BALANCING THE SCALES IN A HOMICIDE TRIAL: A REPLY

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I. GETTING THE BALANCE RIGHT

At the outset, in being asked to respond to the paper delivered on behalf of AdVIC, I should say that I do not intend to reply by way of riposte or rejoinder; rather, I hope in the context of this paper, to engage with the arguments raised in a manner which I hope is frank, realistic and ultimately helpful.

The position of the victim in the context of the homicide trial gives rise to questions of considerable complexity, against a backdrop of the larger context of the position of the victim in the criminal process in general. The questions raised are of considerable antiquity and in a sense pre-figure the modern criminal justice system. The answers are informed by a pendular analysis of a criminal justice system which has arced from its beginnings, as victim inspired, funded and administered, to a point where victims feel, it is said, completely closed out of the system. It is, perhaps, worth noting that a parallel arc can be seen from the position of the accused; a role which has evolved from being prevented from giving evidence to a point where now it is almost compulsory.

It seems to me that the concept of balance, in the sense of balancing scales or balancing rights, is misconceived in the context of this debate.[1] If you take as a starting point the premise that a victim's position can only be improved by a corresponding deterioration in the position of the accused, the analysis becomes intellectually corralled and is fated to produce a corruption of a criminal justice system which is, by and large, worth defending. It

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[1] Ten years ago in the context of the English debate on these issues Andrew Ashworth suggested that the term 'balance' should be banned. See Ashworth, "Crime, Community and Creeping Consequentialism" [1996] *Criminal Law Review* 220.

is this central premise, characterising rights and protections as obstacles or impediments, which gives rise, in my view, to amongst other things a misplaced attack on the presumption of innocence in the context of the criminal trial. When looking at the criminal trial the appropriate first step is to identify the function it, or any of its constituent parts, is set to perform. Thereafter the rights accorded to each of the participants should be identified by reference to the justification for such rights. In those circumstances conflict where it exists can be identified and intellectually resolved.

The criminal trial in the modern debate has come to be seen as the head start the hunter gives to a fox; the procedures often referred to as a game which lawyers 'play' while out of touch judges referee according to whim. It appears that we have travelled from zero tolerance to *zero sum* in reaching the conclusion that the protection of victim's rights involves a necessary diminution in the rights of an accused. The issue of detection rates, for example, rarely receives any oxygen in the context of debate and discussion about victims' rights yet surely there could be nothing more central to the concerns of victims. The State as Public Prosecutor owes duties to victims and to those accused of offending; the political confidence trick that has been performed has been to convince the public that the State's role is to act as referee as between these two competing groups rather than recognising that the State owes duties to both groups and that those duties are simply different.

The State's power to punish, to stigmatise, to fine, to imprison should not be forgotten in the context of this debate and it is that State power to punish which gives rise to its duties to those accused of wrongdoing. The fundamental working principle in the criminal justice system is that the citizen should not be unjustly convicted and punished; such is the horror with which that prospect is regarded that our system readily contemplates the prospect that the guilty may go free. The avoidance of unjust conviction is as much in the interests of victims as everybody else. This goal is the justification for the presumption of innocence and the burden of proof around which all of the evidential principles gather as ballast.

In truth I have never met a victim who suggested that the presumption of innocence was an unacceptable principle, however, the skewed atmosphere in which these issues are discussed has resulted in the principle and sister principles being criticised and debased in the name of victims without any real analysis of how it is suggested that the position of victims might improve by change. For example it seems to me to be inappropriate to correlate the accused's right not to disclose his defence with a submission that the criminal trial process is unbalanced and acting against the interests of the victim. The practical reality of almost all homicide cases is that the nature of the defence that is sought to be raised is manifest from the book of evidence, because the much reviled 'right to silence' in the context of homicide cases is very rarely exercised. The point has been made that the failed prosecution will invariably be seen as the fault of the accused and his bundle of rights in circumstances where the intermediary between the victim and the Courts are policemen and prosecutors who are perhaps unlikely to suggest that such short comings as may exist arise in the collection and/or presentation of evidence.

The public discussion, involving as it does the pendulum; balance and rebalance; recalibration and so on is highly politically charged and the political motivations in my view must be openly confronted. When one considers the list of recent developments in the criminal law it should appear utterly contrarian to suggest that the 'pendulum' consistently swings in favour of the accused. It seems that a combination of political sabre rattling and lazy journalese allows that contention to stand relatively unchallenged and effortlessly repeated. When one considers for example, the Public Order legislation; the amended Offences Against the State Acts; the drug trafficking detention provisions; the Bail Act; the sex offenders register; the new drugs offenders register; mandatory sentencing in relation to particular drugs offences; the Criminal Assets and Proceeds of Crime legislation; video link facilities for people of particular vulnerability; non-judicial warrants and so on it is startling that the claim can be made at all.

The civil libertarian and the victim should, in my view, be acting in collaboration rather than in competition. The substantive rights to which, in my view, victims are entitled are not

necessarily in conflict with traditional concepts underpinning a fair trial. Sadakat Kadri posits the burden of the criminal trial as a riddle: how to do justice without hurting the injured or the innocent.[2] In my experience victims want detection, restitution or compensation, the prevention of recurrence and the provision of information. All of these things are eminently capable of being secured in the presence of a political will to do so. There is a political manipulation evident in the context of the current debate wherein it seems clear to me that the victims' movement has become a large Trojan horse wherein government (and opposition) can secrete its plans to make life easier for itself without in any effective way dealing with some of the very real grievances of victims of criminal offending. Is it coincidence that so much focus is placed on the criminal trial which in one sense is almost statistically insignificant (leaving aside the charge of murder) in circumstances where the vast majority of criminal prosecutions result in pleas of guilty, and in respect of which victims' interests are still a live concern? Is it coincidence that the political cry grounding the claim for disclosure of defences is almost statistically irrelevant? The prosecutorial inclination to have life made easier for itself is as understandable as it is predictable. The real problem is that this agenda masks itself as victim based and victim oriented while being in fact self serving. There is a political clamour to be associated with victims – we have seen it in other jurisdictions where the attempt at association is such that politicians will even put a victim's name on a bill – Megan's law and Sarah's law for example.

It must be acknowledged that there has been, perhaps, in the past a rictal indifference to the position of victims deriving in part from a code of conduct which prevents prosecuting barristers from speaking to witnesses about their evidence. Unfortunately, this translated into a practice of not speaking to victims at all which gave rise of course to further alienation. In fact, that experience of victims was shared by plaintiffs in civil actions for whom the experience of taking a case meant an involvement with a system which did very little to explain itself which gave rise to

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[2] Kadri, *The Trial: A History from Socrates to O.J. Simpson*, (Harper Collins, 2005).

negative attitudes about that which could and should have been regarded positively.

Indeed, while there are those who orbit the criminal justice system on a regular basis it should be remembered that an accused, and more particularly his or her family, can find themselves staring with incomprehension at a court system which appears, to paraphrase Dickens, to first exhaust the pocket, then patience, courage, and hope before overthrowing the brain and breaking the heart. There is no doubt that practices and procedures which are outmoded, arcane and of little utility should be changed. The bar, solicitors and the judiciary must be alive to the necessity for the constant examination of how we do business and how our procedures can be improved. Much might be learned from the English Code of Practice in relation to victims which provides for the provision of very significant levels of information to victims and importantly identifies the responsibilities of organisations within the criminal justice system in this area.

II. THE VICTIM IMPACT STATEMENT

The Victim Impact Statement can give rise to considerable difficulties, conceptual and practical.[3] Particularly in the context of homicide trials the questions:

- what is the role of the victim?; and
- what is the purpose of the Victim Impact Statement?;

do not admit of easy answers.

The provenance of the Victim Impact Statement is section 5 of the Criminal Justice Act, 1993 which provides at sub-section 1:

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[3] See Coen, "The Rise of the Victim – A Path to Punitiveness" [2006] 16 (3) *Irish Criminal Law Journal* 10, Guiry, "Who Is the Victim? The Use of Victim Impact Statements In Murder and Manslaughter Cases" [2006] 16(3) *Irish Criminal Law Journal* 2, Coffey, "The Victim of Crime and the Criminal Justice Process" [2006] 16(3) *Irish Criminal Law Journal* 15, and Ashworth, "Victim Impact Statements and Sentencing" [1993] *Criminal Law Review* 498.

> In determining the sentence to be imposed on a person for an offence on which the section applies, a Court shall take into account and may where necessary receive evidence or submissions concerning any effect (whether long term or otherwise) of the offence on the person in respect of whom the offence was committed.

Further, sub-section 3 provides:-

> Where a Court is determining the sentence to be imposed, on a person for an offence to which this section applies, the Court shall, upon application by the person in respect of whom such offence was committed, hear the evidence of the person in respect of whom the offence was committed as to the effect of the offence on such person upon being requested to do so.

This gives rise to obvious problems in the context of a homicide case where the statutorily contemplated victim is in fact deceased and no express provision is made for evidence to be given in relation to the impact on next of kin. This gives rise to two distinct difficulties:

1. Who has the right to speak and what do they have the right to say? and

2. What effect is the evidence or submission supposed to have in the context of the trial/sentencing process?

The determination of the question of who is a victim for the purposes of preparing such a statement in the context of a homicide trial is not without difficulty. The English practice is for a family spokesperson to be nominated, pursuant to the Code of Practice for Victims of Crime, who is then entitled to receive services both procedural and substantive under the code. There is no guidance at all within the Irish system in relation to how this is to be done. Much of the current practice seems to be based on

modifications to existing practices in respect of victim impact evidence in non-homicide cases.

It must be acknowledged as a matter of practice that Judges in the Central and Circuit Criminal Courts, dealing with cases of homicide, by and large do allow for the receipt of Victim Impact evidence at the conclusion of the trial and/or prior to sentencing. Indeed, this practice has also extended in recent times to the tendering of statements in cases where a murder verdict has been delivered and where the sentence to be imposed is statutorily circumscribed. (Implicit in this development must be an acknowledgement that victim impact evidence may have absolutely no effect on sentence and a further and wider issue arises as to whether such evidence is the opening salvo of a parole hearing which would be held at later stage.)

It seems to me that this practical development will eventually result in considerable difficulty unless formally regulated. One can readily anticipate huge problems in relation to the question of the entitlement to give victim impact evidence in respect of situations where a victim and a family have become estranged or where the crime itself is *intra* family, an all too common feature of indictable crime. One can also readily contemplate arguments which already arise in other contexts in relation, for example, to the status of same sex partners, 'second families' and so on. It is interesting to note that AdVIC proposes an "entitlement" to have a Victim Impact Statement put before the Court on behalf of the family of a deceased.[4] In this specific context the English position appears to be that in the event of an inability on the part of that family to nominate a family spokesperson the senior investigating officer responsible for the case "*must*" him/herself nominate such a spokesperson. It seems therefore, that within the very fabric of the proposed solution there is the obvious potential for further alienation as families may have imposed upon them from without an official spokesperson to speak on their behalf. The alternative, which would involve a proliferation of statements of this nature is obviously unappealing.

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[4] See Deane, "Balancing the Scales in a Homicide Trial", (2007) 1 *Judicial Studies Institute Journal* 18, 22.

There is no universal approach to the question of what can actually be said in the context of a victim impact statement and/or in the course of victim impact evidence. Very recent guidance has been given in this area by the Court of Criminal Appeal in *The People (D.P.P.) v. Wayne O'Donoghue*.[5] The Court of Appeal, in commenting that no legislative provision exists for the family or friends of a victim of an unlawful homicide to give victim impact evidence, recognised and implicitly approbated the development of a practice wherein a trial judge had a discretion to permit such evidence to be admitted.

Interestingly, the Court of Appeal was of the view that such a statement had a potential for two uses:

1. it could be of assistance to a sentencing judge in determining the appropriate sentence to be imposed; and
2. it afforded the family or friends of a deceased victim the opportunity to express their loss.

The Court went on to place some strictures on the manner in which the evidence is to be admitted and in particular stipulated the disclosure of any Victim Impact Statement in advance of it being read and, further, suggested that a warning be given that departure from the statement would have adverse consequences and possibly be a contempt of court. This decision seems to echo decisions of the Superior Courts in Canada, New Zealand and the United States where repeated emphasis has been placed on victim impact statements fulfilling no more than their specific statutory purpose.

The real and unresolved difficulty relates to the effect that a Victim Impact Statement in the context of homicide is supposed to have. It is generally asserted, (and for the purpose of this discussion it is accepted) that tendering such a statement has a cathartic or therapeutic effect on the victim allowing for a public

[5] Court of Criminal Appeal, unreported, Macken J., 18 October 2006. The earliest superior court consideration of this issue appears to be contained in the ruling of Flood J. in *People (D.P.P.) v. C. (M.)*, Central Criminal Court, unreported, Flood J., 16 June 1995.

acknowledgement of their grief and facilitating what is sometimes termed 'closure'. Indeed as AdVIC has stated, it is suggested that the statement has a role in humanising a victim. Leaving aside arguments that may arise in relation to the role that a Court may or may not have in a therapeutic process this still leaves undecided the question of what effect the sentence should have on the sentencing process itself.

It seems to me that judges are placed in an increasingly difficult position, calling to mind what Stalin said of the Russian Jewish community that he could not yet openly terrorise in post-war Russia "I cannot chew them up, and I cannot spit them out". Similarly the trial Judge is 'to have regard to'; 'take into account'; 'to receive evidence or submissions' – phrases which seem calculated to leave a sentencing Court in a difficult position in placing this evidence in its appropriate place. The dog that isn't barking in this context is whether sentences should be longer when 'impact' evidence is before the Court. The obverse question perhaps better illustrates the difficulty – should sentences be shorter when there is no impact evidence or impact evidence suggesting recovery and/or forgiveness? If statements are to be neutral in effect should they come after sentence has been passed? Grief has a form of moral authority which can in many instances be impossible to ignore but it is incredibly difficult as lawyer or judge to place this grief in its appropriate position in the criminal trial process. Does it have a value or worth in the sense in which evidence a court ordinarily hears is ascribed a particular value or worth either in aggravation or mitigation? Does the absence of that grief if that be the case also have a value?

A very real problem which now arises from the victim's perspective is the worry that the absence of a statement of this type might be indicative of unconcern by a bereaved family. I have had first hand experience of a family wondering whether if they don't make such a statement that it might affect the judge's thinking in a negative way on sentencing. In our system, after all, the public wrong is prosecuted by the public. This necessarily involves in the public interest diluting a victim's possible desire for vengeance, but also dilutes in the public interest an individual's capacity for forgiveness. To paraphrase Mr Justice Kevin Haugh 'I won't allow a victim to tell me how long I should

imprison somebody for the same reason I won't allow a victim to tell me that an offender shouldn't go to jail at all.'

I suggest that it is human dignity which is sought to be vindicated by the criminal trial process in the context of unlawful killings. It is the utter and almost ineffable equality of victims of that crime which justifies the prosecution and ultimate punishment of offenders. It would be wrong to allow the justifiable and well-intentioned focus on the position of victims to create a system of punishment wherein the lives of the articulate and well thought of are to be deserving of greater consideration than others. The pressure to eulogise in these circumstances becomes intense. Helena Kennedy Q.C. has spoken in this area on the increasing visibility of unrealistic stereo types in this context: "Dream families are created. Idyllic relationships, doting parents, bereaved wives, the heartbroken fiancée."[6] These classes of victim may be perceived to be more deserving of consideration and therefore the wrongdoer is seen to be deserving of harsher punishment then if the victim is, for example, unregarded or unsympathetic.

There is I suggest within the legal community little argument about the utility of providing procedural and substantive rights to victims in the context of not just homicide cases but criminal cases in general. Substantive services in the nature of counselling, compensation and the like are clearly desirable but as is often the way with a politically skewed debate, the blame for the absence of such services is laid at the wrong door. The provision of those substantive services is a political question involving the allocation of resources and the effective execution of a clear public policy setting out the entitlements of victims. However, while there are lawyers and courts and judges to blame, politicians in this jurisdiction seem happy to avoid dealing with the reasons for not making such resources available. It seems to me that there is no resistance amongst either the judiciary or the wider legal community to the provision of such services. The question of procedural rights can create greater

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[6] Kennedy, *Just Law: The Changing Face of Justice and Why It Matters to Us All* (Chatto & Windus, 2004).

difficulty but again it is my view that when such procedural rights are identified there may in fact be little by way of disagreement.

In relation to procedural rights it is, of course, appropriate that victims should be treated with dignity and respect and in particular, victims should be provided with information in relation to the progress or otherwise of the case in which they have such an important role. The English Code specifically sets out the nature of the information that the victim is entitled to and sets down a clear timeframe within which a victim is to be given that information, as a case progresses. Many of those commitments in relation to the provision of information are contained in our own victims' charter published by the Department of Justice, Equality and Law Reform.

The idea of extending procedural rights to include, for example, individual representation involving presentations independent of a prosecutor borrows from certain aspects of the civil or inquisitorial system, which it is suggested, have been married to certain aspects of the common law system by the International Criminal Court. Organ transplantation of this kind, I suggest is particularly dangerous. The one thing that can be said of all legal systems is that they are cultural in origin and evolution and the insertion into one system of a technique or procedure, without first analysing the effect on the rest of the system, is a recipe for rejection. In particular as each system develops checks, balances and protections peculiar to that system – the civil law system has its codes, career judiciary, examining magistracy which often directs a subordinate police force and so on. Each system says something about the relationship between citizen and State, and in essence our system is predicated on a scepticism about State power. Indeed it is, perhaps ironic, that it is the common law system, with judges taken from the ranks of practitioners, which has allowed for the flexibility wherein Victim Impact evidence in homicide cases can be given, notwithstanding the absence of statutory provision. To burden our system, which is in many ways overtaxed and under resourced, with another layer of representation seems to me to be of very doubtful utility. Further, the undefined relationship between representatives for victims and practitioners, particularly those responsible for

prosecuting cases, is more likely to hinder than help the effective administration of justice.

It has long been recognised that manslaughter as a label can cover a huge range of offending behaviour and that the act itself can vary "from a nominal crime to the boundaries of murder and…sentences can vary from being extremely light to very severe. There is no tariff as to the appropriate sentence for manslaughter."[7]

Within manslaughter itself there are the further classifications of voluntary and involuntary manslaughter and therefore one can readily appreciate without dissecting the legal minutiae of those labels that manslaughter can literally vary from an act which is little more than accidental or negligent, to something almost murderous or indeed involving a murderous intent excused by provocation or some other factor. As a consequence comparing sentences on the basis of a statistical trawl of sentences imposed in manslaughter cases is in my view of little utility without further exploration of the factual background to those cases. Further, in this context, judicial clemency is always susceptible to *ex post facto* analysis and criticism. There is no escape, in a sense, from the remorselessness of the claim that had Mr X received 4 years rather than 3 then he wouldn't have been at large to commit one crime or another. If he had not got bail he could not have offended and so on. This argument has such a looping effect that it can seriously be suggested by a government minister, and adopted by AdVIC, that Shay Bradley (a victim, albeit one who may not be publicly sympathique) would be alive if his bail application had been refused. And so it seems victims too should go to jail to have their interests protected. The backward shadow of hindsight cannot be used to condemn the sentencing process. All that can be asked, in my view, is that the process is open, founded on evidence and submission, based on known precedent and that ultimately the decision maker is accountable by a process of appeal. The desire for fixed sentences or what amounts to the same thing, sentencing within limited and fixed guidelines, is the fruit of this process. I

[7] *R. v. Stavreski* [2004] V.S.C. 16, para. 19.

commend the words of Louis Blom-Cooper writing in 1996 writing about this issue in the English context:

> Mandatory penalties, which are again at the forefront of penal policy, impinge upon the constitutional position of the judges in holding the balance of justice between state and citizen. The relationship between popular sentiment and the public interest is infinitely more complex. In matters of sentencing the independence of the judiciary goes to the heart of the matter. Where the sentencing of offenders is concerned, especially those convicted of notorious crimes, the popular press has tended to resonate expressions of opinion that are more noteworthy for a simplistic and unequivocal advocacy of retributive punishment than a reflective consideration of the more complicated interaction between justice for the individual and the public good. …If public confidence in the judiciary is to be maintained it can be argued that much will depend upon the maintenance of its independence; increasing resort to measures designed to constrain it, such as mandatory penalties of all kinds, can serve only to weaken that confidence by progressively reducing the role of the judiciary to that of automata, applying not wisdom and judgment in the context of justice but politically determined decisions through the medium, of a managerial bureaucracy.[8]

Reference is made to powerlessness in our Courts because of appeals. What might appear to be passing judgment under the "shadow" of an appellate court is in fact no more than the light of transparency; the right of an appeal by an accused *and* an application to review on the part of the prosecutor is a mechanism of accountability ensuring that everything a sentencing judge says and does is open to scrutiny.

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[8] "The Penalty for Murder: A Myth Exploded" [1996] *Criminal Law Review* 707, 716.

The idea that human life is not appropriately respected is not a new theme in this country. De Tocqueville specifically remarked on this feature of Irish life in his travels in Ireland as early as 1835 and in particular referred on the ease with which, he felt, Irish people were given to faction fighting resulting in the loss of life. In the report of the Royal Commission on the 1916 disturbances it was remarked that Irish men 'appreciate the maintenance of order but appear to have an inveterate prejudice against the punishment of disorder.' Similar waves of concern appear periodically in other jurisdictions. Systems often lurch in one direction before there follows a public outcry about miscarriages of justice and so the cycle continues. Crime and patterns of criminal behaviour are changing all the time – as has been noted in the Central and Circuit Criminal Courts there is an increasing recourse to weapons during disputes; an increasing prevalence of kicks and blows to the head resulting in death; the disappearance of the 'fair fight'. These changes are and should be reflected in sentencing policy. Further, the courts should not be neutral in relation to the effect that these crimes have on victims and families and the receipt of impact evidence can inform that general sense of the effect of these crimes.

Our system requires an awareness in my view of our fundamental potential in this context, that is the potential to be a victim or a member of the family of a victim and the potential to be an accused and/or to be a member of the family of an accused. A system that recognises both is worth having.