THE ROLE OF THE VICTIM IN THE IRISH CRIMINAL PROCESS

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In the first instance I want to say how flattered and grateful I am to have been appointed Adjunct Professor of Law in this college. This is an appointment which I will assiduously cherish, and foster even closer relations than already exist between the undergraduate and postgraduate students of this college and the institution of the Central Criminal Court. It seems to me a very European thing to do to appoint a serving judge to a position of this kind.

The first part of the induction process of Adjunct Professors is to take tea with the President of the college in his magnificent suite of offices and this I did some months ago. When leaving I said that some might not be enthusiastic about my being delivered this independent platform and I thought for a moment that I saw the President's face fall and the 'whatever have I let myself in for here' look come over his countenance for less than a second. Professor Fennell did not show any such reaction.

I have decided that for the duration of my term my statutory lectures should be devoted to the topic of the role of the victim in the Irish criminal process. There are two great issues which must be faced:

1. Conduct on the part of the victim which might lead to a liability for contempt of court; and
2. The building up by the media of selected victims into such an iconic status that other participants in the trial process, including the judge, are handicapped in the discharge of their independent roles.

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* Judge of the High Court. Text of inaugural address delivered at University College Cork, 24 November 2006, on appointment as Adjunct Professor of Law at UCC Faculty of Law.

For the purpose of tonight's paper I am treating victims as primarily the surviving relatives or partner of somebody who has met an unlawful, violent death. During my time as a barrister or judge 1,626 citizens of this State have met such a death. I am aware that in relation to fatal cases there are those who will say trenchantly that the victim is dead; there are no other victims to be heard, but matters have moved on beyond that point and cannot be rolled back. This is particularly so in light of the recognition given by the Court of Criminal Appeal to victims in the category I have just described in the case of *D.P.P. v. Wayne O'Donoghue*.[1]

These are important issues which must be faced but in view of the fact that there are raw nerves in relation to certain cases I will postpone these issues until later in my tenure. The first matter I propose to address is the treatment of victims as herein before defined in the judgments of the Court of Criminal Appeal and it has not been a particularly friendly one.

Victim impact evidence is broadly mandatory in sexual cases and cases of personal violence where there is a primary victim usually in the person of the woman who was raped. In relation to homicide cases the judge may refuse to hear the surviving relatives or partner. Some judges absolutely refuse to hear such evidence as happened in *D.P.P. v. David Noonan*.[2] In this case there had been a plea of guilty to dangerous driving causing death and the learned Circuit Court judge refused to read a victim impact report on the family of the deceased. The Director of Public Prosecutions appealed the alleged undue leniency of a 12 month prison sentence. The major plank of the Director's appeal was based on the trial judge's refusal to read the victim impact report. The Court of Criminal Appeal, however, in the judgment delivered *ex tempore* by Hardiman J. found that the judge was correct in his reservations and that it was now acknowledged that he was correct and within his powers not to read the relevant document or hear the relevant evidence.

I will now pass from victim impact and as indicated return to it in a later address during my tenure.

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[1] Court of Criminal Appeal, unreported, Macken J., 18 October 2006.
[2] Court of Criminal Appeal, unreported, Hardiman J., 28 April, 2003.

Victims have a different standing and status in various parts of the world. My recollection from when I watched a larceny trial in Russia is that the victim was in the driving seat as regards all the major decisions in the case. In some parts of the world the victim has the decision as to whether the perpetrator will be beheaded or spared. In this country the victim has merely the status of witness usually as to formal matters such as proving a birth certificate or giving evidence as to the last time the deceased was seen alive and the state of his or her health at that point in time. The status of the victim has been dealt with in a number of judgments in one of them at least in rather dismissive terms.

In *The People (Director of Public Prosecutions) v. M,*[3] Denham J. said that at page 316:

> Sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the Court. Having assessed what is the appropriate sentence for a particular crime it is the duty of the Court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered. Sentencing is neither an exercise in vengeance, nor retaliation by victims on a defendant. However, the general impact on victims is a factor to be considered by the Court in sentencing. The nature of the crime and the personal circumstances of the appellant are the kernel issues to be considered and applied in accordance with the principals of sentencing, for this is an action between the State and the appellant and not an action between the appellant and the victims.[4]

In the same case Egan J. said at page 315:

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[3] [1994] 3 I.R. 306 (S.C.).

[4] [1994] 3 I.R. 306, at 316 (S.C.).

> One should look first at the range of penalties applicable to offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made.[5]

This approach has led in sentencing judgments to frequent references to looking at the offender and not the offence. This approach has made victims feel that their loved one has been airbrushed out of the proceedings and that everything is calibrated in favour of the killer. I am saying killer rather than accused because in homicide cases it is rarely in issue that the accused killed the deceased. The issue is usually between murder and manslaughter.

In *D.P.P. v. Dillon*,[6] the Court of Criminal Appeal held that it was an error in principle to treat manslaughter with a knife as being in a different category from other forms of manslaughter. In that case the sentence imposed was decimated on appeal. The evidence in successive cases in Limerick from the state pathologist has been that stabbings there involve the throat being slit from side to side and in effect bring about what is almost a decapitation. It is difficult to understand why if there is a particular problem in a particular area it cannot be targeted. A Circuit Court Judge or a District Court Judge will have peculiar knowledge of the problems in his or her area and it would seem logical that they should have the powers to deal with it even if it involves viewing a particular crime or a particular manner of perpetrating a particular crime as being more serious in their area because of its local prevalence and discriminating in sentence on that account.

In *D.P.P. v. Stephen Kelly*,[7] Hardiman J said:

> In cases where there has been a death and especially a death caused by an intentional as opposed to a negligent act, unhappiness with the sentence is often expressed in the reflection that even the longest

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[5] [1994] 3 I.R. 306, at 315 (S.C.).
[6] Court of Criminal Appeal, unreported, McCracken J., 17 December, 2003.
[7] Court of Criminal Appeal, unreported, Hardiman J., 5 July 2004

> sentence will end at some point, probably while the defendant is still quite young, whereas the suffering and deprivation of the deceased person's family will be permanent. This is very sadly true. But it ignores the fact that under our present sentencing regime, sentences must be *proportionate not only to the crime but to the individual offender*.[8]

Victims tend to instinctively feel that counsel appearing on behalf of the prosecution is "their barrister" as they would put it. This is not the case and the prosecution team does not in any way represent the victim. There may be a coincidence of interest and there may not. There can be situations where the interests of the victims as they see them and the interests of the prosecution are diametrically opposed. This was strikingly so in a case where the family of the deceased had an obsessive desire to establish that their loved one had not been sexually penetrated but it was an essential plank of the prosecutions case in seeking to bring home a charge of murder that she had. Such a stark divergence of interest of course will seldom occur.

David Garland in *The Culture of Control*[9] referred to the return of the victim and says that there has been a remarkable return of the victim to centre stage in criminal justice policy. Laws are passed and named for victims: Megan's Law; Jenna's Law and the Brady Bill. Victims appear as featured speakers at party political conferences and the new political imperative is that victims must be protected, their voices must be heard, their memory honoured, their anger expressed, their fears addressed. Any untoward attention to the rights or welfare of the offender, Garland says, is taken to detract from the appropriate measure of respect for victims. The offenders gain is the victims' loss and being "for" victims automatically means being tough on offenders.

Garland's views are directed towards the United States and the United Kingdom. In this country victims were ignored and

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[8] Court of Criminal Appeal, unreported, Hardiman J., 5 July 2004, at pp. 19-20.
[9] Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001).

even treated with distain until a situation came about that they decided that they would take it no more and organised themselves.

Victims complained that they were given no information in relation to the course of an investigation, in relation to the preferring of charges and in relation to the early progress of a case through the District Court. They complained that in court no provision was made for their seating and that they found themselves thrown together with the alleged killer or members of his family. They believe that at every stage of the proceedings the rules are calibrated in favour of the accused and that their loved one has been airbrushed out of the proceedings.

From time to time I will have defence counsel come in to me late in the week looking for an adjournment of a trial in the following week's list. When I enquire as to whether the victim knows about the application I get a "what business is it of theirs" type of reaction disguised in a mantra about the accused's right to a fair trial.

When a case was adjourned, collapsed or directed to be retried by the Court of Criminal Appeal victims groups were extremely concerned and frustrated that it went to the bottom of the queue and might wait for up to two years to come on for trial again causing an additional two years distress and absence of closure for the victims. This problem has been greatly eased by the near elimination of backlog in the Central Criminal Court but over and above that I have given an undertaking to AdVIC that cases falling into this category will be re-listed without delay.

Frustrated by their treatment at the hands of the criminal justice system a group of victims got together last year and formed AdVIC, standing for Advocates for Victims of Homicide. Some weeks ago I attended a launch of their Directory of Information for people bereaved by homicide.[10] This is a most comprehensive document which shows how far they have come in such a short space of time. They say in their document "We formed to ensure that the rights of families of homicide victims are not ignored within the criminal justice system and to bring

[10] Available at http://www.advic.ie/AdVIC_leaflet_1.pdf.

about a fairer or balanced systems for such family".[11] AdVIC is not the only group formed by victims of homicide but it is the one I know best and perhaps the most successful.

Due to the efforts of AdVIC and the implementation of the Victims Charter in 1999, victims are now given more of the consideration they deserve. Fair treatment is of course frequently a matter of furnishing appropriate information at the appropriate time and should spring naturally from human compassion and not have to be imposed by charters or pressure groups.

Some matters which seem very simple can involve difficulty. Victims have complained in the past about arriving at a courthouse and finding no seating available or when they do get seated being side by side with the accused or his supporters. It is nowadays routine for the Courts Service to provide reserved seating but since the abolition of the dock by Committee on Court Practice and Procedures in gentler times in the year 1966, it is not always possible to provide equally appropriate seating for the victims and for those accompanying the accused. In a recent case the victims were accommodated in seating immediately behind prosecution counsel and the parents of the accused were accommodated high up in a public gallery and this disparity of seating was commented on daily by the newspapers in the course of a long running trial. I would not wish such a situation to recur and I know that the thinking in relation to the new Criminal Courts Complex to be built shortly is that there shall be separate entrance and exiting for all disparate interest groups and that their paths shall never cross. I hope that this proves achievable and potential conflicts of the kind I have referred to must be had regard to in the redesign and renovation of other court buildings.

There is one area in which the law, it seems to me, can work a great injustice on victims as defined at the start of this paper and on the memory of the person who has been killed and could well do with a measure of reform. This relates to the situation where a defence of provocation is advanced in a murder trial. Provocation of course consists of words or conduct on the part of the deceased which so provokes the accused person so as to cause him to totally lose control of his passions and give rise to the killing. It is

[11] See http://www.advic.ie/AdVIC_leaflet_1.pdf, at p. 6.

judged subjectively on the basis of how the particular accused with all his warts and baggage would behave in a given situation and not according to how a reasonable person would behave. Application must be made to the trial judge for leave to raise the defence of provocation and the threshold for such leave is extremely low. The defence is seldom refused leave to contend for the defence of provocation and this defence, in my view, more often succeeds than fails. The defence if provocation only applies in murder trials and can never reduce an unlawful killing to anything less than manslaughter.

In setting up the defence of provocation the accused person has, in my opinion, *carte blanche* to attack the character of the deceased person and can do so without giving evidence and on the basis of totally hearsay and uncorroborated, unsubstantiated contentions. The family of the loved one may have to listen to the most outrageous and untrue allegations being made without any capacity to intervene and without there being in place any mechanism to test the allegations being made. There is, in effect, free rein to blacken the character of the deceased with no check upon it and no sanction if the allegations are wholly false. One could say that the more outrageous the allegations the more likely the defence of provocation is to succeed.

I can give two examples. A woman who killed her husband by striking him on the head an inordinate number of times with a lump hammer while he slept successfully set up the defence of provocation by contending that the relationship had been an abusive one towards her. After the verdict was brought in the family of the deceased released diaries which strongly contraindicated the acts which had been alleged and strongly suggested that the deceased had been the party in the marriage who was the victim of abuse. There had been no mechanism for this information to come to the attention of prosecuting counsel let alone come to the attention of the jury in the course of the trial on the issue of provocation.

I would also instance a case where it was alleged by the accused in support of a defence of provocation that the deceased, a native of Africa, had said to the mother of the accused that he would cut her up into little pieces, put her in the fridge and eat her bit by bit. Again this material entered the trial on a totally hearsay

basis with no corroboration, substantiation or mechanism for testing it. The link which the jury were being invited to make between the African origin of the deceased and cannibalism is obvious.

It seems to me that a strong case could be made that the interests of justice require that when the defence of provocation is being raised there should be independent legal representation for the victims as defined at the beginning of this paper or in their absence for the good name of the deceased person himself on the same basis on which representation is afforded to the alleged victim of a rape when it is being sought to cross examine her in relation to sexual experience with any person other than the accused.

There are two areas in which AdVIC and victim's organisations are unlikely to get their way. These areas are discretionary sentencing and bail. The duration of a mandatory sentence is of course a matter for the Parole Board and ultimately the Minister for Justice but judges imposing a discretionary sentence must have regard to two seminal judgments. The first is that of Walsh J. in the *People (Attorney General) v. Michael O'Driscoll*:

> The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him insofar as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal.[12]

Sentencing judgments ever since have referred to leaving open a tunnel of hope for the accused or leaving light at the end of the tunnel and have referred to the court's obligation to

[12] Frewen, Volume 1 351, at 359.

consider the offender rather than the offence. In another paper delivered recently I have suggested that a particular category of criminal display such evil that reform is hardly an issue and I have in mind the newly developing phenomenon of people who, without disguise, carry out assassinations in crowded public houses by putting a bullet into a customer's head at point blank range. Apart from cases of this nature the courts are going to seek to induce reform by building into sentences what has now come to be called a tunnel of hope or light at the end of the tunnel, namely the prospect of release within a reasonable time. The courts are also having regard to the passage already quoted earlier from Egan J. as a result of which courts seek out what is favourable to the convicted person and discount on the basis of that. Victims feel that this approach airbrushes their loved ones out of the proceedings and I have seen Powerpoint presentations relating to trials in Sweden where a portrait of the deceased is displayed in happy circumstances. We do not in our jurisprudence have this tradition or culture and the victim impact statement procedure, which of course is post conviction, will have to be relied upon to celebrate the life of the victim if that is to be an objective or considered appropriate.

As regards bail the courts must continue to exercise their jurisdiction on the basis of the presumption of innocence. In homicide cases there is rarely an outright acquittal and in most cases it is admitted that the accused killed the deceased and what is in issue is whether the conviction should be for murder or manslaughter. In contested rape cases however, there tends to be a majority of acquittals and in such cases an accused person who was acquitted could never be compensated for time spent in custody awaiting trial. He will of course be kept in custody if there is an evidential base supporting his being a flight risk or likely to intimidate witnesses.

I am aware that victims' groups are particularly angered by post conviction and pre sentence bail. This bail is not given for the benefit of the person convicted but for the facilitation of people who have to prepare sentencing reports. I have a quarter of a century's experience of the delays, difficulties and humiliations involved in going to prisons for professional purposes to see prisoners whom one is professionally entitled to see. When I say

humiliation I am referring to the obligation to strip off a varying number of layers of clothing depending on the security status of the institution or prisoner concerned. Again if there is an evidential base supporting the proposition that there is a flight risk or a danger of intimidation or retaliation towards the victim this will be a ground for such bail being refused. When I have given bail in these circumstances it has been in a majority of cases with the agreement of the Director of Public Prosecutions. It is of course against the judge that pressure groups vent their anger.

I hope that these remarks will stimulate some thought in relation to the situation of victims in the legal process. The sad situation is that when I take up the second instalment in about 12 months time it will be of relevance to at least fifty more families and probably many more.