BALANCING THE SCALES IN A HOMICIDE TRIAL

JOAN DEANE*

INTRODUCTION

Our criminal justice system works very well…for the accused. It does not work well at all for victims, or their families in the case of homicide. From the moment someone is murdered, the family of that person is thrown into immense trauma, and has to cope with a system within which they have no legal status at all.

The State brings a trial for murder or manslaughter against the accused. In doing so, the State represents its citizens, who have a right to expect their interests to be protected, and a right to see justice done in relation to the most serious crime of all. However, the interpretation and application of our laws, while serving the rights of the person accused of murder or manslaughter, afford no recognition or rights to the victim, or the victim's family. Indeed, this process is called a Criminal Justice System – one does not have to wonder too much as to why it was not originally called a Victim Justice System, for we feel justice is rarely realised for victims.

I. THE DEFENCE

A criminal trial for murder seems to be unbalanced from the very beginning. Is the presumption of innocence, enjoyed by the accused under our common law system, a good enough reason why the defence team is allowed to know what the prosecution case is in advance of a trial, while the prosecution, having to prove the guilt of the accused, is not permitted to know what the

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defence case is? Although the defence and prosecution are both provided with the same resources in terms of legal expertise, this practice appears to tip the scales of justice from the outset.

In December 2003 Deputy Mc Dowell, Minister for Justice, when asked a question by the Chairperson of the Joint Committee on Justice, Equality, Defence and Women's Rights on the constitutional rights of a defendant to be balanced against those of the victim, he answered as follows, and I quote:

> Bearing in mind the constitutional right of everyone under article 40 to have his or her right to life, liberty and property protected, the State is getting the balance wrong within the constitutional framework.[1]

You may also be aware of a speech Paul Anthony McDermott gave at the Prosecutors Conference this year, when he went over some of the current deficiencies in our system, too many to go over here today, but his conclusion speaks volumes:

> The public cannot understand…a system which from start to finish seems to come down on the side of the accused. Perhaps the time has come to recalibrate the criminal trial system so as to balance the scales of justice.[2]

The families of homicide victims do not see balance in the courtroom. They see a barrister appointed by the state to prosecute a case, but not in any way to represent the dead victim of homicide. They see the prosecution rigidly constrained in how they conduct their case, while on the other hand they see a barrister for the defence, who represents a living individual, permitted to go to any lengths to demonstrate the innocence of

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[1] See Joint Committee on Justice. Equality and Women's Rights, Tuesday, 9 December 2003, p. 16. Available at: http://www.gov.ie/oireachtas/Committees-29th-D%C3%A1il/jcjedwr-debates/jjedwr91203.rtf.

[2] McDermott, "Equality of Arms? Balancing the Rights of the Prosecution & the Defence", p. 20. Paper delivered at the Seventh Annual National Prosecutors Conference, Saturday, 13 May 2006.

their client. The defence is also allowed a degree of leeway in terms of what evidence they choose to present, or indeed choose to withhold. The whole purpose of the defence is to raise doubt in the minds of a jury in relation to the prosecution case - and it seems that any doubt will do!

They see a defence allowed on occasion to exploit the emotions of the victim's family, shamelessly and dramatically. This form of harassment would not, for instance, be permitted in a rape trial where there is a living victim, because the feelings of the victim and his/her family are quite rightly taken account of. The harassment of a victim's family in this way is a morally questionable practice that should not be permitted. Where necessary, this issue could be dealt with quite effectively by a judge in his charge to a jury, when he can instruct them to disregard any emotion they may have witnessed.

In order to balance the scales of justice, equal rules of engagement should be afforded to both defence and prosecution. Lip service is being paid to the need for a more equitable system, but it is time for meaningful debate to take place that will lead to action.

II. HUMANISING THE VICTIM

The character of the accused is given a high profile during a trial. Very often the victim is referred to throughout a trial as 'the victim', 'the deceased' or by surname only. The victim is frequently referred to by his/her incorrect name during a trial, and this is permitted without comment. In this way, the humanity of the victim is lost in the trial.

Most families after a homicide trial say that their loved one was lost in the process, that a lot of things said about them were not real, not true, or did not reflect the person they knew and loved so well. They will have had to listen to hours and hours of people, who sometimes barely knew, or did not know their loved one at all, paint a picture to the jury that they, the family, know is not always correct. Who is to protect the good name of the victim? The prosecution, who prosecute, but do not represent the homicide victim, can do nothing because they also know so little

about the victim, and do not collaborate with the families of homicide victims in any constructive way.

The Law of Evidence states that where a defendant calls witnesses who testify to his or her good character, questions relating to his or her previous convictions and character may be put to those witnesses. However, the reality is that the defence will go to any lengths to paint the accused in a wonderful light (omitting mention, of course, of any previous crime, if such exists), and will even concentrate on the hardship that this tragic event has brought upon their client!

In the interest of fairness and balance, if a jury has to be informed of the good character of an accused, is it not reasonable to expect that they also be informed, before retiring to deliberate, when an accused has prior pertinent convictions, for example, for violent assault, or was out on bail for such when the crime took place?

III. VICTIM IMPACT STATEMENT

Legislation is vague about who the victim in a murder case is, and whether the families of victims should be allowed to make a victim impact statement. This ambiguity should be addressed immediately.

International best practice recognises the family of a homicide victim as a victim, and gives them appropriate rights given to a victim of crime. The newly introduced Code of Practice for Victims of Crime[3] in the UK states specifically that in a homicide case, the victim's "family spokesperson" is entitled to receive services under the code – this includes specific court services.[4] In the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[5] the definition of the term

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[3] Available at: http://www.homeoffice.gov.uk/documents/victims-code-of-practice?view=Binary.

[4] Para 3.4.

[5] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. A/RES/40/34 (1985).

"victim" includes where appropriate "the immediate family or dependants of the direct victim".[6]

A victim impact statement is paramount for victims, and we at AdVIC propose that a victim impact statement should be an entitlement. Families should be afforded this opportunity in all homicide convictions, including when a defendant pleads guilty to murder, as it is the only opportunity for the family to be heard within the proceedings and the courtroom, where all the participants of the trial are present, is the best place for this to happen.

A mandatory victim impact statement can hardly be viewed as being a threat to the fair trial of an accused, as this is given at a sentencing hearing and the individual is already a convicted person at this stage of the proceedings, and in any event, the statement will have been submitted in advance of the hearing and will have been 'censored' by the defence to ensure that it does not contain anything that they might consider damaging to the offender.

Studies in New Zealand, and Australia, where Victim Impact Statements have long been in use, show that they do not affect a judge's sentencing decision in a more punitive way. The importance of being able to deliver a victim impact statement should not be minimised, as it has a cathartic affect on families, allowing them to feel that they have had some say in the court process, and gives them the chance to describe the victim in real, rather than abstract terms. It can also be considered an important part of the rehabilitation of the convicted person in facing the reality of what he or she has done. Being made to sit and listen to the victim impact statement of a family may well begin to give them some sense of the consequences of their actions. Rehabilitation is one of the points of a custodial sentence, and this process can best begin in the courtroom.

It is worth looking at the rights the International Criminal Court affords victims. The permanent International Criminal Court has adopted the best practice from international legal systems around the world to create a truly international court. In

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[6] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. Doc. A/RES/40/34 (1985), A(2).

countries with a civil law system, such as France and Germany, the victim plays a far larger role in proceedings than they do in common law countries, such as Ireland, UK, USA and Australia. The ICC has to try and find a balance in the way it tries its cases that marries the best aspects of both law systems together. For instance, even after an accused has admitted guilt, the trial may go ahead and the prosecution may present additional evidence, if it is in the best interests of justice, and particularly in the interests of the victims to do so. The ICC also permits victims to have their own representation, and to make presentations, independent from the prosecutor, at various stages of the proceedings where their interests are implicated. Although they are not entitled, as of right, to address the chambers, if admitted to do so, they may submit briefs, attend hearings and examine or cross-examine witnesses. In addition, it designates the Victims and Witnesses Unit as the organ responsible for providing resources and guidance to victims, including finance, to ensure they are able to exercise their rights during the process.

What is to stop Ireland introducing such measures into our own criminal justice system to redress the imbalance that currently exists?

IV. SENTENCING

As a case moves on to sentencing, imbalance and disconnection with public comprehension become big issues.

Since 2000, 35% of murder cases on average have returned a verdict of manslaughter.[7] Families of homicide victims and the majority of the public at large, feel that the sentences being handed down for manslaughter are frequently too lenient, with the penalties imposed not reflecting the severity of the crime. A label of manslaughter does not erase the fact that a human life has been taken in violence, and society views this as the most serious crime of all. It would be expected that a judge in his sentencing would reflect this view. However, this is not happening in reality, and in effect, is further devaluing the victim, and human life.

[7] Court Service Crime Statistics. See http://www.courts.ie/statistics.nsf.

The maximum sentence for murder is life imprisonment; the likely term served is 9 to 12 years. All other sentencing for homicide conviction is at the discretion of a judge.

The maximum sentence for manslaughter is life imprisonment. However, 75% of manslaughter convictions since 2000 have received a sentence of from 2 to less than 10 years, with the majority of sentences being closer to 5 years. No sentence higher than 10 years imprisonment was given for a manslaughter conviction in 2005. Compare this with 2003 when 35% of manslaughter sentences were given over 10 years and in 2004 the figure was 37%.[8]

Assault causing serious harm also carries a maximum sentence of life imprisonment, but the likely sentence given is 1 to 2 years. Why are sentences for the most serious of crimes so low, especially when we see sentences in double figures being given for crimes where no one is killed? Why is it when the upper range of a sentence is approached, it will always go to appeal? It must also be remembered that one-third is wiped off a sentence from the moment it is passed, thus once again the system swings into action to facilitate the offender.

Lenient sentences frequently cause great unease in the public perception, and a much distorted message to society is given when judicial clemency takes place, as outlined so tragically in the case of serial killer and rapist, Michael Murphy, who first killed in 1984. He was found guilty of manslaughter and served 8 years in prison. Five years after his release, he attacked 2 more women and was imprisoned for 6 months – *6 months for an already convicted killer!* Three years later he raped and murdered Bettina Poeschel.

Recent research undertaken by AdVIC indicates that persons out on bail had committed 3 out of 42 cases of murder at the time.[9] In one case, the accused had 30 previous convictions, including an attempted stabbing, and was still granted bail, during which he went on to commit a murder.

In June 2000 two elderly brothers were attacked in their home, resulting in the subsequent death of 81-year-old Paddy

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[8] Court Service Crime Statistics. See http://www.courts.ie/statistics.nsf.

[9] 'Research into the Voiced Needs of Families of Homicide Victims', research document currently in preparation.

Logan. Both accused had previously been involved in violent killings of pensioners, for which they had each served 3 years. For the manslaughter of Paddy Logan, John and Christopher Doyle were sentenced to 15 and 12 years, respectively. What kind of society do we live in where it is possible to commit two separate homicides over a 16 year period, yet be released from prison by the age of forty-five?

Routinely, concurrent sentences are given for multiple offences that occur during a single incident. This is a very attractive outcome for the accused person. The practice is more appropriately used as a marketing ploy in our retail outlets, where we can buy three items and pay for two.

Judgments in recent times have included reference to the Court of Criminal Appeal, giving the impression that Judges appear to pass sentence under the shadow of this court. It seems that between the defence, who have the advantage of being able to challenge a judgement and the Court of Criminal Appeal, who can overturn a judgement, Judges are being rendered almost powerless in their Courts. Is this fair to Judges?

Justice must not only be *seen* to be done, but it must also *be* done. Ireland is one of the few countries left in the world without effective sentencing guidelines. It is time for judicial thought to be put in place with regard to guidelines, and we would welcome the participation of judges in the debate.

V. MURDER GRADED BY DEGREE

The term manslaughter is very vague, without a definition in Irish law. The label manslaughter is hardly appropriate when a life has been violently taken. Apart from the sad loss to the family, the victim's basic right to life has been taken from him or her, and it is important that we describe this most serious of crimes appropriately.

By labelling it anything less than murder, we are in danger of sanitising it, and by describing it as manslaughter we are in danger of losing sight of the violence involved. A system based on the seriousness of the killing would be more appropriate, and the single charge of murder should be replaced by a charge of

murder graded by degree. Degrees of murder might carry with them a pre- defined range of sentences.

I appreciate that this is a huge issue, and I do not have a legal background, but feel strongly that serious debate is warranted to tease out the legalities involved in bringing about these changes. The system works in other jurisdictions, such as the United States and some European countries, why not here?

When Ken Macdonald, the Director of Public Prosecutions in England and Wales spoke in favour of the introduction of such a system last year, the feedback from his interview was that the English judiciary would back up his call. It is time to open up that debate here, and time for the judiciary in Ireland to voice its opinion.

VI. BAIL

In 1996 in a constitutional referendum, the public approved restrictions on bail. The people decided that where there was a process that showed, on credible evidence, that a person would avail of their liberty to commit further serious crime, they could be deprived of their liberty pending a trial. If stringent bail laws exist, why then were 25% of homicides in 2005 committed by persons out on bail, as indicated in the 2005 Annual Report of the Garda Siochana.[10] Why were the people asked to voice an opinion in 1996, if their opinion is to be disregarded?

AdVIC expressed its grave concerns about these statistics to the Minister for Justice early in 2006, and it was agreed at that time that further examination of the background to these figures was required. It would be important to establish if bail had been granted for a minor or serious offence. We have repeatedly looked for this further information, especially when preparing for today, but to no avail. In the absence of clarification from the Department of Justice, all we can do today is draw your attention to a few cases, as each statistic represents a family.

Michael Doyle, found guilty of the manslaughter of Mark O'Keeffe in Dublin in May 1997, was on bail awaiting trial for the violent assault of a taxi driver at the time of the homicide.

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[10] See http://www.garda.ie/angarda/statistics/report2005/annreport2005b.pdf.

Ian Horgan, was found guilty of the rape and manslaughter of Rachel Kiely in 2000. He was convicted of burglary, assault and possession of stolen property while on bail awaiting a retrial for murder, after his original conviction had been overturned by the Court of Criminal Appeal.

Brian Willoughby found guilty of the murder of Brian Mulvaney in Dublin in 2000, was on bail awaiting trial at the time of the murder after he pleaded guilty to 3 separate unprovoked violent attacks.

Mark McCann, was found guilty of the murder of Robert Rogers in Dublin in 2002. He committed assault while on bail for the murder charge.

Jonathan Tuohy, found guilty of the murder of Noel Carmody in Limerick in 2003, was on bail awaiting sentence at the time of the murder, having pleaded guilty to robbing a taxi-driver at knife point.

Are these unusual cases, or, are they more common as the statistics would point to? In some of those cases bail was granted for a violent serious offence, not unlike the ultimate offence where a human being lost his/her life.

The O'Keeffe, Horgan, Rogers, Carmody and Mulvaney families are just a few cases where the Irish people have been let down by the interpretation and application of our bail laws.

Earlier this year the Minister for Justice voiced his concerns when he said:

> …we, as a society, must now face up to difficult questions, not as a substitute for good and effective policing and criminal investigation, but as a means of ensuring that the scales of justice are held evenly between those who would break the law and those who would uphold it, between the accused and the prosecutor and between the criminal, the victim and the community.[11]

[11] 'Rebalancing Criminal Justice – Remarks by Tánaiste in Limerick', 20 October 2006. Available at http://www.inis.gov.ie.

An Garda Siochana have frequently expressed their frustration that too often their testimony "did not count" when judges granted bail. Shay Bradley was granted bail "in the teeth of Garda opposition" after being charged in connection with the shooting of an innocent man. He later became a murder victim himself.

Who can best present concrete, real evidence to the court of the reasons why a person is at risk of committing serious offences, but the Gardai, who in the execution of their duties regularly come into contact with and are familiar with the character of those individuals?

The right to the presumption of innocence under our constitution means that a large number of people charged with a crime are released on bail when awaiting trial. When it comes to the crime of homicide, this can cause difficulties when victim and offender were known to each other or lived close to each other. It must be said that the reduction in the delay in bringing trials to court has been very helpful in this regard. However, the Gardai are the people who are acutely aware when problems arise in these circumstances, and their opinion should be taken seriously when they request that bail be refused.

How, though, do we explain why convicted criminals are given bail while awaiting sentencing? We are told it is to assist the defence in the preparation of reports for the future sentencing. Once more the balance is in favour of the criminal, with no recognition or regard for the families of the victim. This practice can leave those families with the worst injustice they will ever be faced with.

Because no real examination of the statistics has taken place, it is difficult to quantify the extent of this problem, but to you judges today, I would like to say that allowing bail to a person convicted of homicide or violent crime is not acceptable and it should not take place. It has nothing to do with constitutional rights, but seems to be related to operational issues. A convicted person should not be freed on bail simply because the system is not efficient when it comes to the preparation of reports etc.

Enda Kenny, at the Fine Gael Ard Fheis in May 2006 said that "[i]n the last two years alone, there were 11,000 serious

crimes – robbery, rape, murder – committed by offenders out on bail".[12] Fine Gael have suggested tagging people out on bail. Controversial certainly, but is this such a bad idea, particularly when the person involved is a seasoned criminal, or charged with a serious crime such as murder?

Our criminal justice system works very well for the accused in a criminal trial. It does not work well at all for victims. It is time to re-balance our system to take into account the rights of all parties, instead of the present system, which is too heavily weighted in favour of the accused. Our laws may be outdated and are not necessarily relevant to twenty-first century Ireland.

The letter of the law is being given more weight than the spirit of the law. It should be remembered that our Constitution was framed at a time of conflict in our history, when the chances of our citizens receiving a fair trial might have been compromised. This is not the case today, and while it is a good thing that our Constitution guarantees a fair trial to all, it should not be interpreted to mean that one side, or the other, should receive unfair advantage. It is time now to rebalance the scales by committing the rights of victims to writing.

In the words of our esteemed President, Mary McAleese when she addressed the Law Society of England and Wales conference recently "consistency in showing respect for the human person is a key value and key test of the credentials of the rule of law".[13]

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[12] Keynote speech by Enda Kenny, Fine Gael Ard Fheis 2006. Available at http://www.finegael.ie/uploads/docs/Enda1.htm.

[13] Remarks by President McAleese at the opening of the Law Society of England & Wales Conference 'Lawyers' Independence: the Rule of Law and national security - striking the balance', London, Wednesday 20th September 2006. Text available at http://www.president.ie.