within a statutory context to secure the compensation of a victim's harm more effectively.

The second major policy consideration appears to be the legislature's desire to promote social security and provide certain categories of victims with remedies that gave quicker and more cost-effective access to compensation, and to distribute the risk of certain risk-related activities throughout society.²³ With the enactment of the Constitution²⁴ and the entrenchment of the right to social security as a fundamental human right, the legislature has openly committed itself to the notion of spreading risk to promote social inclusion and social solidarity. The statutory establishment of compensation funds in respect of motor vehicle accidents and occupational injuries and diseases – arguably two spheres in which most individuals are most frequently exposed to the risk of harm – achieves these goals.

A third key policy consideration is the evidentiary difficulties involved in satisfying the common-law requirement of fault (specifically in the form of negligence) when instituting delictual claims.²⁵ This requirement has been criticised as imposing a significant stumbling block on the pathway to obtaining compensation.²⁶ Otherwise deserving victims of harm have been struggling to satisfy this requirement and, where the matter has been argued, courts have expressed a clear preference for the reform, should there be any, to be driven by a legislative process. The argument appears to be that statutory reform provides an advantage that single instances of litigation do not: it enables all the relevant stakeholders to partake in the thorough processes of investigation, analysis and determination that are required to produce a cohesive and effective structure for the development of the law. By removing fault as a requirement for obtaining compensation, victims of workplace injuries and diseases and defective consumer products

²³ See generally Wessels *Developing the South African Law of Delict* 164-171; Wessels 2019 *Fundamina* 229-234.

²⁴ *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

²⁵ See generally Wessels *Developing the South African Law of Delict* 171-177; Wessels 2019 *Fundamina* 234-237.

²⁶ RAF *Report of the Road Accident Fund Commission* 119; Markesinis and Unberath *German Law of Torts* 721-731; Stapleton *Disease and the Compensation Debate* 12.

now have a greater theoretical chance to succeed in obtaining compensation for the harm they have suffered.

Finally, the statutory development of the law of delict has also been considered justified where it has enabled a more time-efficient and cost-effective route to compensation and where it has succeeded in providing a principled, consistent approach to compensation. These policy considerations are therefore also relevant insofar as justification goes.

The policy considerations briefly described above therefore provide a justifiable theoretical framework for the statutory development of the law insofar as the compensation of victims is generally concerned. However, by itself it does not yet justify the singling out of crime victims as a specific category of victims that may come into consideration for statutory compensation (as opposed to any other category of victims). Therefore, the remainder of this article will give attention to the question whether the specific development of the law through the enactment of a statutory compensation fund for crime victims can be justified based on the above-mentioned policy considerations.

3 Policy considerations that may justify a statutory compensation scheme for crime victims in South Africa

3.1 The risk of falling victim to crime and the accompanying risk of receiving no compensation

The existence and extent of a risk of harm has played a key role in the South African legislature's decision to develop the law in the context of motor vehicle accidents, occupational injuries and diseases and defective consumer products.²⁷ Here it is submitted that the risk of falling victim to crime may potentially justify the establishment of a crime victim compensation fund in a similar way.

To understand the risk, regard may be had to some of the most striking violent crime statistics. South Africa has one of the highest murder rates in the world: 36,3 per 100 000 members of the population were murdered in 2019/20, with approximately 58 murders being recorded on average per day in this period.²⁸ In the 2021/22 financial year 24,865 people were murdered, approximately 68 per day.²⁹ The South African Police Services (SAPS)

²⁷ See generally Wessels *Developing the South African Law of Delict* 130-160; Wessels 2019 *Fundamina* 205-228.

²⁸ Africa Check 2020 <https://africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201920>.

²⁹ See the 2021-2022 crime statistics for South Africa, which is available from SAPS 2022 <https://www.saps.gov.za/services/crimestats.php>.

recorded 165,494 common assaults and 166,720 assaults with the intent to inflict grievous bodily harm in 2019/20.³⁰ The corresponding statistics for the 2021/22 financial year were 169,390 (common assaults) and 162,660 (assaults with the intent to inflict grievous bodily harm).³¹ This means that the common assault rate in 2019/20 was 282 per 100,000 people while, on average, 457 assaults with the intent to inflict grievous bodily harm were recorded every day.³² This situation has not really improved since then. Unsurprisingly, South Africa is therefore considered as having one of the highest assault rates worldwide. Furthermore, and contrary to official statistics provided by the SAPS, independent research indicates that the number of rapes that occur during one year may be in the order of a half million.³³

Some perspective on the exceedingly high levels of crime in South Africa can further be gained by comparing violent crime statistics and motor vehicle accident data: the 18,673 murders that occurred in 2015/16³⁴ is much higher than the 13,591 people who died as a result of motor vehicle accidents that took place in 2015/16,³⁵ while the 182,933 assaults with the intent to do grievous bodily harm recorded in 2015-2016³⁶ is almost three times more than the number of people who were seriously injured in motor vehicle accidents in 2015 (62,520).³⁷

These statistics demonstrate that, arguably, with the possible exceptions of poverty, unemployment and the struggling economy, the problems associated with crime, criminality and victimisation are some of the worse that the country has faced in a post-democratic dispensation.³⁸ Although such a high crime rate has social, political and psychological effects on victims and the broader society alike, the economic consequences have been emphasised as proving especially significant. For instance, the "sheer volume of crime, as well as the proportion of violent crime, ensures that

³⁰ Africa Check 2020 <https://africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201920>.

³¹ See the 2021-2022 crime statistics for South Africa, which is available from SAPS 2022 <https://www.saps.gov.za/services/crimestats.php>.

³² Africa Check 2020 <https://africacheck.org/fact-checks/factsheets/factsheet-south-africas-crime-statistics-201920>.

³³ Wessels *Developing the South African Law of Delict* 10.

³⁴ SAPS 2016 https://www.saferspaces.org.za/uploads/files/SAPS_Annual_Crime_report_2015_16.pdf 108; Wessels *Developing the South African Law of Delict* 10.

³⁵ RTMC *Costs of Crashes in South Africa 2*; Wessels *Developing the South African Law of Delict* 10.

³⁶ SAPS 2016 https://www.saferspaces.org.za/uploads/files/SAPS_Annual_Crime_report_2015_16.pdf 108; Wessels *Developing the South African Law of Delict* 10.

³⁷ RTMC *Costs of Crashes in South Africa 2*; Wessels *Developing the South African Law of Delict* 10.

³⁸ Wessels *Developing the South African Law of Delict* 203; SALRC *Report Project 82* 9.

crime in South Africa is inordinately expensive to the society and individuals."³⁹ To get a sense of the economic consequences for an individual crime victim, consider the following set of costs to which she may be exposed:

[P]roductive years lost by victims who are killed or seriously injured[,] working days lost during convalescence[,] reduced productivity following violent victimisation[,] working days lost assisting the investigating officer and attending court[,] working days lost replacing lost and damaged property[,] taxes used to pay for the provision of the services of the criminal justice system[,] insurance premiums and payments for private security[,] lost and damaged property[,] medical costs[,] lost investments and economic opportunities flowing from the increased costs of doing business in a high crime environment [and the] reductions in pleasure derived when activities are avoided as a result of a fear of crime.⁴⁰

Similar to victims of motor vehicle accidents, defective consumer products and occupational injuries and diseases, crime victims are also exposed to the further risk of receiving no compensation. Of course, a victim who has suffered harm because of the culpable conduct of a state employee might be successful in holding the state vicariously liable, but this is only the case if the victim has the funds to afford private litigation, the luxury to live without compensation for a considerable period of time and the means to prove all of the requisite elements of delictual liability.⁴¹ This is hardly the general position. Indeed, most South African crime victims do not have this option, which means that, without intervention of some kind, they will likely be forced to shoulder the burden of the harm by themselves.

In summary, South African citizens are exposed to the very substantial risk of falling victim to harm from crime and are equally exposed to a risk of receiving limited or no compensation. This means that the need to combat the risk of harm that operated to justify the enactment of the COIDA, the RAF Act and the CPA is also applicable here.

3.2 A related question – who should bear the risk?

An important question arising from the above is who should bear the risk of harm? In the case of the COIDA and the CPA, the notion of enterprise liability provides an adequate explanation of why the employer and the manufacturer may be made to shoulder the financial cost of the risks created by employment and manufactured goods respectively.⁴²

³⁹ SALRC Report Project 82 24.

⁴⁰ SALRC Report Project 82 24-25.

⁴¹ As the recent reports by the SALRC on the state's liability for medical malpractice indicate, private litigation is extremely expensive and may easily cost hundreds of thousands of Rands. See, for example, SALRC Report Project 141 186.

⁴² Wessels *Developing the South African Law of Delict* 205-207; Brodie *Enterprise Liability and the Common Law* 2-7.

Essentially, the employer and manufacturer create the risk of harm which may materialise while also potentially benefiting the most from the respective enterprise and must therefore carry the financial harm that results therefrom. In the case of the COIDA, this means that employers are statutorily forced to contribute to the compensation fund for occupational injuries and diseases, while the CPA states that manufacturers may be held strictly liable for harm arising from defective consumer products.

In the case of harm arising from motor vehicle accidents, however, the notion of enterprise liability fails to explain why innocent road users are asked to make a financial contribution towards the road accident fund in the form of fuel levies.⁴³ Nevertheless, although they do not stand to benefit from the use of roads in the same way that a manufacturer stands to benefit financially from the manufactured consumer products, the financial contribution that innocent road users are obliged to make is arguably justifiable on the basis that they contribute towards the creation of a significant risk of harm through their use of motor vehicles.

Similarly, enterprise liability does not appear to find application in the context of crime victim compensation. Most crime victim compensation funds are tax-funded, i.e. innocent taxpayers' monies are used to compensate victims of crime although they did not create or stand to benefit from the risk of harm.⁴⁴ Therefore, on this point they apparently differ from the COIDA or the strict liability regime for defective products under the CPA. They also differ from the RAF Act insofar as it may be argued that all road users contribute towards the creation of a risk of harm by making use of motor vehicles on roads whereas not all South African citizens may be said to contribute towards the risk of harm arising from crime.

In response to the above, it requires emphasis that the need to combat the risk of harm arising from crime must be separated from the issue of responsibility for that risk. Important as it is to determine who should ultimately take responsibility for the risk of falling victim to crime, it remains a valid consideration that in principle the existence and extent of the risk of harm arising from crime could justify the statutory development of the law. In any event, it is submitted that the following statement by Miers, who writes about the justification of a crime victim compensation fund from a comparative perspective, also applies in the South African context:

It is an incontestable fact that each one of us has a statistically determinable risk of victimization. Where schemes are funded by general taxation we may

⁴³ See Wessels *Developing the South African Law of Delict* 205; RAF 2017 <http://www.raf.co.za/about-us/pages/fuel-levy.aspx>.

⁴⁴ SALRC *Report Project 82*; Miers 2014 *International Review of Victimology* 155-156; Wessels *Developing the South African Law of Delict* 205-206.

accept that it is levied for the purpose of insuring us against the risk when it eventuates. In that sense, a victim is, on the occasion of the victimization, a representative of this actuarially constructed group. This argument for public insurance against criminal victimization resonates with some conceptions of the functions of tort law that it is socially more just and economically more sensible to distribute losses occasioned by criminal activity at large, rather than let them fall on the particular victim.⁴⁵

In other words, the enactment of a crime victim compensation fund – and requiring innocent members of the public to make financial contributions towards the fund – arguably relies on "the general proposition that crime losses are endemic to the entire society and that [those] endemic losses should be spread throughout the entire group."⁴⁶ Scholars have correctly pointed out that an "obvious analogy"⁴⁷ may be drawn between such risk and the "statistically determinable risk of being injured in a road accident ... which, like criminal victimization, falls unevenly across the population."⁴⁸

In addition, the fund, if it were to be enacted, may also be financed by the proceeds paid into the Criminal Asset Recovery Account set up under the *Prevention of Organised Crime Act* 121 of 1998.⁴⁹ Essentially that Act provides for the recovery of the proceeds of unlawful activities (through confiscation orders) and the civil forfeiture of criminal assets that have been used to commit an offence (through forfeiture orders). If this were to be done, it would not only be innocent taxpayers that would contribute to the fund but also those who have benefited from unlawful activities.

Lastly, it should be remembered that under the current regime of expanded state delictual liability for harm arising from crime, where the state has been held vicariously liable for a series of crimes committed in a divergent range of circumstances, the innocent taxpayer is in any event ultimately responsible for the compensation of the crime victim. As such, a statutory compensation fund which would require at least a certain category of citizens to contribute towards such a fund would not be different in principle to the current legal regime.

3.3 The role of the Constitution and the need to promote the constitutional right to social security

The Constitution has played a significant role in justifying earlier statutory development of the law. Indeed, the COIDA in particular, which sets up a no-fault based compensation fund for victims of workplace-related injuries

⁴⁵ Miers 2014 *International Review of Victimology* 155.

⁴⁶ Scott 1967 *Wm & Mary L Rev* 282.

⁴⁷ Miers 2014 *International Review of Victimology* 155.

⁴⁸ Miers 2014 *International Review of Victimology* 155.

⁴⁹ Wessels *Developing the South African Law of Delict* 207; Wessels 2019 *Stell LR* 381-383.

and diseases, has been justified on the basis that it promotes the constitutional right to reasonable access to social security.⁵⁰ This is not least because the route to compensation is arguably more cost-effective and quicker if a victim institutes a claim against a statutory fund rather than by instituting a common-law delictual claim.⁵¹

The establishment of a statutory compensation fund for crime victims could be used to give effect to the constitutional right to social security in a similar way. As indicated above, falling victim to crime may bring about severe financial and accompanying social consequences.⁵² Setting up a more cost-effective route to obtaining compensation would arguably mean that more crime victims could be compensated in this way, thereby alleviating the socio-economic consequences of being a crime victim. Doing so along a cheaper, more time-efficient route could assist in the empowerment of the historically disadvantaged, promoting fundamental human rights (particularly human dignity), addressing past injuries and seeking to provide an adequate standard of living to all individuals – all of which constitute part of the right to social security.⁵³

3.4 Evidentiary problems with applying the common-law requirement of fault

Generally speaking, the common-law requirement to prove fault (specifically in the form of negligence) when instituting a delictual claim may place a burden on victims that is very difficult to satisfy, thereby rendering them without compensation.⁵⁴ As indicated above, this consideration has been used to justify the legislative development of the law in a variety of contexts, notably where harm results from defective consumer products as well as workplace-related injuries and diseases, where the legislature has done away with the requirement to prove fault on the part of the manufacturer or employer respectively.⁵⁵

⁵⁰ Olivier "Constitutional Issues" 35; Wessels 2019 *Fundamina* 229-234.

⁵¹ Wessels *Developing the South African Law of Delict* 164-171.

⁵² KPMG 2014 <https://assets.kpmg/content/dam/kpmg/za/pdf/2017/01/za-Too-costly-to-ignore.pdf> 2.

⁵³ This article is based on research that outlines the basic policy considerations that have justified the legislative development of the law of delict in the past. One such pertinent consideration is the need to promote the constitutional right to social security. That is why this section does not deal with other constitutional rights. Nevertheless, it may be said that the enactment of a statutory compensation fund for crime victims may also promote other constitutional rights such as the right to freedom and security of the person, as set out in s 12 of the Constitution.

⁵⁴ Wessels *Developing the South African Law of Delict* 209-211.

⁵⁵ Wessels 2019 *Fundamina* 234-237.

The fault requirement has also presented evidentiary problems to crime victims who instituted delictual claims directly against the state in search of compensation.⁵⁶ An analysis of the law reports shows that crime victims have experienced particular difficulties in cases where the claim is based on the state's so-called systemic negligence.⁵⁷ The most striking examples are those where a victim who endured a violent assault on a train owned and operated by the state-owned railway operator instituted a claim directly against the state on the basis that it was negligent in failing to prevent a crime on one of the trains on its nation-wide network, i.e. that the defendant train operator's entire security system was sub-standard.⁵⁸ The particular difficulty with these cases is the fact that, while victims may be able to prove that the harm they suffered was objectively foreseeable, they cannot prove that a reasonable person in the position of the defendant would have taken steps to prevent the crime. Essentially, this is because evidence has suggested that the crime in question could have been prevented only if a security guard had been stationed on each unit of each train in the national network of trains. Of course, this would come at a massive cost, arguably forcing the operator to increase its ticket prices, which would render the use of trains unaffordable for most South Africans. In short, in the court's view such enormous financial cost and the concomitant undesired knock-on effect on ordinary citizens outweighs any other factor when considering the reasonableness of potential preventative measures. In other words, the institution of delictual claims for harm arising from crime may likely be met with a formidable evidentiary burden of having to prove that the state could and should have undertaken a system of effective and affordable measures which would have prevented the crime – a challenge which may be very difficult, if not impossible, for most crime victims to overcome.

In summary, it may be argued that, as is the case with the COIDA in respect of occupational injuries and diseases, the establishment of a no-fault based statutory crime victim compensation fund could provide a viable alternative that could present an easier, cheaper and arguably more time-efficient route to compensation.

3.5 Avoiding legal unpredictability and promoting legal certainty

As indicated above, courts have held the state (mostly the Minister of Police) vicariously liable for state employees' negligent failure to protect its citizens from crime as well as for the intentional commission of violent crimes by state employees. The expansion of the state's liability for intentionally

⁵⁶ Wessels *Developing the South African Law of Delict* 209-211.

⁵⁷ Wessels *Developing the South African Law of Delict* 105-112, 212.

⁵⁸ *Mashongwa v Passenger Rail Agency of South Africa* 2016 3 SA 528 (CC); *Shabalala v Metrorail* 2008 3 SA 142 (SCA).

caused crimes by state employees in particular has been criticised on the basis that it may produce arbitrary outcomes.⁵⁹ Without repeating the entire criticism here, it suffices to say that it is conceivable that this development may expose future litigants to an element of unpredictability and thereby undermine the constitutional principle of the rule of law, which demands not only that everyone should be treated equally under the law, but also that future litigants should not be taken by surprise by any uncertainty or vagueness regarding specific aspects of the law of delict.⁶⁰ In this regard, the following argument by Gardner⁶¹ should be emphasised:

The ideal of the rule of law is the ideal according to which the law should be capable of guiding those who are subject to it. People should not be ambushed by the law; it should be possible for them reliably to anticipate the legal consequences of their actions and reliably to obtain or to avoid those consequences by following the law. So understood, the ideal sets a wide range of disparate standards for all legal systems to live up to. The ones that mainly concern us here are standards for legal *norms* to live up to. Legal norms should not, according to the ideal of the rule of law, be secret, retroactive, unclear, impossible to conform to, or forever in a state of flux; and particular legal norms (rulings) should be applications of general legal norms (rules).

If future litigants are uncertain about the application of a foundational legal rule, they are likely to be taken by surprise which, in turn, will result in unnecessary litigation with the corresponding financial losses and time wastage. This line of development not only introduces ambiguity regarding legal doctrine, but consequently diminishes future litigants' right to access to justice.

It is proposed that the establishment of a statutory compensation fund could provide a "clearer 'road map' towards obtaining suitable redress"⁶² in the context of harm arising from crime. This could be done by enacting a specific statute that clearly stipulates the eligibility criteria for instituting a claim against a compensation fund, in much the same way as the RAF Act and the COIDA have done for victims of motor vehicle accidents and workplace-related injuries and diseases.⁶³

⁵⁹ See for example Wagener *Assessment of the Normative Bases for the Doctrine of Vicarious Liability*; Fagan 2009 SALJ.

⁶⁰ Wessels *Developing the South African Law of Delict* 211.

⁶¹ Gardner "Some Rule-of-Law Anxieties" 211.

⁶² Farrell, Devaney and Dar 2010 <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2012/08/consultation-recommendations-fault-compensation-scotland-injuries-resulting-clinical-treatment/documents/volume-2-fault-compensation-schemes-medical-injury-review/volume-2-fault-compensation-schemes-medical-injury-review/govscot:document/00403703.pdf> 9.

⁶³ Wessels *Developing the South African Law of Delict* 211.

3.6 *Higher compensation and lower transaction costs*

One of the main arguments employed by the proponents of compensation schemes generally is that the law of delict (like tort law, elsewhere) provides a time-consuming, expensive and cumbersome route by which victims may be compensated through the civil procedure system.⁶⁴ Indeed, the South African civil procedural system is accompanied by high legal transaction costs and provides a significant barrier to access to justice, especially in a country where most people cannot afford the services of legal practitioners.⁶⁵

Furthermore, as mentioned earlier, the potential procedural assistance offered by the *Criminal Procedure Act* has very little practical use, because, even if a crime is reported to the police and culminates in a successful prosecution and sentencing, most criminals are unlikely to have the means to compensate their victims.⁶⁶

Ultimately, this means that most South African crime victims could be left un- or undercompensated for the harm which they have suffered because of crime. Against this background, it may be argued that the establishment of a statutory compensation fund would be a practical manner to improve on these shortcomings in the same way that, for example, the COIDA fund provides quicker and cheaper access to compensation to victims of occupational injuries and diseases.⁶⁷

Furthermore, seeking compensation from a statutory fund may not only increase efficiency in terms of both the time and costs spent on compensating crime victims, but it may also result in the reduction of the right to take legal action in the courts, thus lessening the cost and administrative burden on the courts and interested parties.

As mentioned earlier, the overwhelming majority of delictual claims based on harm arising from crime are instituted by crime victims against some or other organ of the state, which is in a stronger financial position to compensate harm than the impecunious perpetrators. If the state chooses to defend its employees' conduct, it may very likely have severe financial consequences for its resources. These consequences are illustrated by recent reports on the SAPS. For instance, one report regarding the extent

⁶⁴ Cane *Atiyah's Accidents, Compensation and the Law* 461-499; Deakin *et al Markesinis and Deakin's Tort Law* 51-59; Hedley "Tort and Personal Injuries" 249; Loubser and Midgley *Law of Delict* 9-10.

⁶⁵ Wessels *Developing the South African Law of Delict* 179-180; Klaaren 2014 <https://wiser.wits.ac.za/event/public-positions-history-and-politics-cost-justice> 1-6.

⁶⁶ Von Bonde *Redress for Victims of Crime* 88.

⁶⁷ Wessels *Developing the South African Law of Delict* 212.

and impact of civil claims against the SAPS stated that in recent years the SAPS have

reported a substantial annual increase in civil claims filed for damages because of actions or omissions by its officials, and an even larger increase in claims pending. The 2014/2015 SAPS annual report showed that pending claims stood at over R26 billion, which is equivalent to over a third of the SAPS budget.⁶⁸

The report alleged that between 2007/08 and 2014/15, "claims made annually against the SAPS increased by 533% if considering the original rand value, or 313% if adjusted to the same rand value."⁶⁹ Lastly, the report records that in a parliamentary reply the Minister of Police indicated that "just under R570 million had been spent by the SAPS on legal costs relating to civil claims between 2011/12 and 2013/14."⁷⁰ In accordance with the SAPS's annual report for 2019/20, as at 31 March 2020 there was a total of almost fifty thousand pending civil claims to the value of approximately R7 billion.⁷¹ All in all, the overall situation remains extremely dire.

One of the principal reasons for the current under-compensation of crime victims is the length of court proceedings,⁷² which are time-consuming, cumbersome and expensive. As indicated above, the institution of civil claims against the state has significant financial implications on the financial resources of the SAPS. In turn this may significantly prejudice the operation of the SAPS and their ability to effectively prevent crime and promote safety and security, thereby potentially resulting in further claims being instituted and an even greater need for victim compensation.

The establishment of a statutory compensation fund may potentially result in limiting the state's exposure to protracted litigation, thereby allowing for state funds to be spent on resources and enabling the state to combat the risk of crime more effectively, e.g. by employing more police officers, purchasing more police vehicles, etc. This in turn may decrease the likelihood of harm manifesting through the culpable conduct of the state's employees.⁷³

If a crime victim compensation scheme were to be funded by using monies allocated to the budget of the SAPS, the latter would arguably have fewer financial resources available to combat crime and to promote safety and

⁶⁸ Dereymaeker 2015 SACQ 29.

⁶⁹ Dereymaeker 2015 SACQ 31.

⁷⁰ Dereymaeker 2015 SACQ 34.

⁷¹ SAPS 2020 https://www.gov.za/sites/default/files/gcis_document/202012/south-african-police-service-annual-report-20192020.pdf 98.

⁷² Dereymaeker 2015 SACQ 32.

⁷³ SALRC *Report Project 82* 119.

security, thereby undermining the previous argument. However, in this regard it should be noted that "[i]n general, the bulk of funds for compensation schemes internationally are sourced through the relevant budgetary authority at national, state/provincial or local level."⁷⁴ If the South African legislature were to enact a crime victim compensation scheme, it is recommended that it should be funded by monies received from the national budget and not by using the funds available to the SAPS for the purposes of promoting safety and security. After all, crime victim compensation is not the responsibility of the SAPS and bestowing on it such an onerous financial burden could potentially undermine the national crime prevention strategy.

3.7 Improving the status of the criminal justice system

The SALRC's investigation into a potential fund recorded that crime victims have "certain emotional and practical needs, including trauma counselling, advice and referral, information on court procedure, and compensation."⁷⁵ It also noted that if these needs are not met and "the victim's position in the criminal justice system is not drastically reformed, it will further contribute to [a] legitimacy crisis of the criminal justice system in South Africa."⁷⁶ Therefore, another motivation for the legislature's interference with the *status quo* would be that it could contribute towards addressing this concern. After all, as the report stated,

a compensation scheme could build confidence in the criminal justice system by demonstrating that it is a system that is sensitive to the needs of victims. This could encourage victims to form a partnership with the State to combat crime and would clearly enhance reporting rates.⁷⁷

It is therefore submitted that the establishment of a statutory compensation fund for crime victims would enhance the legitimacy and status of the criminal justice system. This has also been a reason used to justify the establishment of similar funds in other jurisdictions.⁷⁸ Providing more victims with compensation in a quick and relatively cost-efficient manner presents a practical way in which crime victims may be assisted by the state, contributing thereby to the notion of victim empowerment.⁷⁹

⁷⁴ Wessels *Developing the South African Law of Delict* 214.

⁷⁵ SALRC *Report Project 82* 27.

⁷⁶ SALRC *Report Project 82* 310.

⁷⁷ SALRC *Report Project 82* 281.

⁷⁸ SALRC *Report Project 82* 308-311; Burns *Criminal Injuries Compensation* 120-129.

⁷⁹ SALRC *Report Project 82* 285-286, 308-310, 333.

4 Considerations that potentially count against a statutory compensation scheme

4.1 *Financial considerations that relate to the establishment of a statutory compensation fund for crime victims*

The financial concern related to the establishment of a statutory compensation fund for crime victims was highlighted in the SALRC's report.⁸⁰ In this section I will briefly attempt to determine whether there are convincing reasons why the SALRC's final recommendation against the establishment of a crime victim compensation fund should be reconsidered. For the sake of clarity, it may be noted at the outset that it is not yet definitively clear whether or not the establishment of a statutory crime victim compensation scheme is affordable and this section should not be understood as making a conclusive statement in this regard.

In its report the SALRC recorded the concern of the National Council of Women of South Africa, who recognised that a state-funded compensation scheme for crime victims seems "ideal",⁸¹ but argued that the potential funding of such a scheme through public taxation would cast a "further burden on the taxpayer"⁸² and that it should therefore be avoided. Similarly, awareness of the "fiscal constraints"⁸³ led the Lawyers for Human Rights to state its reservations about a potential scheme because its establishment would mean "that the amounts paid would have to be limited".⁸⁴ They further argued that a "system which would work like the Workmen's Compensation Fund, where it takes years for the matter to be set down for a hearing, will only exacerbate the frustration of victims".⁸⁵

The commission also referred to the argument that, although compensation for harm that results from a rape or violent robbery makes "moral sense, [it is] difficult to justify in a context of limited resources, where poverty alleviation, combating Aids and providing employment all demand increased resourcing."⁸⁶ For these reasons the SALRC concluded that at the time the scheme was "something South Africa cannot afford".⁸⁷ Today we may add the significant financial challenges associated with combatting the wide-spread effects of the Covid-19 pandemic.

⁸⁰ SALRC Report Project 82 118, 303.

⁸¹ SALRC Report Project 82 159.

⁸² SALRC Report Project 82 159.

⁸³ SALRC Report Project 82 161.

⁸⁴ SALRC Report Project 82 161.

⁸⁵ SALRC Report Project 82 161.

⁸⁶ SALRC Report Project 82 188.

⁸⁷ SALRC Report Project 82 29.

In any event, it is argued that the SALRC's final recommendation against the establishment of a statutory compensation fund for the victims of crime should be reconsidered for the following reasons.

First, as the SALRC itself emphasises, the determination of the financial implications regarding the establishment of a statutory compensation fund proved to be extremely difficult, since "an accurate estimate depended on a number of variables, too difficult to verify or to define with certainty."⁸⁸ We should further note that the attempt to determine the cost implications was based on "[e]stimates and assumptions"⁸⁹ and done "in spite of much of the necessary data being unavailable".⁹⁰ Therefore, any conclusions reached about affordability would be premature until an authoritative financial analysis has been completed on this issue.

It should also be remembered that the cost implications to the state of violent crime are "enormous in terms of the loss of productive human resources and other costs such as providing health care for victims."⁹¹ Therefore, it is arguable that the payment of compensation to a crime victim may allow the victim to contribute towards the generation of wealth by re-entering the marketplace.

In addition, as was pointed out above, the cost implications of the current judicial expansion of the state's vicarious liability are significant and could provide fresh impetus for a reconsideration of the financial implications of establishing a compensation fund for crime victims.

The conclusion reached in the SALRC's report that a compensation fund is financially unaffordable was based on a model fund which sought to provide full compensation for victims of violent crime, which included murder, attempted murder, rape, assault with the intent do grievous bodily harm, indecent assault and aggravated robbery.⁹² The commission determined that at the time it would require R4,7 billion to sustain such a fund. Taking inflation into account, this amounts to approximately R10,5 billion in 2022.⁹³

However, the SALRC did not adequately investigate the possibility of lower levels of compensation, e.g. limiting the type of injuries or harm in respect of which a statutory claim may be instituted against the fund or limiting the amount of compensation claimable against such a fund. It also failed to determine whether it would be financially viable to adopt more limited

⁸⁸ SALRC *Report Project 82* 2.

⁸⁹ SALRC *Report Project 82* 118.

⁹⁰ SALRC *Report Project 82* 118.

⁹¹ SALRC *Report Project 82* 303.

⁹² SALRC *Report Project 82* 111-114.

⁹³ Crause 2022 <https://inflationcalc.co.za/>.

eligibility criteria, e.g. recognising only those claims brought by victims of intentionally-committed violent crimes who have suffered serious bodily or psychiatric injuries. Indeed, considering the fact that most crime victim compensation funds provide a capped amount of compensation and generally only in respect of intentionally committed violent crimes,⁹⁴ this might have a significant impact on the affordability of the proposed fund.

Against this background it is arguable that the proposed crime victim compensation fund could be more cost-efficient than the current liability system, which continues to expand insofar as the state is concerned. However, the affordability of the proposed scheme is a matter for later determination and any statement about the fund's cost-efficiency is therefore not conclusive.

Lastly, if the legislature were to enact the proposed crime victim compensation scheme, it is proposed that the fund would be well-advised to approach the Criminal Assets Recovery Account, as set up under chapter 7 of the *Prevention of Organised Crime Act* 121 of 1998, with a request to make available monies (the proceeds of unlawful activities) to the scheme for the purpose of funding crime victim compensation.⁹⁵

4.2 Administrative problems with the establishment of a statutory compensation fund for crime victims

The SALRC recorded several problems with the administration of a statutory compensation fund that weigh against the proposal to establish a fund in South Africa. The commission notes that, given "the current infrastructural situation in South Africa's public service, it is likely that the establishment of a compensation scheme could be hampered by the lack of effective inter-sectoral co-operation and co-ordination, as well as by the underdeveloped administrative systems in some government departments."⁹⁶

Based on the protracted nature of and difficulties involved in handling "18 000 Truth and Reconciliation urgent reparation claims",⁹⁷ the report states that "there may be little realistic prospect for setting up a new bureaucracy with the purpose of compensating thousands of potential victims."⁹⁸ Highlighting fraudulent claims and the ineffective reporting of crimes as further reasons weighing against the success of a statutory compensation fund, the SALRC Report concludes that the necessary

⁹⁴ See generally Greer *Compensating Crime Victims*.

⁹⁵ Wessels *Developing the South African Law of Delict* 218-219; Wessels 2019 *Stell LR* 381-383.

⁹⁶ SALRC Report Project 82 354.

⁹⁷ SALRC Report Project 82 354.

⁹⁸ SALRC Report Project 82 355.

prerequisites of the effective and efficient administration of such a fund are absent.⁹⁹

The commission also documented its concerns that the creation of a statutory compensation scheme might "encourage criminals to further their actions and it may lead to fraud and corruption by the community with a resultant increase in workload on the functionaries in the criminal justice system."¹⁰⁰ Although the compensation scheme for crime victims would find support in principle, "it would of necessity lead to actions being instituted on false charges for the sole purpose of financial gain."¹⁰¹ It is argued that it would be "very difficult to identify such cases prior to the eventual hearing and it would have a definite effect on court roles [sic] and could well lead to a significant number of additional courts having to be established to handle the extra work."¹⁰²

The corruption and maladministration problems in the South African public sector are well documented.¹⁰³ While various state-owned enterprises such as the national airline and electricity supplier have been locked in a perpetual struggle to provide basic services to South Africans, the Road Accident Fund – set up under the RAF Act to compensate victims of road accidents – has been the target of corrupt public sector officials and attorneys and is unable to pay billions of Rands in outstanding debt.¹⁰⁴

Notwithstanding the above, the SALRC's conclusion on this matter does not by itself dictate against the creation of a statutory compensation fund for crime victims. Brooks points out that "establishing an efficient machinery of investigation"¹⁰⁵ and "stringent requirements of proof"¹⁰⁶ could go some way towards addressing the concerns raised above. Finally, it is worth remembering that:

[it is] not as though governments have never undertaken programs which involved monetary payments upon a showing of injury. There are multitudes of activities where the potential for fraud exists. It is most desirable to prevent fraud and to punish fraud when it occurs, but this has been the business of government for centuries. It is germane to note that problems of fraud or

⁹⁹ SALRC *Report Project 82* 354-355.

¹⁰⁰ SALRC *Report Project 82* 160. Also see Brooks 1976 *Tulsa LJ* 501.

¹⁰¹ SALRC *Report Project 82* 161.

¹⁰² SALRC *Report Project 82* 161.

¹⁰³ See generally Kgobe 2020 http://ulspace.ul.ac.za/bitstream/handle/10386/3199/kgobe_africanised_2020.pdf?sequence=1; Segwagwa of *President Zuma, Nkandla and the Constitutional Imperatives Of South Africa*.

¹⁰⁴ See generally Venter 2020 <https://www.iol.co.za/pretoria-news/news/court-battle-over-raf-inability-to-pay-billions-in-outstanding-debt-40136235>; De Villiers 2020 <https://www.businessinsider.co.za/road-accident-funds-double-amount-claimants-can-claim-2020-2>.

¹⁰⁵ Brooks 1976 *Tulsa LJ* 502.

¹⁰⁶ Brooks 1976 *Tulsa LJ* 502.

attempted fraud have occasioned no mention of difficulties for those jurisdictions that presently administer crime compensation programs.¹⁰⁷

In any event, if this objection were to be heeded, South Africa would struggle to introduce any new initiatives in the public sector. Of course, immediate and radical improvement is required, and cleaner, more accountable governance and administration would be required to run any tax-funded compensation scheme.

4.3 Concerns that the establishment of a statutory compensation fund raises about the function of the law of delict

It is generally agreed that the law of delict, like tort law, is primarily concerned with the compensation of harm.¹⁰⁸ Other functions include the protection of certain interests, the promotion of social order and cohesion, the education and reinforcement of values, providing socially-acceptable compromises between conflicting moral views, deterring the injurer from behaving similarly in future and reallocating and spreading losses.¹⁰⁹ In short, compensation might be the primary function, but it is "not the sole function of the law of delict".¹¹⁰ Furthermore, the law of delict, as a fault-based system of liability, appears to be founded on the central moral notion of personal responsibility.¹¹¹

The question that requires answering against this background is whether the establishment of a crime victim compensation fund would undermine this function. More specifically, it may be asked whether a compensation scheme might undermine the function of deterrence or the notion of personal responsibility.

Regarding the potential undermining of personal responsibility, the following should be considered. First, without a statutory compensation fund, a crime victim is entitled to institute a delictual claim against the criminal or, if the harm was wrongfully caused by the culpable conduct of a state employee, a state organ may be held vicariously liable. In the case of the former, research and practical experience provides evidence that delictual claims are seldom successfully instituted because the criminal is not in a position to pay damages.¹¹² In other words, in these circumstances the law of delict

¹⁰⁷ Brooks 1976 *Tulsa LJ* 502.

¹⁰⁸ See Macintosh *Negligence in Delict* 1; Van den Heever *Aquilian Damages* 3; McKerron *Law of Delict*; Van der Merwe and Olivier *Onregmatige Daad* 1-3; Loubser and Midgley *Law of Delict* 9-10; Neethling and Potgieter *Law of Delict* 3-24.

¹⁰⁹ Loubser and Midgley *Law of Delict* 10-15.

¹¹⁰ Loubser and Midgley *Law of Delict* 9.

¹¹¹ Loubser and Midgley *Law of Delict* 13; Wessels *Developing the South African Law of Delict* 221-225.

¹¹² Wessels *Developing the South African Law of Delict* 222.

is incapable of ensuring that criminals are held personally responsible for their wrongdoing.

If a crime victim decides to rather institute his delictual claim against the state, he or she may succeed in holding the state vicariously liable but the criminal is also not held personally responsible for the harm that he caused to the victim. In this type of case the taxpayer ultimately provides the funds for the payment of damages by the state. Again, it may be argued that in this situation the law of delict does little to give effect to the notion of personal responsibility for causing harm. Against this background it is arguable that the establishment of a statutory compensation fund would conceivably do little to undermine the principle of personal responsibility.

The argument that, unlike a compensation fund, delictual liability will promote socially desirable behaviour and deter dangerous conduct may be summarised as follows:

It is first assumed that, absent tort law [or the law of delict], people would selfishly pursue their own interests, putting their personal desires ahead of the safety of others. As a result, people (and property) would be unreasonably damaged. By contrast, since tort law [or the law of delict] threatens people with having to pay for the harms they cause, it is seen to force them to take the interests of others into account. In other words, it is assumed that in order to avoid tort liability [or delictual liability], people will alter their behavior in a socially desirable, less injury-producing way.¹¹³

In New Zealand it was argued that the establishment of a general accident compensation fund for harm arising from personal injuries and the abolition of tort actions in respect of personal injuries would produce an increase in the number and severity of accidents giving rise to personal injury. However, in a 1985 study Brown found that the available statistics at the time suggested the opposite, namely that "no significant increase in motoring activity ... occurred; and (2) no noticeable increase in accident rates."¹¹⁴ More recently, Schuck pointed out that:

the empirical evidence documenting the effect of liability rules and compensation practices on deterrence remains inconclusive [and that all] systems, therefore, have had to adopt auxiliary measures - information, education, administrative regulation, instinct for self-preservation, technology, market effects (including reputation), professional discipline, and other behavioral influences - to augment the call for accident prevention.¹¹⁵

¹¹³ Sugarman 1985 *CLR* 560.

¹¹⁴ Brown 1985 *CLR* 1002.

¹¹⁵ Schuck 2008 *Yale L & Pol'y Rev* 200.

In a study conducted by Cardi, Penfield and Yoon,¹¹⁶ the authors refer to the attention that has been given to the potential deterrent effects of the common law of tort and set out to test the validity of the assumption that tort liability deters tortious conduct. They explain that the "study's most surprising and provocative finding"¹¹⁷ is the failure of tort liability to deter. Similarly, McEwin notes:

Accident law does not deter, it is argued, because any deterrent effect is swamped by imperfect insurance that does not properly penalize careless or unsafe behaviour ... Instead, deterrence is better achieved by safety regulation. No-fault schemes re-allocate costs away from lawyers to accident.¹¹⁸

The potential of delictual liability to deter people from risky conduct is premised on the assumption that people behave rationally, i.e. that they know what the legal consequences of their risky conduct would be and, further, that they consider such consequences (delictual liability) prior to engaging in their conduct. As Cardi, Penfield and Yoon demonstrate,¹¹⁹ there is little evidence to substantiate such an assumption.

There are further intuitive reasons to question the law of delict's ability to act as a deterrent: "if negligent behavior consists of an actor's accidental disregard of moral imperatives to take reasonable care, perhaps legal incentives are superfluous."¹²⁰ Moreover, even if people might be influenced by the threat of tortious/delictual liability if they are aware of the law's mandates, evidence shows that people are typically ignorant of the law – and even if they are indeed aware of the content of the law, people "commonly discount the chance of being held liable".¹²¹

Fleming refers to another convincing reason why deterrence plays little role in tort law/law of delict:

[T]he admonitory effect of an adverse judgment is today largely diffused by liability insurance which protects the injurer from having to pay the accident cost and instead distributes it among a large pool of premium payers and thereby socializes the loss. In many countries the victim no longer even in

¹¹⁶ Cardi, Penfield and Yoon 2011 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851383 1.

¹¹⁷ Cardi, Penfield and Yoon 2011 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851383 24.

¹¹⁸ McEwin "No-Fault Compensation Schemes" 736-737.

¹¹⁹ Cardi, Penfield and Yoon 2011 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851383 3-4.

¹²⁰ Cardi, Penfield and Yoon 2011 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851383 3-4.

¹²¹ Cardi, Penfield and Yoon 2011 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851383 3-4.

form addresses his claim to the injurer but proceeds directly against the latter's insurance carrier or compensation fund, thereby eliminating even the symbolic tokens of individual blame.¹²²

We may conclude from the above that deterrence plays a marginal role as a function of the law of delict. In reality, it seems as if "government regulation, criminal sanctions and ordinary economic pressures"¹²³ would be the best way to educate and deter. Therefore, it is suggested that the question whether deterrence would be undermined by the establishment of a statutory compensation fund for crime victims "should play a minor role in determining whether to abolish or modify tort law and replace it with a no-fault compensation system."¹²⁴

5 Conclusion

This article has sought to respond to a gap left open in the SALRC's report,¹²⁵ namely the identification of considerations that may justify the legislature's development of the law of delict relating to crime victim compensation through the enactment of a statutory fund. It has been argued that the significant risk of falling victim to crime and the accompanying risk of receiving no compensation in respect of harm suffered may justify the enactment of a fund in a similar way that the risk of harm justified the development of compensation funds in the context of motor vehicle accidents and occupational injuries and diseases. The proposed development of the law in this context could also promote the constitutional right to social security and potentially assist victims in bridging an evidentiary obstacle which they may face when instituting common-law delictual claims.

It has further been argued that considerations that thus far have counted against the introduction of the fund, namely problems with affordability and administration, as well as the potential subversion of the deterrence function of the law of delict, do not present conclusive arguments against its implementation.

To conclude, it is submitted that, when compared to the common-law development of the law of delict and amending existing legislation, in principle a statutory compensation fund seems a desirable solution to improve the legal position of crime victims insofar as their compensation is concerned.

¹²² Fleming 1984 *La L Rev* 1197.

¹²³ Fleming 1984 *La L Rev* 1198.

¹²⁴ Brown 1985 *CLR* 979; Wessels *Developing the South African Law of Delict* 225.

¹²⁵ SALRC *Report Project 82* 318-319.

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List Of Abbreviations

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| CLR | California Law Review |
| COIDA | Compensation of Occupational Injuries and Diseases Act 130 of 1993 |
| CPA | Consumer Protection Act 68 of 2008 |
| La L Rev | Louisiana Law Review |
| RAF | Road Accident Fund |
| RAF ACT | Road Accident Fund Act 56 of 1996 |
| RTMC | Road Traffic Management Corporation |
| SACQ | South African Crime Quarterly |
| SALJ | South African Law Journal |
| SALRC | South African Law Reform Commission |
| SAPS | South African Police Service |
| Stell LR | Stellenbosch Law Review |
| Tulsa LJ | Tulsa Law Journal |
| Wm & Mary L Rev | William and Mary Law Review |
| Yale L & Pol'y Rev | Yale Law and Policy Review |