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## **Victim impact reports in Northern Ireland: Victims' voices influencing sentencing?\***

*Luke Moffett*

Since the 1980s Northern Irish judges have been proactive in discovering the impact of crimes on victims through statements and medical reports to inform sentencing decisions. Victim impact reports prepared by psychiatrists or psychologists are supposed to provide medical insights into the harm caused to victims, whereas statements written by victims and support practitioners are intended to provide a more personal perspective on the harm suffered. Including victims' voices in sentencing in criminal proceedings remains controversial. However, over the past two decades victim personal statements have become commonplace in sentencing decisions in the UK, where controlled and structured statements from victims can be used to instruct appropriate sentences without undermining the rights of the defendant. In 2013 the English Court of Appeal in *R v Perkins and others* affirmed that victim personal statements (VPS) can constitute evidence, inform sentencing and be subject to challenge by the defence through cross-examination.<sup>1</sup>

This Review has been at the forefront of the debate on the impact of victim personal statements in England and Wales on sentencing.<sup>2</sup> Some concerns over the rights of defendants have proved unfounded, given that defence advocates do not usually challenge victim personal statements, but this may reflect a concern that cross-examining a victim on their statement risks an adverse effect on the defendant's sentence.<sup>3</sup> It may also indicate perceptions that VPS have little or no effect on sentencing decisions.<sup>4</sup> However, in a number of statements by senior judges and in court decisions, victim statements are seen as an important part in determining appropriate sentences. The Northern Irish Lord Chief Justice Sir Declan Morgan has said that there is 'a need to ensure that the victim's voice is heard within the criminal

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<sup>1</sup> [2013] EWCA Crim 323 at [9].

<sup>2</sup> A. Sanders, "Victim impact statements: don't work, can't work" [2001] Crim. L.R. 447; and J. Chalmers, P. Duff, and F. Leverick, "Victim impact statements: can work, do work (for those who bother to make them)" [2007] Crim. L.R. 360.

<sup>3</sup> E. Erez, "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice" [1999] Crim. L.R. 545, p549. See J. Shapland and M. Hall, "Victims at court: necessary accessories or principal players at centre stage?" in A. Bottoms and J. V. Roberts, *Hearing the Victim: Adversarial justice, crime victims and the State* Routledge (2010), 163-199.

<sup>4</sup> Sanders "Victim impact statements: don't work, can't work" [2001] Crim. L.R. 447., p454.

process ...the harm done to the victim is highly relevant to the sentence. Hearing the victim's voice speaking of that in the pages of a report is one way of acknowledging their needs.'<sup>5</sup> More recently the Northern Irish Crown Court has held that,

'One constituent element of sentencing is retribution and accordingly victim impact statements are an important part of the sentencing process informing the court as to the short or long term consequences of criminal activity. Statements from victims not only provide further information to the court in relation to the retributive element but also they inform the public as to the devastation inflicted on the lives of individuals by criminal activity.'<sup>6</sup>

Yet, three recent cases before the Northern Irish Court of Appeal on sentencing for convictions of sexual violence challenge this perspective; all involve appeals on the role of victim impact reports. They leave judges stuck between wanting to rely on the victim's report of the harm suffered, but unable to do so due to the lack of reliability of the expert's report. This article evaluates the reasoning in these cases against the background of current reform and literature on victim statements on sentencing.

## **Background**

Northern Ireland is unique within the UK in that victim impact statements and reports have been able to be submitted to the court since the 1980s.<sup>7</sup> By contrast they were not introduced in England and Wales until 2001. In Scotland a pilot scheme was ran between November 2003 to November 2005, before being rolled out in April 2009. The Northern Irish experience reveals a complex picture on the use of both statements from the victim and reports by medical experts on the impact of the crime on victims. In January 2014 the Northern Ireland Department of Justice introduced VPS along with a Victims' Charter to better inform victims of their 'rights' in criminal proceedings. These recent reforms have focused on putting victim statements on a statutory footing through the Justice Act 2015. The rationale for this reform comes from EU Directive 2012/29, which requires states to provide for the victim's 'right to be heard' in the criminal justice system whether verbally or through writing.<sup>8</sup>

There are two types of statements or reports which provide for reports of the impact of the crime on the victim to be used in sentencing in Northern Ireland: the first, victim personal statements (formerly victim impact statements) allow victims to

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<sup>5</sup> The Right Honourable Sir Declan Morgan Lord Chief Justice of Northern Ireland, *Building For The Future*, St Dominic's High School, Prioress's Lecture, 14 April 2011.

<sup>6</sup> *R v Chen and others* [2012] NICC 26 at [49].

<sup>7</sup> *R v Valliday* [2010] NICC 14 at [18].

<sup>8</sup> Article 10.

make a written statement on the physical, financial, emotional, and psychological effect of the crime on them; it is treated as evidence, disclosed to the defence and the victim can be cross-examined on it. These are usually written by victims or in their own words recorded by a member of Victim Support or NSPCC (for child victims), or a PSNI Family Liaison Officer (in cases of homicide). The second type are victim impact reports (VIR) prepared by medical experts, such as a psychiatrist, or psychologists, to provide a ‘specialist opinion on the traumatic impact of the crime on the victim and any consequent needs of the victim.’<sup>9</sup> Victims are unable to provide any direct comment or opinion on a victim impact report, but it usually includes some testimony they gave to the expert who assessed them. In a number of cases VIR and VPS are submitted together and are treated as complementary in order that the court can gain a full picture from both a medical and personal perspective of the victim’s harm.<sup>10</sup>

VIRs are sourced by the Public Prosecution Service (PPS) at the request of a judge for information about the impact of the crime on the victim. Although they can be requested in cases involving any crime, judges most commonly use them in cases of sexual violence and occasionally in homicide.<sup>11</sup> While these VIR are often completed by private psychological practices in the Belfast and Londonderry/Derry, outside these areas they are completed, at least in children’s cases by the NSPCC, for free. In contrast to victim personal statements prepared at a victim’s choice, judges proactively request VIRs to help inform the sentencing process. Yet, as the analysis of recent Northern Irish Court of Appeal cases below reveals, their evidential value has become somewhat circumspect. This brings into question the continuing value of judges’ practice since the 1980s of requesting these reports if they are nothing more than a psychologist recording the victim’s statement and experience and finding them consistent with international definitions on PTSD. Moreover, the VPS reform towards a more entrenched victim personal statement system as in the rest of the UK brings into question the need for the replication of information to the courts through VIR. Despite these recent decisions, drawing material from interviews with legal and support practitioners, these practitioners treat victim impact reports as more reliable and accurate accounts of a victim’s suffering, as they are derived from a psychologist

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<sup>9</sup> Provision of Victim Impact Statements and Victim Impact Reports: A Department of Justice Consultation, December 2011, para.10.

<sup>10</sup> *R v McArdle* [2008] NICA 29 at [8-11].

<sup>11</sup> *R v Valliday* [2010] NICC 14 at [18].

or medical professional, rather than the subjective opinion of the injured party for in a victim personal statement. During the consultation on reform of victim impact statements and reports, there were some submissions calling for greater guidance on the contents of victim impact reports.<sup>12</sup> There remain some concerns that VIRs fail to provide well-evidenced suffering of victims and the courts are increasingly reluctant to rely on them.

### **Recent cases before the Northern Irish Court of Appeal**

Three recent cases have been appealed to the Northern Irish Court of Appeal on the grounds of the weight to be given to details in VIR of victims' suffering as a result of the crime: *R v S and C*,<sup>13</sup> *R v TH*<sup>14</sup> and *R v McCormick*.<sup>15</sup>

In *R v S and C*, two children were physically and sexually abused by their father and uncle from 1990 to 1998. One ground of appeal by the defendants was the inclusion of new uncorroborated information reported in the VIR by one of the victims, which the appellants alleged undermined her credibility. While the victim was cross-examined during the trial about physical abuse in her kitchen resulting in a knee injury, after the completion of the trial and before sentence, a VIR was submitted reporting that the victim having been thrown down the stairs by one of the defendants was the cause of her knee injury.<sup>16</sup> Medical notes relating to the victim could not corroborate this information, as the psychiatrist had shredded his notes, and the victim could not recount the source of the information. Although the Court of Appeal took the VIR into account, the Court considered that the material in it did not undermine the safety of the convictions, as the victim had been closely cross-examined at trial as to her credibility about the manner in which her injury was sustained.

In *R v TH* the defendant sexually assaulted and digitally penetrated his ex-girlfriend, and was sentenced to 18 months in prison and 18 months on licence. He appealed on the grounds that the trial judge failed to calculate correctly the total sentence, including his guilty plea and victim impact report (VIR). The psychologist reported in the VIR his opinion that the victim suffered Post Traumatic Stress

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<sup>12</sup> Summary of Responses to: A Consultation on the Provision of Victim Impact Statements and Victim Impact Reports (2012), p21-22.

<sup>13</sup> [2015] NICA 51.

<sup>14</sup> [2015] NICA 48.

<sup>15</sup> [2015] NICA 14.

<sup>16</sup> [29-31].

Disorder (PTSD) as a result of the crime, but this finding had been based on the uncorroborated testimony of the victim, without any supporting medical evidence or diagnosis. The Court of Appeal accepted that the victim suffered psychological harm, but stated that if the opinion of the psychologist had ‘been reliably established that would have constituted a significant aggravating factor’. The expectation was that it would be backed up by medical records or a PTSD diagnosis by a psychiatrist.<sup>17</sup>

In the final case *R v McCormick* the defendant pleaded guilty to engaging in sexual activity with a child aged between 13 and 16. The victim had become pregnant during her relationship with the defendant and dropped out of school. The victim impact report noted that she had two incidents of overdosing on tablets, but there were no dates or medical notes to support this claim.<sup>18</sup> Thus the victim’s harm was based on her sole recollection. Despite this lack of supporting evidence, the Court of Appeal believed that the victim had suffered ‘material harm’, but not psychological harm consistent with the impact of other similar cases of sexual activity with children.<sup>19</sup> As a result, the defendant was sentenced to three years, comprising of 18 months in custody and 18 months on licence. The sentence was reduced on appeal to 2 years (12 months in custody and 12 months on licence), but this seemed to have nothing to do with the influence of the VIR.

### **Victim impact reports as evidence-based harm for sentencing**

From these cases it is apparent that VIRs can have an influence on sentencing, at least in sexual violence cases, yet they also raise concerns over evidential reliability. In *R v TH* while the Court was prepared to find psychological harm to the victim, if further harm had been satisfactorily evidenced, it would have ‘significantly’ aggravated the defendant’s sentence.<sup>20</sup> Nevertheless in the two cases involving sexual abuse against children of *R v S and C* and *R v McCormick* the victims’ claims of harm were accepted, despite the fact that in the former case medical notes were shredded and in the second case that there was a lack of corroborating medical evidence for the two overdosing incidents.

There remains a need to ensure procedural fairness when measuring the weight to be given to VIRs. According to Edwards, in this context procedural fairness

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<sup>17</sup> [20].

<sup>18</sup> [6].

<sup>19</sup> [10].

<sup>20</sup> *R v TH* at [19].

requires that evidence in victim impact reports should be proved beyond reasonable doubt as a sort of ‘quality control’ to protect the rights of defendant.<sup>21</sup> As the court stated in *R v Perks*, the suffering of the victim should be supported by evidence, and ‘[e]vidence of the victim alone should be approached with care’.<sup>22</sup> In *R v Perkins and others* the English Court of Appeal affirmed that statements should be ‘properly formulated’ with the prosecution being responsible for ensuring its admissibility.<sup>23</sup> From the three recent cases discussed before the Northern Ireland Court of Appeal it seems that this evidential standard and quality control has been maintained. Although in *R v S and C* the victim was cross-examined as to her injuries, defence counsel in the other two cases did not have this opportunity to ensure the reliability of such evidence. Yet regular use of cross-examination to guarantee the veracity of VIR may discourage victims from providing such information if they are aware that they will have to be questioned on supposedly private assessment by a psychologist. This may serve to frustrate the purpose of ensuring victims’ voices are heard.

Judicial adjudication of procedural fairness is not only important for defendants, but also victims and their ‘right to be heard’. In *R v McCormick*, the Northern Irish Court of Appeal noted that the failure of the VIR to locate corroborating medical notes on the overdosing incidents was ‘unsatisfactory and perhaps unfair to the victim.’<sup>24</sup> The court’s statement signify clearly that the sentence imposed is meant to reflect the harm suffered by victims, as well as to enable victims to have some input into the sentencing decision-making process by having their interests considered or in the language of the EU Directive to allow them to be ‘heard’. In addition, in *R v TH* the court acknowledged that the lack of corroborating evidence for the VIR claims of psychological harm failed to capture effectively the victim’s suffering to the extent it could be used for sentencing. This suggests that judges need to carefully balance the public interest, rights of the defendant and the suffering of victims when using victim statements or reports in sentencing.

In a subsequent case involving rape before the Court of Appeal, again similar problems of a non-corroborated VIR with medical evidence meant that it could not be

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<sup>21</sup> I. Edwards, “The evidential quality of victim personal statements and family impact statements” 2009 *Int’l J. Evidence & Proof*. 13(4), 293, p314.

<sup>22</sup> *R v Perks*, [2000] EWCA Crim 34.

<sup>23</sup> [2013] EWCA Crim 323 at [9-10].

<sup>24</sup> [6].

relied upon.<sup>25</sup> However, the Lord Chief Justice noted that ‘[i]f a finding of harm is to lead to an increased sentence of imprisonment it must be convincingly established.’ Moreover, such medical evidence should be used to corroborate VIR so ‘to ensure that the court can give full voice to the harm suffered as a result of offences of this nature.’ This may suggest not only procedural justice concerns for victims, but instrumentalising their voices for retribution through longer sentences for convicted persons.<sup>26</sup> As such, there is a delicate balancing exercise between ensuring victims are heard, guaranteeing the fair trial rights of the defendant, and maintaining the legitimacy of the criminal justice system and the evidence it relies upon.

The reliance on experts in criminal trials is a much wider concern than the issue of VIR in Northern Ireland. Although judges are experts in law, it is more difficult for them to assess the validity of psychologists or psychiatrists’ diagnosis of PTSD in VIRs.<sup>27</sup> However, in the cases before the Court of Appeal discussed above, the difficulty was the lack of corroborating evidence in the victims’ medical records of the psychologist’s findings, which could have been relied upon if the victim had simply submitted a personal statement instead.

## **Conclusion**

These three appeals demonstrate that victims’ voices in sentencing remain controversial despite EU-wide consensus on the need to improve processes to allow their voices being ‘heard’ in criminal proceedings. This is apparent with defence counsel challenging the evidential value of victim impact reports and the appropriate weight to be given to them in sentencing. Although VIRs are distinct from victim personal statements, in that it is a medical expert or a psychologist who is giving evidence, they can still include uncorroborated evidence. This may reflect bad practice of experts in preparing such reports or lack of editing by the prosecution before sentencing. However, consistent with requirements of victim personal statements in *R v Perkins and others*, the Northern Irish Court of Appeal considered that if VIRs are to be relied upon evidentially, they have to be held up to scrutiny like

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<sup>25</sup> *R v Lukasz Artur Kubik*, [2016] NICA 3.

<sup>26</sup> See J. Doak, R. Henham and B. Mitchell, “Victims and the sentencing process: developing participatory rights?” 2009 L.S., 29(4) 651.

<sup>27</sup> K. Shaw, “Expert Evidence Reliability; Time to Grasp the Nettle”, 2011 J.C.L. 75 368.

any other piece of evidence.<sup>28</sup> It may be the case that in comparison to defence counsels' concerns about causing further victimisation to a victim and damaging the defendant's good behaviour by challenging the victim prepared VPS through cross-examination, VIRs are fair game and issues of causing further harm to the victim are avoided by challenging the veracity of the expert rather than the victim.

In terms of sentencing outcomes, the impact to the victim of those crimes deemed to be more serious, such as sexual violence, in particular those committed against children given their perceived vulnerability and the likely impact of psychological harm, is already taken into account in sentencing guidelines.<sup>29</sup> This may suggest that VIR or VPS for these crimes is perfunctory, as judges are more willing to accept the impact of suffering on children, as a particular class of victim, despite the questionable evidential value of VIRs. This brings into question the utility of victim personal statements and victim impact reports if judges expect such harm to be a normal consequence of such crimes.<sup>30</sup> Although there has been rhetoric on the need for the victim's right to be heard as provided for by the EU Directive 2012/29, such rights and their impact on sentencing outcomes remain purposively ambiguous and patchy.<sup>31</sup> This ambiguity may mean that there remains a gap between victims' expectations and decisions made by professionals within the criminal justice system.<sup>32</sup> It may also reflect continuing discomfort with allowing victims to have a voice in adversarial criminal proceedings.<sup>33</sup>

As Bottoms suggests, we should be reframing the debate on the role of victims' voices in sentencing by placing a duty on the system to ensure victims are heard and the 'appreciate description' is understood by the court, i.e. taking into account the individual and subjective impact of the crime on the victim.<sup>34</sup> Nevertheless, victim impact reports do influence sentencing, albeit within established

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<sup>28</sup> *R v Perkins and Others* [2013] EWCA Crim 323. See D. Thomas, "Case Comment: *R. v Perkins* (Robert): sentencing - victim personal statements and family impact statements", 2013 *Crim. L. R.* 6 533.

<sup>29</sup> *Attorney General's Reference (Number 4 of 2005)* *Martin Kerr*, [2005] NICA 33 at [24-25]

<sup>30</sup> E. Erez and L. Rogers, "Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals", (1999) *Brit. J. Criminol.* 39(2), 216, p224.

<sup>31</sup> K. Starmer, Human rights, victims and the prosecution of crime in the 21st century [2014] *Crim. L. R.* 11 777, p786; and J. Doak, "Enriching trial justice for crime victims in common law systems: lessons from transitional environments", [2015] *I. R. V.* 21(2) 139, p150.

<sup>32</sup> A. Ashworth, "Victims' views and the public interest", [2014] *Crim. L. R.* 11, 775-776 p775.

<sup>33</sup> Doak n.31.

<sup>34</sup> A. Bottoms, "The 'duty to understand': what consequences for victim participation?" in A. Bottoms and J. V. Roberts, *Hearing the Victim: Adversarial justice, crime victims and the State*, Routledge (2010), 17-45.

parameters. Judges in the Northern Irish Court of Appeal have paid attention to procedural fairness for both the defendant and the victim in capturing harm and culpability in sentencing. Given the ambiguity and lack of a formal sentencing structure surrounding the VIR, unlike the VPS, the future use of victim impact reports in Northern Ireland will require better guidance for judges and supporting medical evidence to be obtained to be of value in sentencing. More fundamentally, perhaps with formalising the VPS scheme under the Justice Act 2015, the Northern Ireland criminal justice system is moving more concertedly in the direction of hearing victims through their own voice in the VPS as required by the EU Directive 2012/29, rather than relying on reinterpretation by experts.