

VICTIMS' VOICES

JUSTICE WANTING IN THE LEON BORTHWICK TRIAL

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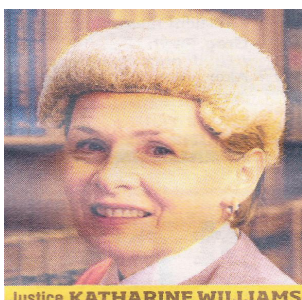
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EDITORIAL

Victimizing the Victims

Damien Carrick of the ABC's The Law Report followed this disgusting Victimizing the Victims trial of Leon Borthwick for the killing of Mark Zimmer from start to finish and will be well worth following. You can either listen to or read the transcript. There is also a blog at the end of each segment for listeners to leave their comments. You can find the first segment at <http://www.abc.net.au/rn/lawreport/stories/2011/3119705.htm>

In 20 years of coming to court and looking after victims, I have never seen the likes of what I saw in the handling of this case. It's an absolute disgrace and the judge should be re-



Justice KATHARINE WILLIAMS

Victim Impact Statements

Last year Victims Voices brought you the story of how the loved ones of 19 yr old Mark Zimmer, killed by Leon Borthwick, were humiliated by not being able to read out their previously presented victim impact statements in court during the sentencing stage. As bad as that was, there unfortunately were more instances where the judicial system seemed to seriously contradict that well known adage: 'Justice must not only be done, it must be seen to be done'.

Respect For Victims

Following the debacle of the reading of the Victim Impact Statements, a shock was awaiting the Zimmer family when they returned to court for the handing down of the sen-

moved from the bench straight away. So much for victims' rights and this charter of Victims Rights (much heralded by then Attorney General Rob Hulls when he brought it in) as a great right for victims. This being the case when a person is found guilty by their peers, what harm can be done by victims having a say through their heart and eyes? Let us and our politicians know what you think of this disgusting and outrageous treatment of victims by a member of the judiciary.

Noel McNamara



tence. On attempting to enter the main body of the court room they were barred and instead told they had to go upstairs, to the upper balcony where seeing and hearing the proceedings were more difficult.

Justice Katherine Williams claimed the reason was to separate the Zimmer family from that of the Borthwicks, family of the felon. Apart from the fact that there had been no disruptions with the Borthwick family during the full course of the trial anyway, according to Mark's father, Christian Zimmer, one wonders why it should have had to be the Zimmer family to go upstairs. Technically the main interested parties in a criminal trial are

the accused and the victim. As in a murder trial the primary victim cannot be present, then it would be logical that the two main parties now become the accused and those secondary victims, the loved ones of the deceased. Even though the accused's family certainly have a right to be there it would seem illogical to try to claim that they are of equal standing, let alone superior, to the primary victim's family.

On this humiliation Kornelia later said: "It's like just a constant fight and it's a fight for our rights and I hated seeing my parents be shoved up there like my brother's life meant nothing to them."

Crown Prosecutor Michelle Williams was sympathetic to Kornelia's predicament. "...we prepare [victim's families] in a way that we think is best for the court process, but if the court is not going to co-operate with us, then it's really counter-productive....and most unfair." (contin. P2)



Ruth and Christian Zimmer with Noel McNamara

JUSTICE WANTING IN THE BORTHWICK TRIAL ... (FROM P.1)



I think we need to recognise that ... victims' families are part of this process. They're not just a peripheral part to be just let them sit there, and let them shut up and not be part of the process; they should be treated with respect.

Prosecutor Michele Williams

The Rule of Law

One facet of the judicial system is that of impartiality, whereby the court should treat the prosecution and the defence equally.

That it were so. Apart from the usual imbalances such as the defence, but not the prosecution, can introduce character evidence; is free from handing over to the other side relevant evidence; has the right to subpoena any witness; is free from judges overturning their preferred verdict; many court

watchers were surprised to learn of another advantage only the defence possesses: that of to introduce pre-trial witness statements made by cross-examination witnesses. During the initial investigation of Mark's death some of Leon Borthwick's friends who were with him at the time, gave very damning evidence in police statements. However when cross-examined in court as to what they remembered from the incident, they simply stated that they could not remember. One wonders how often these defence witnesses must have witnessed first hand some one being run over and killed such that they forgot an incident that only happened two years previously. Reading out their original statements in court could have easily assisted them 'in remembering', but unfortunately the law does not allow the prosecution to do that. Also, as everyone within

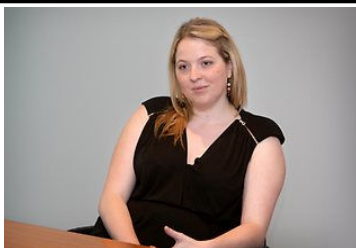
the judicial system should know, while it is the judge who decides on what is the law, it is the jury who decide, on the evidence presented, just what are the facts. Thus on the charge of manslaughter, it was the jury to decide on guilt, and if so, whether it be dangerous act manslaughter or, the lesser charge, criminal negligent manslaughter. After the jury had declared that the accused was guilty of manslaughter, most surprisingly, Judge Williams did not further enquire into which type of manslaughter Leon Borthwick was guilty of. After dismissing the jury she then took it upon herself to decide which type so as to hand down the requisite sentence. Not only the arbiter of law, Judge Williams now decided she was also the arbiter of fact. As Crown Prosecutor Williams declared: "It's very unusual [and] we need to revisit

whether this is the appropriate task for the sentencing judge."

Sentencing

As perhaps would surprise no one, Judge Kathy Williams decided upon the lesser criminally negligent manslaughter, to which she ultimately gave a sentence of seven and a half years where the maximum could have been 20 years. This despite the fact that, as the judge herself stated, Borthwick had given self serving inaccurate versions of the event, had shown limited remorse for Mark's death, and had taken no evasive action seconds prior to the killing despite the screamed protests of his passengers. Borthwick, who, as the court was told, previously threatened to kill Mark before actually carrying out the deed, if granted parole can now be free in as early as five years.

Philip Lillingston



Kornelia Zimmer

wrong. It's basic neuroscience. "You can talk about revenge or you can talk about symptoms that can be absolutely torturous."

He wants the judiciary to "recognise the symptoms, not just dismiss them as revenge". Those symptoms - anger, sleeplessness, depression - are due to fundamental, microscopic changes among the brain cells: "Memories are strengthened, new ones

formed."

There are also what Dr Keane calls "adaptive processes" that lead people like Cleary, McNamara and Ashton to then lead lives fighting for other victims, as they all do.

Noel McNamara agrees. The veteran justice campaigner says that "you are in shock when it (the murder) happens, after which the shocks of birthdays and Christmases eat away at you and locals stop talking. And you keep wondering what if I'd done this or that ... " McNamara has seen it eat away at other victims of crime and kill

them.

"a grossly inadequate sentence is incongruous to the rational mind"

Dr Keane knows who the killer is: "A grossly inadequate sentence that is completely incongruous to the rational mind; that can cause a secondary brain injury," he insists.

"Adequate justice will start to repair some of those changes. Real justice can repair some of the damage done by the original crime. It can take people from being stranded in permanent victimhood. "The legal elite sarcasti-

cally dismiss anyone who's interested in just sentencing and that stifles debate.

"We're ignorant, we don't understand, we're lay people. "But it's an ideological realm they're living in; it's not based on reason."

"Must this be a sad story; can't we make things better?" asks Dr Keane. Indeed. Of course, we can never undo the crime, but it's past the time that we stopped further "crimes" being committed in the name of justice.

Kornelia Zimmer says to the group as we stand to leave: "Common sense would be great if it were common."

THE REAL VICTIMS (CONTIN. FROM P 3)

THE VICTIMS OF LENIENT SENTENCING

VICTIMS - IT'S A DIRTY WORD Alan Howe, Herald Sun Nov 1 2010

Melbourne doctor Michael Keane winces every time he hears the Victorian judiciary deliver a sentence that also disappoints the rest of us. Lenient sentencing by the judiciary takes its toll on us all. Many feel real anger when, say, a killer such as Robert Farquharson escapes without a life sentence. Farquharson killed his three boys by driving them into a freezing dam on Father's Day, having planned to save his own scalp; this to spite his estranged wife because they had fallen out. If that's not worth life in jail, I dread to think what our judiciary demands we do to win a longer sentence, but Justice Lex Lasry thought Farquharson should be sentenced to less than life. The remorseless Farquharson took away perhaps 200 years of life from Cindy Gambino's sons, for which he has been sentenced to a minimum of 33 years. That's 11 years for each life. Inadequate, you ask? Of course. Absurd, in fact. If we are angry at that, imagine Ms Gambino's distress, along with the boys' other relatives and friends. These are the people Dr Keane (far right in photo) worries about. He is employed these days as a consultant anaesthetist, but worked previously as a psychiatry registrar in London's East End regularly assessing suspected criminals. He is a researcher at Swinburne University's Brain Science Institute, a lecturer in public health at Monash University and studies neuropharmacology.

"the brain is an evolving organ"

He is also a student of the

research into what happens in the brains of the secondary victims of crime; those who live on with the consequences of the crime and whatever "justice" has been served up to the guilty. We know now the brain is an evolving organ - neurons and synapses grow, connect, disconnect and wither, revive - and that this can change us. As we better understand neuroscience, it has become clear you can damage the brain with what we might call "news".

Our brains can change as we digest terrible events in our lives. Physical manifestations of this might be irritability, perhaps depression, and sometimes suicide - longer-term, these can change our brains permanently with drastic ramifications. We might suffer brain damage as a result of such incidents.

Dr Keane recognises the potential injury to the brain that inadequate sentencing may cause those affected by crime eg. the families of those who have been murdered. In other words they may suffer brain damage. Often permanently.

"like taking a baseball bat to the secondary victims"

Judges and magistrates might not yet know it, but their lenient sentences can be like "taking a baseball bat to these victims, for the damage they incur". To test Dr Keane's thinking, I brought him to the Herald Sun to meet four Victorians betrayed by our justice system.

Phil Cleary's younger sister, Vicki, was viciously and repeatedly stabbed outside the kindergarten she

worked at by her former boyfriend, Peter Keogh, who claimed the woman had provoked him by swearing at him as he approached, carrying a large knife.

He came to kill. But Keogh was found guilty of manslaughter and ultimately served less than four years. While you are trying to work that out, let me tell you about Noel McNamara's daughter, Tracey, killed by a man, now walking our streets, in a ferocious attack in which he bashed the poor girl's head against a table and the floor. He got just ten years.

McNamara admits after the sentence he was angry, "fell into a black hole for about six months", and sought medical help. Cleary also complains the sentence "was a profound problem to the extent that it reflected a miscarriage of justice", but he is angrier still that the court "extinguished my sister's human rights".

In his sister's case the provocation defence was seen "at its most barbaric".



Cindy Gambino

tion had operated. Here am I, 23 years later still talking about it. What am I outraged about - the abolition of my sister's human rights - that will not go away. There's plenty of hurt."

"injustice a potent emotion"

Kornelia Zimmer, too, is hurt by losing the "one chance we had to have a voice for Mark". Dr Keane spent many years frustrated at the injustice for the victims of crime. He believes the system looks at the crime that can't be undone and punishes the guilty with only that in mind, ignoring the ongoing damage to secondary victims. "We talk about revenge - but injustice is an incredibly potent emotion," he explained.

He believes the "legal elite" too easily dismiss the impact of a crime on a victim's life



He insists there were no grounds for such a defence. "What it means for me and my family is that the state has legitimised the act of violence against my sister by not decreeing it as murder." "Why had society turned a blind eye to the way provoca-

"and they use terms like revenge, because revenge is a bad thing", and that some victims have even been made to feel guilty. "Injustice has correlates in the brain," he said. "To just dismiss it as vengeful is misleading. It's fundamentally (<<contin. P.2)



Making justice a right,
not a privilege



FOLLY OF MISGUIDED LOYALTY SHOULD BE TAUGHT IN SCHOOLS

AAP April 08 2010

Recently Nathan Smith, a teenager from St Albans, was jailed for 22 years for the fatal stabbing of 20 year old Nathan Roberts-Nunan after pleading guilty to murder, intentionally causing serious injury and affray.

The former butcher was among a group of nine men armed with baseball bats, machetes and knives who attended a planned fist fight at the Diggers Rest reserve, north-west of Melbourne. Smith also stabbed the victim's friend Steven Thorneycroft, who received a lacerated liver and needed his spleen



Justice Paul Coghlan

removed. Afterwards, Smith and his group attacked Mr Roberts-Nunan's car, stabbing the tyres and smashing windows.

In sentencing Smith, Judge Paul Coghlan of the Victorian Supreme Court, described the brawl as an "unremitting senseless and cowardly display of mob violence at its most extreme".

He added that the consequences of using knives

could not be better shown than in this case.

The court heard the daylight fight was arranged in retaliation for an earlier assault allegedly committed by Mr Roberts-Nunan's younger brother.

Smith had felt obliged to take part in the brawl out of misguided loyalty to a friend.

"Your story should be taught in schools to show how such an apparently simple enterprise taken in the name of absolutely mistaken loyalty can lead to such tragic consequences," Judge Coghlan said.

"It is an example of what a group of young men can senselessly do in a gang when I doubt that any of you would have done it alone."

COPS IN LEAK SCANDAL SHOULD BE THANKED

POLICE who leaked information of clear public interest should be commended, not criticised, a crime victims advocate said.

CVSA president Noel McNamara said it was "just outrageous" for senior police to waste time and resources pursuing force whistleblowers.

"It's obviously in the public interest for the public to know when bikie gangs have arrived on our doorstep," Mr McNamara said. "But apparently it's for senior police to know and the rest of us not to know.



Geoff Wilkinson Herald Sun Sep 26 2010

"It beggars belief what goes on behind the police command curtain."

Mr McNamara said Chief Commissioner Simon Overland's determination to identify and sack the source of a *Herald Sun* story about bikie gangs was "woefully misguided at best".

He said the accessing of a reporter's phone records to try to identify the person who leaked a police intelligence alert was an abuse of power.

"Mr Overland seems intent on creating a police state," Mr McNamara said.

"Where are the checks and balances, and the scrutiny to make sure the power to check telephone records is not

abused?"

Police argue they have a legal obligation to investigate the unauthorised disclosure of information by peers because it is a criminal offence.

Information from mobile phone records is often used to establish the whereabouts of a suspect who has claimed to be elsewhere at the time of a crime.

But Mr McNamara said a 10-month investigation by the ethical standards department was an overreaction.

Several police who spoke to a reporter around the time the bikie gang story was published last November have been interviewed by investigators.



Commissioner Simon Overland

Mr McNamara said he was sure his telephone number would also feature on reverse call charge record checks of media phones by police.

Mr Overland has faced claims of a "police state" since the *Herald Sun* revealed last week a reporter's phone records had been accessed and other journalists were thought to have been targeted after writing stories that embarrassed force command.