CJM
CRIMINAL JUSTICE MATTERS

MATTERS OF CHANCE?

Offenders, victims, and the luck of the draw

Andrew Ashworth

In all aspects of our lives we feel the effects of luck. Chance occurrences can be good or bad, but they are certainly plentiful. The criminal justice system itself is not immune from the influence of luck. Local solicitors come to know about the approaches of different chairpersons in the magistrates' courts, and barristers come to know about the leanings of different judges in the Crown Court. These differences can affect the results of a case.

The law itself ought to be above this. It should be a settled set of objective rules. But the law has some awkward dilemmas to resolve, and one of those is how to deal with unexpected consequences in an individual case. Take a case like *Goodchild* (unreported, 1991), where two market traders were involved in an argument over a parking space. As one of them went to remove an obstruction from the road, the other punched him in the face. The victim fell backwards, his head hit the kerb and he died from a fractured skull. The offender's intention was to assault the victim; because death resulted, the law classified his offence as manslaughter. What should be the proper approach to sentencing on such facts? Should Goodchild be sentenced on the basis of what he intended (a moderate assault), or on the basis of the actual result (death)?

Should the courts take account of matters which, so far as the offender is concerned, are matters of pure chance?

With some crimes the law takes a clear line. The difference between the offence of dangerous driving and the offence of causing death by dangerous driving may often be a matter of chance (e.g. whether there was a car coming in the opposite direction round a bend), but the law prescribes maximum penalties of two years and 10 years respectively. The maximum penalty is also higher when aggravated vehicle-taking causes death (five years instead of two), and when death is caused by careless driving whilst intoxicated (10 years instead of six months). Although there is often a slice of good luck or bad luck in whether a particular piece of bad driving causes death (or injury), the law puts people on notice. The reason for creating an offence like dangerous driving is that such conduct may cause death or serious injury. When death does result, Parliament has ordained that the driver must take the consequences. The sentence will be higher.

The sentencing guidelines for rape, set out in the *Billam* judgement in 1986, state that "the crime should be treated as aggravated ... [where] the effect on the victim, whether physical or mental, is of special seriousness." One could argue that, so far as the offender is concerned, the effect on the victim may often be a matter of chance. On the *Billam guidelines*, an offender whose victim suffers a very traumatic reaction will receive a higher sentence. The other side of the coin was what caused controversy in the Ealing vicarage case some years ago: if the victim's suffering is assessed as less than normal, this too might be reflected in the sentence imposed on the offender.

BBC documentaries: The Trial

Fairness and sentencing

What should we do when there are no great consequences? Should the courts take account of matters which, so far as the offender is concerned, are matters of pure chance? In cases of bad driving, Parliament has answered yes. In rape cases, the courts have answered yes. What about the manslaughter case of *Goodchild*, with which we began? There, the Court of Appeal released the offender after he had served the equivalent of seven months imprisonment. That means that the sentence was more in line with the offence of assault occasioning actual bodily harm than with homicide. Is that fair? That was all Goodchild intended. The risk that a single punch will cause death is a slight one, so is it really fair to say that everyone who punches another person should have to take all the consequences? The Court of Appeal thought not.

Where does all this lead? Doesn't it appear that the law is adopting double standards here? Bad drivers and rapists have to take the consequences, even if they are matters of chance, whereas people who throw punches - even if convicted of manslaughter - do not. The fairness issue becomes even more complicated when we consider sentencing for offenders who try to cause harm but fail. A person who fires a shotgun at another, intending to kill, can expect a sentence of around 12 years for attempted murder. Yet, if he misses, he has caused no direct harm at all. If sentencing is to be based on the idea that every offender has to take the consequences? Give a very small sentence for attempted murder? Or should we focus on what the offender intended, rather than the actual result, and say that the sentence for attempted murder should be little short of that for murder itself?

The views of victims

The *actual* consequences may be relevant in other areas of law. They are relevant to civil liability, and also under the Criminal Injuries Compensation Scheme. The criminal law, however, generally lays emphasis on what the offender intended, or knowingly risked. Sentencing, as we

HUMANISING JUSTICE

have seen, vacillates between the two approaches. These uncertainties have a bearing on the idea of bringing victims more into the sentencing process. Some courts seem willing to receive a Victim Impact Statement, in which the victim sets out all the consequences that the crime has had for her or him. As we have seen, it is questionable whether this is relevant to sentencing - for some crimes it is, for others it is not. Is there good reason to receive such a Statement in cases where its contents will have no bearing on the sentence?

The difficulties become even more acute when the victim, or victim's family, goes further and petitions the court for leniency. For example, in the *Kavanagh* case ([1994] Criminal Law Rev. 467) the offender, during a "domestic" altercation, seized an iron bar and tried to strike a pregnant woman with it, hitting her 3 year-old son and fracturing his skull. The woman and her family wrote to the court pleading for leniency and saying that the offender had already been punished enough by being remanded in custody for four months. The trial judge agreed, and made a probation order. The Court of Appeal held that this was an unduly lenient sentence, although for other reasons it did not increase it. Should a court be swayed by forgiveness from the victim or victim's family? Or should the court take the view that sentencing is a matter of public interest, to which the victim's views (whether forgiving or vindictive) are not relevant?

This short comment has raised two questions. First, should offenders be sentenced according to the actual consequences of their lawbreaking? Second, should the views of the victim, or victim's family, be given any weight in the sentencing process? There is plenty of room for debate, but would it not be fairest if sentencing were based on the harm that the offender intended or knowingly risked, irrespective of whether the actual harm caused was great or small, and irrespective of the victim's views? Many elements of luck would thereby be removed from sentencing law, without in any way affecting victims' rights to compensation. ■

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The rights of victims: making good the harm

Martin Wright

Recent changes in the criminal justice process, to take account of victims, have not changed the process itself. The listing of court cases is to be as convenient as possible for witnesses: but the timing of trials is still often unpredictable. The Royal Commission on Criminal Justice said that judges should act firmly to control bullying tactics by counsel: the fact remains, however, that the system is essentially adversarial, and defence barristers still try to make witnesses sound confused and self-contradictory, which is an unpleasant experience for victims.

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Victims and other prosecution witnesses attending court want information, reassurance, and a waiting area where they will not be confronted by the defendant's family and friends. These needs, too, are beginning to be met. The Crown Court Witness Service will soon cover every Crown Court centre, and facilities are beginning to be provided in magistrates' courts, although separate space cannot always be found in old buildings. But still the system forces the parties into opposing camps, uses the language of war, and is based on the expectation that the offender will be punished, often by imprisonment. Not surprisingly, therefore, some offenders threaten to attack the victim who "grassed" to the police.

Making a contribution

Besides wanting information from the criminal justice process, victims often want to contribute to it. The court should receive information on which to base compensation, the prosecution should know whether a plea in mitigation is unfair to the victim and ought to be challenged. But in addition, they often want recognition of what the crime has meant to them, and in particular they want the offender to be made aware of it: some would like to tell him themselves.

One solution, currently attempted in countries such as the United States and New Zealand, has been the introduction of victim impact statements. The victim is given the opportunity to make a written or even an oral statement to the court before the sentence is decided. In this country there have been objections from both the victim's and the offender's point of view. Victim Support (1995) has argued that most victims do not want the responsibility of influencing the sentence, which they rightly see as the province of the courts; and if the information they provided were challenged by the defence, they might be subjected to a second ordeal in the witness box.

From the offender's standpoint, sentencing influenced by victims would be even more inconsistent than it is already, and probably more retributive. But victims do want to contribute to the proceedings. They want the court to have information relevant to compensation. Victim Support's proposal is that the information should be provided at the beginning of the case, so that it would be separated from sentencing, and would provide the CPS with information they need if they have to challenge bail applications or pleas in mitigation, or applications to question a rape victim about her previous sexual experience. This would have advantages, although the information, once on file, would inevitably also be taken into account for sentencing.

Victims also want recognition of what the crime has done to them, and especially where the victim has died as a result of the crime their family wants him or her to be spoken about as an individual. Some of them want the offender to hear the effects of his actions.

Offering more to victims

There is, then, a list of things victims want after a crime. Contrary to beliefs prevalent among politicians and some leader writers, they are not more retributive than the general public, and there is strong support for reparation, community service, and efforts to rehabilitate themselves.

These needs can be met without most of the problems described above, by a process that takes place outside the court. Victim/offender mediation is arranged to suit the convenience of the participants. It begins with introductions and an explanation of the process. It is voluntary. There is an opportunity to discuss the amount of reparation and the form it should

HUMANISING JUSTICE

take. Perhaps the term "out-of-court" offence resolution", used in Austria, describes the process better, because mediation services enable victims to say what they want to the offender, and discuss it with him, in a way which would not be possible in court. They can ask questions, and can hear from the offender how he came to commit the crime. If they want reparation they can discuss with the offender the nature and amount: apology, money, work, community service, or co-operation with a rehabilitative programme. This would take place in prison only when that was necessary for the protection of the public, or possibly for purposes of enforcement.

Participants have reported very high satisfaction rates of 80 per cent or more (Marshall and Merry, 1990). It is reported that offenders are more ready to pay compensation after it has been agreed than after it has been ordered by a court; in Northamptonshire only 4 per cent of the agreed compensation had to be written off.

The Victim's Charter made a commitment that victims would be informed when a life-sentence prisoner is to be released, with the implication that if they are afraid, the offender's parole licence may require him to live elsewhere. Probation officers have found this work unfamiliar, and in some cases victims have been reluctant to see them, assuming that they have come to make a request on behalf of the offender. There can indeed be a conflict of interest, since probation officers work primarily with offenders. It has been found, notably in West Yorkshire, that this work can successfully be undertaken by trained mediators, who are accustomed to approaching both victims and offenders in a neutral way. In some cases the victims or families need to know more about the original offence, and some offenders have agreed to exchange information; this can be helpful to the victims and relatives, who may finally get answers to questions that have been left unanswered over many years.

A victim-centred response to crime

In a long-term vision, victim/offender mediation would not operate rather uncomfortably alongside a retributive criminal justice system, but would influence the system itself to adopt one philosophy: restorative justice. The present confusion of aims of sentencing would thus be rationalised. Crime prevention would be the province of a separate department of government. General deterrence would, as has always been widely accepted, be a function of the probability of being caught; it would also be matched by a policy of general incentive which would aim to ensure that law-abiding conduct was "rewarded" - if not financially, then by improved quality of life. Denunciation of the offence would still be achieved, not by the severity of the punishment, with all its undesirable side-effects, but by the amount of reparation. The criminal justice system would be left with a single, overriding aim: to repair, as far as possible, the harm caused by the crime.

Elizabeth Cook, Court Artist

When an offender was detected, and admitted the act, he would at first be given the opportunity to make amends. If he and the victim both wish it, mediation could be arranged, to enable them to communicate, and agree on any required reparation. Prosecution is not necessarily the best way to deal with every crime. Often the reparation agreed would be sufficient to allow the case to be discontinued; if it were not, the sentence imposed by the court would also be of a reparative nature. Restriction of liberty (which would take the form of custody only where the offender presents a serious risk of grave harm to the public) would be ordered for public prosecution only, and not as a punishment.

This process may be taken a step further by the introduction of Family Group Conferences (for juveniles) and Community Group Conferences (adults), on the New Zealand or Australian model. Here the victim and the offender are both accompanied to the mediation by their families and other individuals whose good opinion matters to them. The offender is held accountable, and forced to think about the effects of what he has done; but thereafter he is not subjected to lasting humiliation, but given the opportunity to make amends. This includes co-operating with rehabilitative programmes if that is what will help him to avoid further offending.

It has been found in New Zealand and Australia that both groups of families and supporters work together to find constructive solutions. In this way the victim and members of the community are involved in a way which would not be acceptable if the object was to inflict punishment. This should not of course be adopted uncritically: the scheme may need to be modified when it is transplanted to Britain, and it is welcome that experimental projects are being developed here. Safeguards for victims are needed and the effect on offenders needs to be considered. Making victims part of a retributive process puts them at risk of retaliation and further alienates offenders: enabling them to take part in restorative measures can be a healing process for them and for a divided society. ■

References:

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