

RECONSIDERING THE LEGAL POSITION OF VICTIMS OF VIOLENT CRIME: *DN V MEC FOR HEALTH* 2014 (3) SA 49 (FB); *MEC FOR HEALTH V DN* 2015 (1) SA 182 (SCA)

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SUMMARY

In Parts 1–4 of this article, the facts, legal question and judgments delivered in *DN v MEC for Health* 2014 (3) SA 49 (FB) and *MEC for Health v DN* 2015 (1) SA 182 (SCA) is briefly described. Part 5 of this article provides a critical evaluation of some of the aspects of the judgment by the Supreme Court of Appeal, and focuses on the role which the court assigns to motive and risk in establishing whether the injury sustained by the plaintiff was an “accident” arising “out of and in the course and scope of employment”. Furthermore, a brief comparative overview is provided of the legal position of victims of violent crime in New Zealand (as an example of a jurisdiction that offers compensation to crime victims by means of a general social-security system) and England (as an example of a jurisdiction that offers compensatory relief *via* a tailor-made no-fault based-compensation scheme for crime victims).

1 FACTS

In *DN v MEC for Health*¹ the plaintiff, a female medical doctor employed by the defendant (“doctor”), brought a delictual action against the defendant, her employer, in order to recover the harm she had suffered after being raped by an intruder who had gained access to the employer’s premises. The doctor was raped while discharging her duties, at approximately 02:00 in the morning of 30 October 2010, while walking from one hospital building to another. She was attacked by being struck with a brick which rendered her unconscious, and then raped on the first floor of the ward to which she was headed. At the time of the incident, building construction was being carried out at the hospital and a portion of the perimeter fencing was under temporary repair. In addition, the elevator between the ground and first floor in the building was defective and the lights on the first floor were also not working. The doctor’s assailant was not a patient of the relevant hospital, had no authorisation to be on its premises and was later convicted of rape and sentenced to 15 years’

¹ 2014 (3) SA 49 (FB); and *MEC for Health v DN* 2015 (1) SA 182 (SCA).

imprisonment. The doctor's delictual claim for compensation against her employer was based on the negligent and wrongful failure on the part of her employer to take adequate steps to secure her safety, which failure caused her loss.² The defendant raised a special plea, namely that by virtue of section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA") the doctor was barred from instituting a delictual claim against her employer.

2 LEGAL QUESTION

The court of first instance as well as the Supreme Court of Appeal ("SCA") was tasked with determining whether the doctor could institute a common-law claim in delict against her employer, or whether section 35(1) of the COIDA³ barred her from doing so. In other words, was the doctor statutorily obliged to institute her claim against the no-fault-based compensation fund established under the COIDA,⁴ or did she fall outside the scope of the Act? As discussed below, both courts confirmed that answering this question ultimately depended on whether, for the purpose of the COIDA,⁵ the rape of the doctor could be regarded as an "accident" arising "out of and in the course and scope of employment."⁶ The answer to this question would be of great significance to both parties. While reverting to the common law of delict would mean that the doctor would be required to prove all the elements of a delict, including fault,⁷ it would enable her to secure fuller compensation than what would otherwise have been offered to her under the provisions of the Act. For example, the doctor would be entitled to claim damages in respect not only of the patrimonial harm she suffered, but also the non-patrimonial harm arising from the crime, such as the pain and suffering and loss in the amenities of life arising from the rape.

3 JUDGMENT OF THE COURT A QUO⁸

Judge Mocumie commenced her judgment with reference to section 35(1) of the COIDA. It states as follows:

² *LAWSA XVIII Social Security: Core Elements* par 131: At common law the employer owes a duty to an employee to take reasonable care for her safety: "The employer is in the first place under a duty to see that his or her employees do not suffer through his personal negligence, such as failure to provide a safe working environment and a failure to provide [a] proper and suitable plant, if he knows or ought to have known of such failure."

³ 130 of 1993.

⁴ *Ibid.* Note that, although the Act established a no-fault-based compensation fund, fault continues to play some role, since an employee is entitled to additional compensation if he can establish that his injury or disease was caused by the negligence of the employer or certain categories of managers and fellow employees.

⁵ 130 of 1993.

⁶ See s 1 of the COIDA 130 of 1993.

⁷ Proving fault, especially negligence, is difficult and places a burden on the plaintiff in the doctor's position, a burden often hard or impossible to discharge. See Loubser and Reid *Product Liability* (2012) 4.

⁸ *DN v MEC for Health* 2014 (3) SA 49 (FB).

“No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”⁹

It is trite that the COIDA established a no-fault-based compensation fund against which employees may institute statutory claims in the event that they suffer occupational injuries or diseases.¹⁰ Section 1 of the COIDA¹¹ defines “occupational injury” as a “personal injury sustained as a result of an accident”, while “accident” is defined as “an accident arising out of and in the course and scope of an employee’s employment and resulting in personal injury, illness or the death of the employee”. Accordingly, in order to determine whether the Act applied to the circumstances of the case, the court had to decide whether the rape of the doctor was such an accident arising out of and in the course and scope of employment.¹² In addressing this question, the court confirmed that the approach developed in the majority judgment of Chief Justice Rumpff in *Minister of Justice v Khoza*¹³ was still good law for establishing whether an incident is an “accident” which “arose out of or in the course of employment”.¹⁴ Essentially the *Khoza* approach required in the broad sense a causal connection¹⁵ between the employee’s employment and the relevant accident.¹⁶ Applying the *Khoza* approach, the court held that the attack on the doctor bore no relationship to her employment and thus dismissed the defendant’s special plea. In doing so, the court emphasised that the rape, although unexpected, was intentional and fell outside the scope of meaning ordinarily ascribed to “accident” by South African courts.¹⁷ Furthermore, the fact that the doctor was intentionally injured by a person unauthorised to be on the hospital’s premises, together with the latter’s motive, played a significant role in concluding that there was no causal connection between the doctor’s employment and the crime.¹⁸

⁹ The constitutionality of this section was confirmed in *Jooste v Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC).

¹⁰ *LAWSA XVIII Social Security: Core Elements* par 114.

¹¹ 130 of 1993.

¹² *DN v MEC for Health supra* 51G–51I.

¹³ 1966 (1) SA 410 (A).

¹⁴ *DN v MEC for Health supra* 52A–52B.

¹⁵ See *LAWSA XVIII Social Security: Core Elements* par 126, where the authors refer to *Basson v Ongevallekommissaris* 2000 1 All SA 67 (C), in which the employee had a pre-existing back condition and was subsequently involved in an accident. With regard to the causal connection between the accident and the employment, the court held that it was not required that the injury suffered by the employee should be exclusively the result of the accident in question. In other words, it was sufficient that the accident was merely a “contributing factor” to the injury. Put differently, the court thus held that there could be more than one factual cause of the injury: both the pre-existing back condition and the accident. This differs from the common law of delict, which requires of a plaintiff to prove a necessary cause (*conditio sine qua non*) and therefore imposes a greater evidentiary burden on the plaintiff.

¹⁶ See *Minister of Justice v Khoza supra* 417: “In die loop daarvan’ beteken dat die ongeval moet plaasvind terwyl die werksman besig is met sy werksaamhede en dit ontstaan ‘uit sy diens’ as die ongeval in verband staan met sy werksaamhede.”

¹⁷ *DN v MEC for Health supra* 53I–53J.

¹⁸ *DN v MEC for Health supra* 54A–54C.

4 JUDGMENT OF THE SCA¹⁹

The court commenced its judgment with a brief description of the purpose of section 35 of the COIDA.²⁰ It concluded that, essentially, the COIDA²¹ provides a source of compensation for employees who suffer from occupational injuries, and without the necessity of having to prove negligence, although negligence may result in greater compensation.²² Further, it stressed the object of the Act as being intended to benefit employees, whose common-law remedies have been restricted in order to enable “easy access to compensation”.²³ The court conducted an overview of the wording of section 35 of the COIDA²⁴ and confirmed that it ought to be interpreted beneficially for employees.²⁵ In this regard, the court’s remarks are in line with previous decisions,²⁶ from which it appears clear that the COIDA’s underlying policy was “to assist workmen as far as possible”,²⁷ and that it should not be interpreted restrictively so as to prejudice an employee if it is capable of being interpreted in a more favourable manner.²⁸

Briefly canvassing the judgments in *McQueen v Village Deep GM Co Ltd*,²⁹ *Nicosia v Workmen’s Compensation Commissioner*³⁰ and *Langeberg Foods Ltd v Tokwe*,³¹ the SCA held that a personal injury suffered as a result of an intentional act may constitute an “accident” for the purposes of section 35 of the COIDA.³² In his judgment, Acting Deputy President Navsa quotes with approval from the judgment by Judge President De Villiers in *McQueen*:

“even where the act is intentional as regards third parties, as long as it was intended so far as the workman was concerned it must be taken to be an accident *qua* the workman.”³³

Applied to the facts, this meant that the doctor was not barred from instituting a statutory claim against the compensation fund merely because the “accident” causing her injuries arose from an intentional act. In addition, with reference to the judgment in *Khoza*, the court held that, while the “accident” *in casu* may be regarded as having occurred during the course of

¹⁹ *MEC for Health v DN* 2015 (1) SA 182 (SCA).

²⁰ 130 of 1993.

²¹ *Ibid.*

²² *MEC for Health v DN supra* 186J–187A. See fn 3 above.

²³ *MEC for Health v DN supra* 187A–187B.

²⁴ 130 of 1993.

²⁵ *MEC for Health v DN supra* 188C–188D.

²⁶ *Healy v Workmen’s Compensation Commissioner* 2010 (2) SA 470 (ECG); *Davis v Workmen’s Compensation Commissioner* 1995 (3) SA 689 (C); *Urquhart v Compensation Commissioner* 2006 (2) All SA 80 (E); and *Pretorius v Compensation Commissioner* 2007 SAFSHC 128.

²⁷ *Healy v Workmen’s Compensation Commissioner supra* par 16; and *Davis v Workmen’s Compensation Commissioner supra* 694F–G.

²⁸ *Ibid.*

²⁹ 1914 TPD 344.

³⁰ 1954 (3) SA 897 (T).

³¹ [1997] 3 All SA 43.

³² 130 of 1993.

³³ *MEC for Health v DN supra* 189D.

the doctor's employment, the "sole difficulty" would be to determine whether the rape of the doctor arose from her employment.³⁴

In answering this question, the SCA, like the court below, turned towards the approach developed in *Khoza*. In an attempt to establish a causal connection between the employee's employment and the relevant accident, Acting Deputy President Navsa reaffirmed Judge President Rumpff's approach in *Khoza* that, generally, such causal connection would lie when the accident occurs at the place where the employee works.³⁵ Furthermore, if the employee executes his duties at various locations, the connection may still exist if the workman was injured while executing his duties.³⁶ Also, the SCA followed *Khoza* in so far as it may be said that a causal connection would be extinguished if the accident were of such a kind that the employee would have sustained the injuries even if he had been at a place other than where he was executing his duties as an employee or when, through his own act, he caused the causal connection to be extinguished.³⁷ Importantly, the court emphasised that, in accordance with the approach in *Khoza*, the causal connection must be regarded as being severed when the employee was intentionally injured by a stranger, and the motive for the assault bore no connection to the injured person's employment.³⁸

The *Khoza* approach implied the absence of a causal connection in the present case. Nevertheless the SCA referred to three lower-court judgments in order to illustrate the inconsistent approach that South African courts have adopted in determining whether an accident arose out of an individual's employment.³⁹ In *Van de Venter v MEC of Education, Free State Province*,⁴⁰ the Free State High Court ignored *Khoza* and concluded that an employee who suffered injuries during the course of a robbery could institute a statutory claim against the compensation fund.⁴¹ The Free State High Court held that the fact that the employee was injured by criminal outsiders and not fellow employees made no difference and thus allowed a claim under the COIDA.⁴²

The court also referred to the decision in *Ex Parte Workmen's Compensation Commissioner: In re Manthe*,⁴³ where it was held that an employee who had been assaulted had suffered an accident for the purposes of section 2 of the then operative Workmen's Compensation Act.⁴⁴ In its determination of a causal connection, the Eastern Cape High Court held that there were a number of factors that played a part, namely time, place and circumstances of the accident.⁴⁵ In *Manthe* the court ultimately held that the

³⁴ *MEC for Health v DN supra* 190H.

³⁵ *MEC for Health v DN supra* 190J–191A.

³⁶ *MEC for Health v DN supra* 191B.

³⁷ *MEC for Health v DN supra* 191C–191D.

³⁸ *MEC for Health v DN supra* 191D.

³⁹ *MEC for Health v DN supra* 191E–193I.

⁴⁰ (FB 3545/2010) ZAFSHC 185.

⁴¹ *MEC for Health v DN supra* 191E–191I.

⁴² *MEC for Health v DN supra* 191I.

⁴³ 1979 (4) SA 812 (E).

⁴⁴ 30 of 1941.

⁴⁵ *MEC for Health v DN supra* 192C–192E.

employee's assault was covered by the Act,⁴⁶ emphasising that the employee was on his employer's premises, at a place where a robbery could occur, carrying out his employer's instructions, in the course of his employment and during working hours.⁴⁷ Taking this into account, the court remarked that any failure to recognise the assault as an accident under the Act must be regarded as being based on the view that "the attack which caused his injury was not aimed directly at him as a *workman*, but simply as a member of the public who could also have been at that place."⁴⁸ This, however, could produce arbitrary results: whereas a security guard employed to deliver money to a bank would be entitled to compensation under the Act if he was assaulted in the street by someone who knew that he was a security guard, he would receive no compensation if his assailant did not know the nature of his employment.⁴⁹

Lastly, the SCA referenced *Twalo v the Minister of Safety and Security*,⁵⁰ in which case an employee, a policeman, was shot and killed at a police station by a fellow officer. Facing a delictual claim for loss of support instituted by the mother of the deceased employee's minor children, the defendant employer sought refuge in the COIDA.⁵¹ In this instance, the Eastern Cape High Court held that COIDA⁵² had no application. In doing so, the court placed great emphasis on the origin of the attack: the murderer was "motivated by personal malice towards the deceased who had taunted him about the relationship the deceased had with his wife" and emphasised that the "sole reason" for the former's shooting of the deceased was such dispute.⁵³ Contrary to the court's earlier approach in *Manthe*, Judge Ebrahim held that the fact that the murder occurred while both police officers were on duty as policemen and at their workplace was "entirely coincidental."⁵⁴ As such, the "motive for the shooting bore no causal relationship with their work."⁵⁵

Following the exposition of these cases, the SCA confirmed the finding of the court below, holding that the rape of the doctor *in casu* did not arise from her employment. The court remarked that less attention should in future be paid to motive when determining whether an incident arises out of and in the course and scope of employment, but did not discard the *Khoza* approach altogether.⁵⁶ Instead, it held that the reference to motive under the *Khoza* approach could be "resolved by a slight adjustment", namely to focus on the following question: "whether the act causing the injury was a risk incidental to the employment".⁵⁷ Having identified the correct question to ask, the court pointed out that there is no bright-line test to apply in this regard and

⁴⁶ 130 of 1993.

⁴⁷ *MEC for Health v DN supra* 192E–192H.

⁴⁸ *MEC for Health v DN supra* 192H.

⁴⁹ *MEC for Health v DN supra* 192H–192J.

⁵⁰ [2009] 2 All SA 491 (E).

⁵¹ 130 of 1993.

⁵² *Ibid.*

⁵³ *MEC for Health v DN supra* 193C–193D.

⁵⁴ *MEC for Health v DN supra* 193E.

⁵⁵ *Ibid.*

⁵⁶ *MEC for Health v DN supra* 196E–196F.

⁵⁷ *MEC for Health v DN supra* 196E–196G.

emphasised that each case had to be dealt with on its own merits.⁵⁸ According to Acting Deputy President Navsa, it was difficult to see how a rape perpetrated by an outsider on a doctor on duty at a hospital, could have arisen out of her employment.⁵⁹ Indeed, he confirmed that the risk of rape being incidental to such employment was inconceivable.⁶⁰ Recognising that there can be no more egregious invasion of a woman's physical integrity and her mental well-being than rape,⁶¹ the SCA concluded that, as matter of policy alone, no rape victim should be excluded from the possibility of instituting a delictual action arising from rape, and the greater compensation that could be obtained when compared to a claim under the COIDA.⁶² In closing the court commented:

“Dealing with a vulnerable class within our society I have difficulty contemplating that employees would be assisted if their common-law rights were to be restricted as proposed on behalf of the MEC. If anything, it might rightly be said to be adverse to the interests of employees injured by rape to restrict them to COIDA. It would be sending an unacceptable message to employees, especially women, namely that they are precluded from suing their employers for what they assert is a failure to provide reasonable protective measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our Constitution will countenance.”⁶³

5 EVALUATION AND CRITICISM

5.1 The role of motive and risk

The judgment by the SCA in this case is commendable in so far as it is a conscious response to the inconsistent approach previously adopted by South African courts in answering a particularly difficult question, namely whether an accident arose out of an individual's employment. The SCA has hereby confirmed the approach to be adopted in future cases and identified the question that requires answering in future similar cases. As such, the decision should be welcomed inasmuch as it is able to create legal certainty and to ensure a stable development within this branch of the law.

The decision may be regarded as fusing the approaches adopted in *McQueen* and *Khoza*. On the one hand it retains the latter's focus on the need to establish a causal connection between the fact of employment and the relevant accident giving rise to the enquiry. On the other hand, instead of allowing the motive of the third-party assailant to play a central role in answering that question, the court elected to rather follow *McQueen* and focus on whether the accident may be regarded as a risk inherent to the employment. Motive, of course, may play an important role where employers are sought to be held vicariously liable in delict for the wrongdoing of their

⁵⁸ *MEC for Health v DN supra* 196F–196G.

⁵⁹ *MEC for Health v DN supra* 196G–196H.

⁶⁰ *Ibid.*

⁶¹ *MEC for Health v DN supra* 196H.

⁶² 130 of 1993.

⁶³ *MEC for Health v DN supra* 197A–197C.

employees.⁶⁴ When courts have to decide on the issue of an employer's vicarious liability, attention is paid, among other things, to the question whether the employee acted within the course and scope of his employment.⁶⁵ In doing so, the subjective state of mind of the wrongdoer-employee may be a relevant indicator of whether he acted within the course and scope of his employment.⁶⁶ However, this may be contrasted with the role assigned to motive under the *Khoza* approach, where, in seeking to establish a causal connection between wrongdoing and employment, attention is afforded to the motive of a third-party assailant. It may well be asked why the subjective state of mind of such party should have any bearing on determining whether or not the employee's occupational injury or disease arose from the fact of employment. It is submitted that the motive of a third-party assailant is simply too far removed from the objective fact of an employee's employment to provide any meaningful contribution in solving the problem. Indeed, having recourse to the motive of the third-party assailant seems arbitrary and unlikely to offer fair, consistent results. If motive is to play any role in establishing a causal connection in claims under the COIDA, it should be one that is aligned with its role in vicarious-liability cases. In other words, without forming the crux of the enquiry, the motive of the employee may be taken into account as a factor when determining whether his accident arose from employment.

Viewed from this angle, the decision to rather focus on establishing the inherent risks of specific employment circumstances should therefore be welcomed. It appears to be in line with the approach adopted in foreign jurisdictions.⁶⁷ Cane writes about the industrial-injuries system⁶⁸ in England: "the requirement that the accident should arise 'out of the employment' indicates that the injury must have arisen out of a risk peculiar to the

⁶⁴ See *Minister of Police v Rabie* 1986 (1) SA 117 (A) 132; *Mhlongo v Minister of Police* 1978 (2) SA 551 (A) 567; *Minister van Polisie v Gamble* 1979 (4) SA 759 (A) 765; *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); and *F v Minister of Safety and Security* [2011] ZACC 37.

⁶⁵ See Wicke *Vicarious Liability in Modern South African Law* (unpublished LLM dissertation, University of Stellenbosch 1997); Loubser and Midgley *The Law of Delict* (2012) 30; Neethling and Potgieter *Law of Delict* (2014) 389: the common-law requirements of the doctrine may be summarised as follows. First, a plaintiff is required to prove a relationship between the wrongdoer and another person, which warrants the imposition of liability. Secondly, it must be proved that the wrongdoer committed a delict. Lastly, the delictual conduct must have taken place in the course and scope of performing the defendant's instructions, be for the defendant's benefit, or fall within the risk created by the defendant when establishing the relationship with the wrongdoer.

⁶⁶ See *Minister of Police v Rabie* *supra* 132; *Mhlongo v Minister of Police* *supra* 567; *Minister van Polisie v Gamble* *supra* 765; *K v Minister of Safety and Security* 2005 (3) *supra*; *K v Minister of Safety and Security* 2005 (6) *supra*; *Minister of Safety and Security v F* *supra*; and *F v Minister of Safety and Security* *supra* 37.

⁶⁷ Eg, England – see Lewis in Oliphant and Wagner (eds) *Employer's Liability and Worker's Compensation: Tort and Insurance Law* (2012) 137–202; and Cane *Atiyah's Accidents, Compensation and the Law* 6ed (2006) 339. Also, Germany – see Waltermann in Oliphant and Wagner (eds) *Employer's Liability and Worker's Compensation: Tort and Insurance Law* (2012) 265–292; and *MEC for Health v DN* *supra* 194A–194C.

⁶⁸ The term "industrial-injury scheme" refers to the social-security system provided for work-related injuries under the Social Security (Contributions and Benefits) Act 1992 and the Social Security Administration Act 1992.

employment”.⁶⁹ Unfortunately, the court refrained from providing any guidance in determining whether a risk is inherent to specific employment, noting only that there is no “bright-line test” and that “[each] case must be dealt with on its own facts”.⁷⁰ In this regard, the following remarks may be made. First, it is submitted that the question be answered without any reference to the reasonableness of the employer’s conduct, since, after all, the purpose of the COIDA is to introduce a no-fault-based compensatory scheme. Secondly, it is proposed that the factors set out in *Manthe* – namely the time, place and circumstances of the accident – should not be entirely discarded when determining the risks incidental to specific employment.⁷¹ Lastly, it may be noted that, having admitted that determining whether an accident arose from employment is an “extremely difficult one”, the English legislature sought to solve such problem practically by electing to treat certain types of accident as having arisen out of the employment if they occurred in the course of employment.⁷² Although such statutory step may apparently solve the problem in a practical manner, it essentially gets very close to a point where an accident arising in the course of the employment will almost inevitably fall within the industrial-injuries system which, in turn, would make it very difficult to justify having a special scheme for work-caused accidents.⁷³

5 2 The future: reconsidering the creation of a no-fault-based compensation scheme for victims of violent crime⁷⁴

Generally, with regard to compensating the victims of violent crime, legal systems have a choice as to the manner in which they may respond.⁷⁵ First, violent-crime victims may be offered compensation under the existing common-law regime of delict/tort liability.⁷⁶ Secondly, compensation may be awarded by means of a general social-security system.⁷⁷ Lastly, compensatory relief may be offered *via* tailor-made no-fault-based compensation schemes for crime victims.⁷⁸ The arguments bearing on such decision are complex and electing between the various options remain a matter of fervent

⁶⁹ Cane *Atiyah’s Accidents* 339.

⁷⁰ *MEC for Health v DN supra* 196G.

⁷¹ *Ex Parte Workmen’s Compensation Commissioner: In re Manthe supra*.

⁷² S 101 of the Social Security (Contributions and Benefits) Act 1992; Lewis in Oliphant and Wagner (eds) *Employer’s Liability and Worker’s Compensation* 137–202; and Cane *Atiyah’s Accidents* 339.

⁷³ Cane *Atiyah’s Accidents* 339.

⁷⁴ For earlier considerations of this proposal see: Van den Berg *’n Penologiese Studie Rakende Restitutie as ’n Bevel aan die Slagoffer van Misdaad* (unpublished DPhil thesis, University of South Africa 1996); South African Law Reform Commission Project 82: *Sentencing (A Compensation Fund for Victims of Crime)* (2004); and Von Bonde *Redress for victims of crime in South Africa: A comparison with selected Commonwealth jurisdictions* (unpublished LLD thesis Nelson Mandela Metropolitan University 2007).

⁷⁵ Wagner “Tort, Social Security, And No-Fault Schemes: Lessons from Real-World Experiments” 2012 23 *Duke Journal of Comparative and International Law* 1 3; Cane *Atiyah’s Accidents* 328–360; and Greer *Compensating Crime Victims: A European Survey* (1996) 3–5.

⁷⁶ Eg, South Africa.

⁷⁷ Eg, New Zealand.

⁷⁸ Eg, England and Germany.

academic debate.⁷⁹ The judgment of the SCA is consistent with the existing legal position in South Africa: victims of crime should seek refuge in the common law of delict in order to compensate the loss they suffered as a result of falling victim to crime, even if the criminal act amounts to intentional and violent infringements of innocent civilians' physical integrity. Whereas the SCA's judgment may be applauded as it clearly seeks to provide valuable assistance to those who find themselves victims of rape, which is appropriately described as a "scourge upon South Africa",⁸⁰ the desirability of such final state of affairs may be questioned.

The SCA seems convinced that the best way forward in compensating the vulnerable class of rape victims is to side-step the COIDA, which is viewed as restricting the rape victims' common-law right to claim full compensation for all harm suffered. This conclusion is based on the notion that offering the possibility of full compensation under the common law of delict, as opposed to limited compensation receivable under the COIDA, is more consistent with what the Constitution requires and would offer more valuable assistance to rape victims.⁸¹ The court fails to provide reasons as to why it would be more consistent with what the Constitution requires, whereas the idea that it provides more valuable assistance to rape victims clearly rests on the assumption that the law of delict is effective in fulfilling its primary function, namely compensating the victims of loss caused wrongfully and culpably by the conduct of others.⁸² However, that assumption has been the target of growing criticism over the last few decades.⁸³ The criticism may be briefly summarised as follows. First, civil litigation is expensive⁸⁴ and only a limited

⁷⁹ Fleming "Is There a Future for Tort Law?" 1984 44(5) *Louisiana LR* 1193 1193–1199; Sugarman "Serious Tort Law Reform" 1987 24 *San Diego LR* 795 795–804; Cane *Atiyah's Accidents* 328–360; Hedley in Arvind and Steele (eds) *Tort Law and the Legislature* (2013) 235 249; and Miers "Offender and State Compensation for Victims of Crime: Two Decades of Development and Change" 2014 20(1) *International Review of Victimology* 145 145–156.

⁸⁰ *MEC for Health v DN supra* 197A–197B.

⁸¹ *Ibid.*

⁸² An overview of the relevant South African sources on the law of delict reflects compensation of loss as the primary function of this branch of the law. See De Villiers *Roman and Roman-Dutch Law of Injuries* (1899); Van den Heever *Aquilian Damages in the South African Law* (1944); Joubert *Grondslae van die Persoonlikheidsreg* (1953); Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990); Zimmermann and Visser *Southern Cross – Civil Law and Common Law in South Africa* (1996); Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1976); Neethling and Potgieter *Deliktereg*; Van der Walt and Midgley *Principles of Delict* (2005); and Loubser and Midgley *The Law of Delict in South Africa*.

⁸³ See Wright "The English Law of Torts: A Criticism" 1955 11(1) *University of Toronto LJ* 84; Sugarman "Doing Away with Tort Law" 1985 *Cal LR* 558–622; Hutchison "Accident Compensation: New Zealand Shows the Way" 1985 48 *THRHR* 24; Sugarman 1987 24 *San Diego LR* 804; Abel "A Critique of Torts" 1990 37 *UCLA LR* 785; Cane *The Anatomy of Tort Law* (1997) 231–237; Atiyah *The Damages Lottery* (1997); Luntz "A Personal Journey through the Law of Torts" 2005 *Sydney LR* 383; Sugarman "Tort Reform through Damages Law Reform: An American Perspective" 2005 *Sydney LR* 24; Cane *Atiyah's Accidents* 461–499; Lytton, Rabin and Schuck "Tort as Litigation Lottery: A Misconceived Lottery" 2010 52 *Boston College Review* 267; and Deakin, Johnston and Markesinis *Markesinis and Deakin's Tort Law* (2013) 53.

⁸⁴ Sugarman 1987 24 *San Diego LR* 795: Tort law is "an intolerably expensive and unfair system of compensating victims". For a South African perspective, see also Hutchison 1985 48 *THRHR* 24–35.

number of plaintiffs can afford the accompanying legal-transaction costs,⁸⁵ thereby restricting the general access to justice and potential compensation.⁸⁶ Secondly, many delicts are committed by members of society who are financially unable to compensate the loss which they cause, exposing most crime victims to the burden of carrying their loss at their own cost.⁸⁷ Thirdly, civil litigation is time-consuming, resulting in many plaintiffs electing not to institute their delictual claims at all.⁸⁸ In addition, a plaintiff in the position of the doctor will now have to prove all the elements of a delict, including fault. Proving fault, especially negligence, however, may be difficult and places a burden on a plaintiff which is often hard or impossible to discharge.⁸⁹ Assisting victims of personal injuries by removing such burden has been a predominant policy consideration in the enactment of various no-fault-based statutory schemes, notably in the fields of product liability,⁹⁰ occupational injuries and diseases⁹¹ and road accidents.⁹²

The high costs involved in the pursuit of compensation, the great amount of time swallowed by litigious proceedings, the impact of proving fault under the common law as well as the effects of secondary victimisation which litigation may have on the victim of violent crime,⁹³ cast a shadow of significant doubt

⁸⁵ Eg, costs relating to investigating of claims, costs relating to litigation – see Deakin *et al Markesinis and Deakin's Tort Law* 53. See also Sugarman 1987 24 *San Diego LR* 798: "The money available for compensation is paid into insurance companies as liability-insurance premiums finds its way into the pockets of victims. The rest is ground up in lawyers' fees and the associated costs that litigation generates. The money also is consumed in the marketing, general overhead and claims-administration costs of the insurers, as well as their profits in years when they make profits. Furthermore, there are public costs to the judicial system that the tort system imposes, both financial and through delay in the handling of other cases." For a South African perspective, see also Hutchison 1985 48 *THRHR* 24–35.

⁸⁶ See SALRC Report *A Compensation Fund for Victims of Crime* (2004) 236; Cane *Atiyah's Accidents* 461–499; Cane *The Anatomy of Tort Law* 231–237; Sugarman 1985 *Cal LR* 558–622. For a South African perspective, see also Hutchison 1985 48 *THRHR* 24–35.

⁸⁷ SALRC Report *A Compensation Fund for Victims of Crime* 315: "In South Africa, it has been shown that the majority of accused persons do not have the means to compensate their victims." For a South African perspective, see also Hutchison 1985 48 *THRHR* 24–35.

⁸⁸ Sugarman 1985 *Cal LR* 558–622. See also Sugarman 1987 24 *San Diego LR* 796: "When someone now makes a tort claim, rather than obtaining swift justice, he often will wind up waiting years before his suit is resolved. Moreover, he frequently will come away from the experience far more frustrated than satisfied. A victim today rarely can expect to recover directly from the individual who injured him. Instead, he will recover from an insurance-company or a large impersonal enterprise, such as a corporation or a government entity."

⁸⁹ Loubser and Reid *Product Liability* 4.

⁹⁰ Loubser and Reid *Product Liability*: "the consumer plaintiff is "normally unable to analyse or scrutinise the products for safety".

⁹¹ This may be true not only of the COIDA and related South African legislation, but also of the position in England and Germany. See Markesinis and Unberath *German Law of Torts* (2002) 727–731; and Stapleton *Disease and the Compensation Debate* (1986) 88–115.

⁹² The proposed the Road Accident Benefit Scheme of 2014 represents a further example of potential legislative intervention in the law of delict motivated by the burden associated with proving fault. The preamble of the RABS states that the "the existing fault-based compensation system administered by the Road Accident Fund, established by the Road Accident Fund Act [...] is not effectively achieving the reasonable, equitable, affordable and sustainable in the long term" and that "there is a need to expand and facilitate access to benefits by providing them on a no-fault basis".

⁹³ Orth "Secondary Victimisation of Crime Victims by Criminal Proceedings" 2002 *Social Justice Research* 313 313–316.

over the current state of affairs, as confirmed by the SCA. As a result of the SCA's judgment, future plaintiffs in the position of the doctor, having been denied "easy access to compensation",⁹⁴ may, because of the high costs and risk involved in instituting protracted litigious proceedings, lose the opportunity to recover any compensation whatsoever. In other words, it is conceivable that, although admirable in its intention, the SCA's decision to make available only delictual claims to such persons may have the opposite effect of providing little practical assistance to a vulnerable class of people suffering from loathsome violations of their right to bodily integrity, which is also protected in the Bill of Rights. On this basis, some scholars may argue in favour of statutory reform.

Some scholars may possibly argue in favour of statutory reform by widening the existing scope of the COIDA. In other words, it may be argued that the meaning of "accident" should be developed so as to include rape victims in the position of the doctor. Such argument may be based on the following line of reasoning. The practical and socio-economic reality is that most South African victims of rape will not be in a position to institute delictual proceedings against either their employer or the original wrongdoer. Taking this as well as the above critique of the law of delict into account, more valuable assistance could be provided to victims of rape by providing them access to the COIDA, where they may obtain at least *some* compensation in terms of a process that consumes less time and money.

It may be agreed that such expansion of COIDA's application has the potential to provide a certain category of rape victims with the possibility of compensation on a much more affordable and time-efficient basis. However, it is submitted that, should the scope of the COIDA be expanded so as to include injuries arising from rape by third party assailants, it would become impossible to justifiably deny compensation under COIDA in respect of injuries arising from any other intentional and criminal wrongdoing. Furthermore, awarding victims of violent crimes such as rape compensation under the COIDA would be an acknowledgment that they amount to risks incidental to employment, a conclusion which would exceed the boundaries of logical reasoning. Furthermore, it may be argued that awarding a claim under the COIDA in circumstances comparable to the present case would effectively mean that, *via* their statutorily obliged employer contributions, employers would be held indirectly responsible for the failure to ensure the general prevention of crime and the promotion of safety and security – an obligation that rests on the State.⁹⁵

If, however, neither the law of delict nor the COIDA provides a preferred method of compensating rape victims in the position of the doctor, it begs the question: is there any other possible solution that may be investigated? One such solution is the creation of a statutory no-fault-based compensation fund for crime victims. In its judgment, the SCA referred in passing to the English Criminal Injuries and Compensation Scheme of 2012,⁹⁶ which was brought

⁹⁴ *MEC for Health v DN supra* 187A–187B.

⁹⁵ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 446. See s 2, 7, 12 and 205 of the Constitution.

⁹⁶ *MEC for Health v DN supra* 194D–194E.

into life under the auspices of the Criminal Injuries Compensation Act of 1995. The Act aims to provide compensation to a person who has sustained a “criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place.” Set out below is a brief description of the statutory solutions offered by New Zealand (as an example of a jurisdiction that offers compensation to crime victims by means of a general social-security system) and England (as an example of a jurisdiction that offers compensatory relief *via* a tailor-made no-fault-based compensation scheme for crime victims).

5 3 New Zealand

New Zealand introduced the first state-funded statutory scheme to compensate crime victims for personal injury when it enacted the Criminal Injuries Compensation Act of 1963.⁹⁷ The adoption of the scheme may be understood, on the one hand, against the background of a growing discontent with the compensation of personal-injury victims, including victims of crime, under the common-law tort law regime, and on the other hand, the State's growing social-welfarist awareness of a communal responsibility towards those who suffer from criminal violence.⁹⁸ The Act provided for a Crimes Compensation Tribunal to hear claims instituted by “crime victims”, who, broadly speaking, were considered victims of violent crimes caused intentionally, for example assault and sexual offences.⁹⁹ Dependants of deceased victims could also be awarded compensation,¹⁰⁰ while, for mainly financial reasons, property damage was not covered by the scheme.¹⁰¹ The tribunal could award a claim regardless of whether or not any offender had been apprehended or convicted.¹⁰²

In 1975, this compensation scheme was subsumed within the no-fault-based accident-compensation regime, which had been brought into life under the auspices of the Accident Compensation Act of 1972 (“ACA”).¹⁰³ The ACA, which abolished the common-law tort action for the recovery of damages arising from personal injury, was a response to the 1967 report by the Royal Commission of Inquiry.¹⁰⁴ Broadly speaking, the latter was tasked with

⁹⁷ See Todd “Forty Years of Accident Compensation in New Zealand” 2011 28(2) *Thomas M Cooley LR* 189–193; New Zealand Law Commission Report (2008): *Compensating Crime Victims* 2; Palmer “New Zealand’s Accident Compensation: 20 Years On” 1994 44 *University of Toronto LJ* 223–230; Cameron “The New Zealand Criminal Compensation Act, 1963” 1964 16(1) *The University of Toronto LJ* 177–178.

⁹⁸ See Todd 2011 28(2) *Thomas M Cooley LR* 189–193; New Zealand Law Commission Report (2008): *Compensating Crime Victims* 2; and Palmer 1994 44 *University of Toronto LJ* 223–230.

⁹⁹ Cameron 1964 16(1) *The University of Toronto LJ* 177–180.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ The Accident Compensation Scheme came into force on 1 April 1974.

¹⁰⁴ New Zealand Law Commission Report (2008): *Compensating Crime Victims* 2–5. See also Accident Compensation Corporation “History of ACC in New Zealand” (2015) <http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/aba00004> (accessed on 2015-06-16).

investigating the law relating to compensation of damages for incapacity and death arising out of accidents and diseases suffered by employees.¹⁰⁵

The report highlighted a series of practical and theoretical concerns with the existing common-law tortious claim in respect of loss arising from injuries and accidents. These concerns, which are often presented as justificatory reasons for the establishment of no-fault-based compensation for victims of personal injuries, are complex and a detailed analysis thereof fall outside the parameters of this article.¹⁰⁶ Nonetheless, for the purposes of this article, it is prudent to mention three of the primary concerns, which appear to have some bearing on the conclusion reached by the SCA in the present case. First, the burdensome nature of the court process together with the long delays typical of a tort claim was noted to hinder the rehabilitation of injured persons.¹⁰⁷ Second, the high administration and related costs were underlined as an inherent feature of the court process, and held out to be a stumbling block in the road to effective compensation.¹⁰⁸ Thirdly, it was clear that the compensation for accident victims through the tort system was limited to those who could afford legal assistance and succeed in proving culpable wrongdoing.¹⁰⁹

Ultimately the report advised not only in favour of change to the established worker's-compensation scheme, but also recommended a new no-fault-based compensation scheme for loss arising from personal injury generally. The New Zealand legislature adopted the recommendation and with the enactment of the ACA led the country into a new era of no-fault-based-statutory compensation for personal injuries arising from accidents.¹¹⁰ The ACA did not define "personal injury by accident," but merely stated that it included the physical and mental consequences of the injury or accident, medical misadventure, incapacity resulting from occupational disease, and bodily harm caused by the commission of certain criminal offences.¹¹¹ The abandonment of tort claims for most personal injuries has remained the most significant aspect of the scheme, and the policy of rejecting the tort system has been a constant feature of the New Zealand legal landscape since its enactment.¹¹²

Since the enactment of the ACA, the accident-compensation scheme as a whole has been re-enacted several times.¹¹³ Under the current ACA a person

¹⁰⁵ Todd 2011 28(2) *Thomas M Cooley LR* 190.

¹⁰⁶ These reasons, along with related matters, are critically investigated in an LLD thesis (*Developing the Law of Delict: The Statutory Compensation Fund for Victims of Crime*), which the author of this article is in the process of finalising.

¹⁰⁷ New Zealand Law Commission Report (2008): *Compensating Crime Victims 2*. See also Todd 2011 28(2) *Thomas M Cooley LR* 189–196; and Palmer 1994 44 *University of Toronto LJ* 223–230.

¹⁰⁸ New Zealand Law Commission Report (2008): *Compensating Crime Victims 2*.

¹⁰⁹ *Ibid.*

¹¹⁰ See Todd 2011 28(2) *Thomas M Cooley LR* 189–193.

¹¹¹ *Ibid.*

¹¹² Palmer 1994 44 *University of Toronto LJ* 223–230.

¹¹³ The re-enactments include the Accident Compensation Act of 1982, the Accident Rehabilitation and Compensation Insurance Act of 1992, the Accident Insurance Act of 1998, and the Injury Prevention, Rehabilitation, and Compensation Act of 2001. In 2010, the name

is eligible for compensation for “personal injury” when it is suffered as a result of an “accident”. The term “accident” is broadly defined and includes both intentional and negligent criminal conduct that results in personal injury.¹¹⁴ As such, a person in the position of the doctor in the present case would have been eligible for the benefits set out under the ACA, which includes compensation in respect of loss of earnings, lump-sum payments for physical impairment, mental injury,¹¹⁵ dependants’ losses and certain miscellaneous expenses.¹¹⁶ These may be claimed in terms of a claims process that involves no litigation.

5 4 England

England followed New Zealand’s approach and in 1964 it adopted the Criminal Injuries Compensation Scheme.¹¹⁷ The 1964 scheme was administered by the Criminal Injuries Compensation Board (“CICB”) and aimed to provide compensation for victims of violent crimes committed intentionally.¹¹⁸ Unlike the position in New Zealand, however, payments made by the CICB to crime victims were made *ex gratia*.¹¹⁹ Accordingly, there was no statutory obligation on the Board to pay compensation, nor a statutory right to receive it.¹²⁰ Nonetheless, decisions by the Board were amenable to judicial review.¹²¹ The assessment of crime victims’ damages was done based on the common law so that, essentially, the award was calculated as if it had been made in a successful tort claim against the perpetrator for personal injury.¹²²

As is the case with New Zealand, there appears to be a wide range of justifications that may be offered,¹²³ a discussion of which will be out of place in this article.¹²⁴ For present purposes, however, the following reasons may be highlighted. First, it has been argued that the state owes a moral duty towards its citizens to protect them from criminal activities and, when it fails to perform that duty, it is morally obliged to compensate the crime victim.¹²⁵ Secondly, it was submitted that victims of violent crime are comparable to victims of war, and since the State had accepted an obligation to provide compensation for

of the 2001 Act was changed to the Accident Compensation Act 2001, thereby returning to the original title.

¹¹⁴ Todd 2011 28(2) *Thomas M Cooley LR* 189–193; and *MEC for Health v DN supra* 193G–193I.

¹¹⁵ Only in the event that it arises from physical injury and other limited circumstances.

¹¹⁶ New Zealand Law Commission Report (2008): *Compensating Crime* 32–35.

¹¹⁷ Miers “Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012” 2014 34 *Legal Studies* 242.

¹¹⁸ *Ibid.*

¹¹⁹ Baber *Criminal Injuries Compensation Research Paper 95/64* (1995) 1.

¹²⁰ *Ibid.*

¹²¹ *R v Criminal Injuries Compensation Board ex p Lain* [1967] 2 QB 864 DC.

¹²² *Criminal Injuries Compensation Authority Annual Report 2013-2014* 2014 3. See Miers 2014 34 *Legal Studies* 269.

¹²³ Deakin *et al Markesinis and Deakin’s Tort Law* 55, argue that the theoretical foundations of the scheme have “always been in doubt and never really sorted out”.

¹²⁴ These reasons, along with related matters, are critically investigated in a LLD thesis (*Developing the law of delict: the statutory compensation fund for victims of crime*), which the author of this article is in the process of finalising.

¹²⁵ Deakin *et al Markesinis and Deakin’s Tort Law* 55.

injuries suffered during the latter, it had a comparable obligation to those who fell victim to crime.¹²⁶ Thirdly, since the State discourages citizens to arm themselves in order to exact private vengeance, the State must assume some form of responsibility if someone should be injured in circumstances wherein he would have been able to defend himself or where he could have taken the law into his own hands.¹²⁷ Fourthly, the State relies on assistance of citizens in achieving criminal justice and if compensation is not possible, citizens will desist from helping the State in achieving its criminal justice goals.¹²⁸ Furthermore, the argument was made that, since criminals are deserving of better, more caring treatment by the State, victims should receive compensation that goes beyond the inadequate existing levels of social-security benefits.¹²⁹ A further related argument was that the payment of compensation to crime victims would effectively deter them from taking the law into their own hands.¹³⁰ It should be added that some scholars, however, have maintained that, “essentially, [the scheme was] based upon vague but widespread notions of sympathy and compassion.”¹³¹

The original compensation scheme was criticised for lacking a statutory basis, and in 1995 the legislature introduced a new statutory scheme *via* the enactment of the Criminal Injuries Compensation Act of 1995.¹³² Although the scheme continued to provide compensation to victims of violent crimes committed intentionally, it severed the link with the assessment of compensation on the basis of the common law of tort, providing instead for payment of compensation to be made on the basis of a tariff of awards that grouped together injuries of comparable severity, to which a financial value was attached.¹³³

This scheme was amended on several occasions, most recently in 2012.¹³⁴ The 2012 Scheme is administered by the Criminal Injuries Compensation Authority (“CICA”) and may provide compensation for injuries suffered as a result of violent crime in England, Scotland and Wales.¹³⁵ Section 4 of the scheme provides that a “person may be eligible for an award under this Scheme if they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence committed in a relevant place.” “Relevant place” is said to refer to Great Britain or any other place specified in

¹²⁶ *Justice Report on Compensation for Victims of Crimes of Violence* Cmnd 1406 (1962) London; Deakin *et al Markesinis and Deakin’s Tort Law* 55; and Cane *Atiyah’s Accidents* 305.

¹²⁷ Cane *Atiyah’s Accidents* 305. See also the *Justice Report on Compensation for Victims of Crimes of Violence* Cmnd 1406 (1962) London.

¹²⁸ *Ibid.*

¹²⁹ Cane *Atiyah’s Accidents* 305.

¹³⁰ *Ibid.*

¹³¹ Deakin *et al Markesinis and Deakin’s Tort Law* 55.

¹³² Miers 2014 34 *Legal Studies* 242.

¹³³ *Ibid.* *Contra* the SCA in *MEC for Health v DN supra* 194C–194D: “the Criminal Injuries Compensation Scheme provides for compensation for personal injury ‘caused by a crime of violence broadly in line with common-law damages for tort’”.

¹³⁴ The 2012 scheme came into force in November 2012, under the auspices of the Criminal Injuries Compensation Act.

¹³⁵ European Judicial Atlas in Civil Matters “Great Britain” (2015) http://ec.europa.eu/justice_home/judicialatlascivil/html/cv_nationallaw_uk_en.htm (accessed on 2015-06-16).

Annexure C, while the meaning of “crime of violence” is explained in Annexure B attached to the scheme.

Resembling its predecessors, the aim of the 2012 scheme is to compensate those who suffer serious physical or mental injury as the direct result of intentional violent crime.¹³⁶ The scheme shares the committal of its predecessors to the provision of a form of enhanced social security for seriously injured victims of violent crime,¹³⁷ and, contrary to the remarks made by the SCA in the present case,¹³⁸ continues the shift made by the 1995 scheme away from assessment of compensation on common-law grounds.¹³⁹ The new scheme has, however, introduced several changes. Significantly, for financial viability-related reasons, the new scheme introduces more stringent eligibility criteria in order to differentiate more clearly those victims deserving from those undeserving of the allocation of public funds.¹⁴⁰ In respect of compensation payable, the new scheme also eliminates the lowest tariffs involving the least severe injuries and the awards payable in a middle range of tariff levels are reduced by set proportions.¹⁴¹ Unlike the New Zealand ACA, the Criminal Injuries Compensation Act has not abolished the common-law tort action against the original wrongdoer for the loss arising from the crime and the CICA has communicated its expectation of claimants “to try to claim compensation from the person, or persons, who caused your injury or loss.”¹⁴² A claimant in the position of the doctor *in casu* would be eligible to receive the benefits under the Act, including loss of earnings, mental injury,¹⁴³ dependents’ losses and certain miscellaneous expenses. Although the claimant is not required to institute lengthy and costly civil proceedings against the wrongdoer, the legislature has left her that option, which she may exercise in pursuit of loss not covered by the compensation scheme.

6 CONCLUSION

The judgment of the SCA cemented the current legal position of victims of violent crime. In order to obtain compensation, crime victims must seek refuge in the common law of delict. Generally, this means instituting a delictual claim against the wrongdoer and, if the criminal incident occurred at work and falls outside the ambit of the COIDA, the victim may attempt to hold her employer liable in delict. However, the law of delict/tort has been subjected to criticism, predominantly levelled at its high costs, protracted nature, unpredictability and its common-law requirement of fault, especially negligence. Some of these factors, together with other considerations, have led New Zealand to abolish

¹³⁶ S 4 of the Criminal Injuries Compensation Scheme. See also Miers 2014 34 *Legal Studies* 256.

¹³⁷ Miers 2014 34 *Legal Studies* 248.

¹³⁸ *MEC for Health v DN supra* 194C–194D: “the Criminal Injuries Compensation Scheme provides for compensation for personal injury ‘caused by a crime of violence broadly in line with common-law damages for tort’”.

¹³⁹ Miers 2014 34 *Legal Studies* 242–248.

¹⁴⁰ Miers 2014 34 *Legal Studies* 247.

¹⁴¹ Miers 2014 34 *Legal Studies* 248.

¹⁴² European Judicial Atlas in Civil Matters “Great Britain” (2015) http://ec.europa.eu/justice_home/judicialatlascivil/html/cv_nationalaw_uk_en.htm (accessed on 2015-06-16).

¹⁴³ Only in the event that it arises from physical injury and other limited circumstances.

tort law in its entirety, while some of these factors, together with other reasons, have influenced the English legislature to develop tort law by establishing a tailor-made compensatory scheme for crime victims.¹⁴⁴

In light of the above, it may be time to reconsider the possibility of establishing a statutory no-fault-based compensation scheme for victims of violent crime in South Africa.¹⁴⁵ Based on the overview of the historical development of state-funded compensation for victims of crime, it appears that there is a lack of a single, clear justification or fundamental principle.¹⁴⁶ Such philosophical uncertainty prevailed in the early 1960s with the introduction of the first compensatory schemes. Subsequent attempts to resolve the problem have not proved to be any more acceptable or convincing.¹⁴⁷ Taking this into account, an investigation into the potential of such scheme should, however, attempt to explain, generally, under what circumstances it would be justifiable for the legislature to supplement the law of delict and, specifically, why a statutory no-fault-based compensation scheme would be the most appropriate form of reform required to compensate victims of crime effectively. In addition, such investigation would be required to address the following practical and theoretical concerns:¹⁴⁸ what should the eligibility criteria be for succeeding with a claim against the statutory compensation fund? For instance, should a “victim” for the purpose of instituting a claim against the fund be determined by focusing on the nature of the legal interest infringed upon, or by having regard to the identity of the wrongdoer or the manner in which the legal interest was infringed? Should the availability of a statutory claim of a crime victim against the compensation fund be limited to certain types of harm? For example, should the statutory claim be limited to compensation of patrimonial harm arising from bodily injuries or should patrimonial harm arising from property damage, pure economic loss and non-patrimonial harm also be recoverable? Should the availability of a statutory claim of a crime victim against a compensation fund be limited to loss caused in a certain manner or by certain types of conduct? Should crime victims have a residual common-law right to claim damages in delict from the actual wrongdoer for the remainder of their loss not covered under such compensation fund or should the victim’s residual common-law claim against the wrongdoer be abolished?

¹⁴⁴ It may be noted that, following, the adoption of statutory-compensation schemes for victims of crime in New Zealand and the UK in 1963 and 1964, respectively, similar compensation schemes have been adopted in several common-law-based jurisdictions, including the USA, India, Canada, Australia as well as a further 18 European jurisdictions.

¹⁴⁵ Such proposal is reconsidered in a LLD thesis (*Developing the Law of Delict: The Statutory Compensation Fund for Victims of Crime*), which the author of this article is in the process of finalising.

¹⁴⁶ Greer *Compensating Crime Victims: A European Survey* 682.

¹⁴⁷ *Ibid.*

¹⁴⁸ These concerns, along with related matters, are critically investigated in an LLD thesis of author. See fn 106 above.