R. v. Gabriel

Regina v. Gabriel

137 C.C.C. (3d) 1

Ontario Superior Court of Justice
Court File No. 2369/98
Hill J.

May 31, 1999;
JUNE 30, 1999

Sentence — Procedure — Victim impact statements — Victim impact statement should describe harm done to or loss suffered by victim — Statement should not contain criticisms of offender, assertions as to facts of offence or recommendations as to severity of punishment — Trial judge has discretion to allow victim to make oral presentation of written impact statement — Prior to impact statement being filed with court, it should be vetted in some way to ensure compliance with Criminal Code requirements — Filing of many repetitive statements from relatives of deceased not of assistance to court — Statements from persons of unknown or remote connection to deceased also unhelpful — Cr. Code, s. 722.

Volume 137 -- C.C.C. (3d Series) ***[page1]*** The accused pleaded guilty to criminal negligence causing death. At the sentencing proceedings, over 30 victim impact statements from various people were filed with the court. These included the deceased's relatives, as well as statements by people whose connection to the deceased could not be determined and statements filed by people whose relationship to the deceased was remote. The content of the documents was repetitive. Many of the statements contained references to the facts of the offence, the character of the accused and the punishment he deserved. Counsel acknowledged a general lack of guidance respecting victim impact statements and in particular permissible limits of content subject matter. Accordingly, supplementary reasons for judgment were issued following the imposition of sentence.

Held, the court considered only the contents of the victim impact statements which described the harm done to, or loss suffered by, the identifiable victims. ***[page2]***

Pursuant to s. 722 of the Criminal Code, a victim impact statement should have the following features to be admissible: (1) the statement is to be prepared in writing; (2) it is to be in the form and in accordance with procedures established by a program designated for that purpose by the province; (3) it is to be authored by a person who meets the definition of "victim" in s. 722(4) of the Criminal Code; (4) the statement is to describe the harm done to, or loss suffered by, the victim arising from the commission of the offence; (5) the statement is to be filed with the court;

and (6) pursuant to s. 722.1 of the Criminal Code, the clerk of the court is to provide a copy of the statement to the prosecution and the defence. Section 722(4) defines "victim" as person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence and, where that person is dead, ill or incapable of making a statement, as including the spouse or relative of that person, anyone who has custody of that person or is responsible for the care or support of that person or any dependant of that person. Pursuant to s. 722(3) of the Criminal Code, the sentencing court has the discretion to consider other evidence concerning the victim of an offence beyond that contained in a victim impact statement. Although the victim impact statement serves a number of purposes and contributes significantly to a just sentencing process, a victim impact statement is not the exclusive answer to the civilized treatment of victims within the criminal process. There is a civil justice system to address actionable wrongs between individual citizens. A criminal trial, including the sentencing phase, is not a tripartite proceeding. Impact statements should describe the harm done to, or loss suffered by, the victim arising from the commission of the offence. They should not contain criticisms of the offender, assertions as to the facts of the offence, nor, absent exceptional circumstances, recommendations as to the severity of the punishment. The court has a discretion to permit written impact statements to be presented orally, having regard to the totality of the circumstances, including the health and stability of the victim, the nature of the crime committed, concerns as to control of the courtroom and the number of statements filed. However, at present there is no statutory or constitutional obligation to permit this. The Criminal Code does not speak directly to the mechanism by which a victim impact statement is filed. However, whether this is done by the prosecution office or the personnel administering the program designated by the province, there should be some vetting function to ensure that the statement complies with the requirements of the Criminal Code.

The Criminal Code does not itself prescribe the form of a written victim impact statement, but provides that it be prepared in a form and in accordance with the procedures established by a program designated for that purpose by the province. Although in this case the form mandated by the provincial program was not used, the established form mandated by the provincial program was disturbing in that it requested information relating to physical injuries and financial impact, without reference to emotional loss or other forms of harm; it invited inappropriate statements relating to the offender, the facts of the offence and the suggested punishment; and, finally, the accompanying information sheet stated that it was up to the judge whether or not to consider a victim impact statement, which was no longer a correct statement of the law as s. 722(1) of the Criminal Code assures judicial consideration of an otherwise admissible victim impact statement. Although the ***[page3]*** information sheet advised that vengeful comments or suggestions about penalty should be avoided, it appeared that many of the victims in this case were not provided with, or failed to abide by, this direction.

Many of the statements in this case were filed by people beyond the category of "victim" as defined in s. 722(4)(b) of the Criminal Code. Although, pursuant to the Interpretation Act, R.S.C. 1985, c. I-21, "victim" is likely to be interpreted in the plural, the number of statements filed far surpassed what was helpful to the court. It also was not of assistance to have statements from people who were either unidentified in their connection to the deceased or whose connection was remote. In a case of a crime resulting in death, human experience, logic and common sense go some distance in presuming the existence of profound grief, loss and despair. In addition,

statements which purported to refer to the facts of the offence were inaccurate, statements speaking of the offender were not informed views of his background or circumstances, and suggested penalties were made without regard to appropriate principles and objectives of sentencing. Furthermore, the labelling of the impact statements as involving a "killing" was inflammatory and jeopardized the desired restraint of the sentencing hearing. The crime was in some instances also wrongfully equated to "murder". In the end result, only the contents of victim impact statements which described harm done to, or loss suffered by, the identifiable victims were considered.

Cases referred to

Booth v. Maryland, 482 U.S. 496 (1987) -- refd to

Payne v. Tennessee, 501 U.S. 808 (1991) -- refd to

R. v. Barling (1995), 106 W.A.C. 317, 28 W.C.B. (2d) 551, [1995] B.C.J. No. 2225 (QL) -- refd to

R. v. Coelho (1995), 41 C.R. (4th) 324, 27 W.C.B. (2d) 397 -- refd to

R. v. Curtis (1992), 69 C.C.C. (3d) 385, 11 C.R. (4th) 92, 122 N.B.R. (2d) 194, 15 W.C.B. (2d) 139 -- refd to

R. v. Darrach (1998), 122 C.C.C. (3d) 225, 49 C.R.R. (2d) 189, 13 C.R. (5th) 283, sub nom. R. v. D. (A.S.), 38 O.R. (3d) 1, 107 O.A.C. 81, 37 W.C.B. (2d) 307; leave to appeal to S.C.C. granted 124 C.C.C. (3d) vi, 52 C.R.R. (2d) 188n, 227 N.R. 296n -- refd to

R. v. F. (R.) (1994), 24 W.C.B. (2d) 639, [1994] O.J. No. 2101 (QL) -- refd to

R. v. Gladue (1999), 133 C.C.C. (3d) 385, 171 D.L.R. (4th) 385, [1999] 1 S.C.R. 688, [1999] 2 C.N.L.R. 252, 23 C.R. (5th) 197, 198 W.A.C. 161, 238 N.R. 1, 41 W.C.B. (2d) 402, [1999] S.C.J. No. 19 (QL) -- refd to

R. v. Grant (1998), 38 W.C.B. (2d) 144, [1998] O.J. No. 1511 (QL) -- refd to

R. v. Lauzon (1940), 74 C.C.C. 37, [1940] 3 D.L.R. 606 -- refd to

R. v. Lecaine (1990), 105 A.R. 261, [1990] A.J. No. 360 (QL) -- refd to

R. v. M. (C.A.) (1996), 105 C.C.C. (3d) 327, [1996] 1 S.C.R. 500, 46 C.R. (4th) 269, 120 W.A.C. 81, 194 N.R. 321, 30 W.C.B. (2d) 177 -- refd to

R. v. M. (E.) (1992), 76 C.C.C. (3d) 159, 41 M.V.R. (2d) 25, 10 O.R. (3d) 481, 58 O.A.C. 149, 17 W.C.B. (2d) 234 -- refd to

R. v. McAnespie (1993), 82 C.C.C. (3d) 527, 64 O.A.C. 70, 20 W.C.B. (2d) 96; revd 86 C.C.C. (3d) 191, [1993] 4 S.C.R. 501, 68 O.A.C. 185, 162 N.R. 155, 22 W.C.B. (2d) 87 -- refd to

R. v. McDonnell (1997), 114 C.C.C. (3d) 436, 145 D.L.R. (4th) 577, [1997] 1 S.C.R. 948, 43 C.R.R. (2d) 189, 6 C.R. (5th) 231, [1997] 7 W.W.R. 44 sub nom. R. v.

M. (T.E.), 141 W.A.C. 321, 49 Alta. L.R. (3d) 111, 196 A.R. 321, 210 N.R. 241, 34 W.C.B. (2d) 194 -- refd to R. v. Ohlenschlager, [1994] A.J. No. 510 (QL) -- refd to R. v. Phillips (1995), 26 O.R. (3d) 522, 29 W.C.B. (2d) 218 -- refd to R. v. Porter (1976), 33 C.C.C. (2d) 215, 75 D.L.R. (3d) 38, 15 O.R. (2d) 103 -- refd to R. v. R. (M.) (1998), 107 O.A.C. 233, 37 W.C.B. (2d) 413, [1998] O.J. No. 737 (QL) -- refd to R. v. Selig (1994), 6 M.V.R. (3d) 283, 134 N.S.R. (2d) 385, 25 W.C.B. (2d) 70 -- refd to R. v. Smith, [1994] O.J. No. 3899 (QL) - - refd to R. v. Sweeney (1992), 71 C.C.C. (3d) 82, 11 C.R. (4th) 1, 33 M.V.R. (2d) 1, 15 W.A.C. 1, 15 W.C.B. (2d) 26 -- refd to R. v. Swietlinski (1994), 92 C.C.C. (3d) 449, 119 D.L.R. (4th) 309, [1994] 3 S.C.R. 481, 24 C.R.R. (2d) 71, 33 C.R. (4th) 295, 75 O.A.C. 161, 172 N.R. 321, 24 W.C.B. (2d) 589 -- refd to R. v. W. (W.H.) (1992), 59 O.A.C. 317, 17 W.C.B. (2d) 594, [1992] O.J. No. 2407 (QL) -- refd to

Statutes referred to An Act to Amend the Criminal Code (Victims of Crime), Bill C-79, S.C. 1999, c. 25, assented to June 17, 1999 (not yet in force) Preamble Criminal Code s. 718(e), (f) [re-enacted 1995, c. 22, s. 6] s. 718.1 [re-enacted 1995, c. 22, s. 6] s. 718.2(d) [re-enacted 1995, c. 22, s. 6] s. 722(1) [re-enacted 1995, c. 22, s. 6] s. 722(2) [re-enacted 1995, c. 22, s. 6] s. 722(2.1) [enacted 1999, c. 25 s. 17 (not yet proclaimed in force)] s. 722(3) [re-enacted 1995, c. 22, s. 6] s. 722(4) [re-enacted 1995, c. 22, s. 6] s. 722.1 [re-enacted 1995, c. 22, s. 6] s. 724(3) [re-enacted 1995, c. 22, s. 6] s. 735(1.1) [enacted R.S.C. 1985, c. 23 (4th Supp.), s. 7 -- Part XXIII replaced 1995, c. 22, s. 6 Interpretation Act, R.S.C. 1985, c. I-21 s. 13 s. 33(2) Victims' Bill of Rights, S.O. 1995, c. 6 s. 3(2)

Authorities referred to Rubel, H.C., "Victim Participation in Sentencing Proceedings" (1985-86), 28 C.L.Q. 226 Ruby, Clayton, Book Review of From Crime Policy to Victim Policy: Reorienting the Justice System, by E.A. Fattah (1987- 88), 30 C.L.Q. 126 Skurka, Steven, "Two Scales of Justice: The Victim as Adversary" (1993), 35 C.L.Q. 334 Stuart, Don, "Charter Protection Against Law and Order, Victims' Rights and Equality Rhetoric", in Jamie Cameron, ed., The Charter's Impact on the Criminal Justice System (Toronto: Carswell, 1996)

SUPPLEMENTARY REASONS for judgment, 43 W.C.B. (2d) 39, with respect to the imposition of a sentence of two years less one day imprisonment, two years' probation and a five-year driving prohibition imposed upon the accused's plea of guilty to criminal negligence causing death.

D. Quick, for the Crown.

D. Lent, for accused.

HILL J.

HILL J.:—On May 31st, 1999, Raymond Gabriel was sentenced to a term of imprisonment of 2 years less 1 day following his guilty plea to the charge of criminal negligence causing death [summarized 43 W.C.B. (2d) 39]. This disposition was imposed allowing the offender a 7-month credit for pre-sentence custody. In addition, Mr. Gabriel was made the subject of a 2-year probationary term with special conditions and a 5-year driving prohibition.

During the sentencing hearing, counsel acknowledged a general lack of direction or guidance respecting victim impact statements in particular relating to the permissible limits of content subject matter.

In the reasons for sentence, I stated: The prosecution filed in this trial over 30 victim impact statements from family and friends of Samantha Hunt. At the outset of the sentencing proceeding, counsel agreed that aspects of these statements contained inadmissible material; notably, statements regarding Mr. Gabriel and the operation of the criminal justice system. These matters were ignored by me in consideration of the victim impact statements. Supplementary reasons will be issued by the Court respecting the subject matter of victim impact statements drawing on the examples in this case. The statements were helpful to me in providing a very clear picture as to who Samantha Hunt was, to the extent that written documentation can do so, and the very real effects her loss has had upon so many people. Mr. Pallin, the victim's grandfather, and Mr. Mills, Ms. Hunt's boyfriend, assisted the Court with their testimony yesterday as to how their lives have changed as a result of their loss.

The Victim Impact Statements

The victim impact statements filed in the Gabrielcase included documents authored by the deceased's parents, grandparents, aunts, uncles, cousins, fiance, and employer. As well, some statements were filed by authors whose relation to the victim could not be determined. As well, a statement was filed by the stepmother of Ms. Hunt's best friend. ***[page6]***

As one would expect, given the number of statements, there existed considerable repetition in content within the population of documents filed.

Almost without exception, the victim impact statements were titled "Auto Accident by Raymond Gabriel Killing Samantha Hunt".

Some of the victim impact statements were in the form of letters. The majority of the statements, however, were set out in a form entitled, Victim Impact Statement, with the following subtitles:

(1) My Name
(2) Address
(3) Phone Number
(4) Relationship to Samantha Hunt

(5) Description of Impact (including emotional, psychological, social and financial loss)

(6) Date; Signature.

Some of the statements appended photographs of the deceased or poetry.

More than half of the victim impact statements contained references to one or more of the following topics:

(1) the facts of the offence,
(2) the character of the offender,
(3) the punishment Mr. Gabriel deserved.

The following excerpts are representative of identifiable themes within the statements:In contrast, Raymond Gabriel who caused her death was not only speeding, but had been drinking. And then as she lay there dead in front of him, he was profane and accused her of wrecking his car. These are not Raymond Gabriel's first offences -- I understand he has a string of prior offences and very obviously hasn't learned from his past mistakes. And now he has killed my niece.Raymond Gabriel made choices on the night of July 1st that have serious consequences. His mockery of the law resulted in Samantha's death. We have a judicial system in place in Canada that states there are now consequences that he must pay for disobeying the law and taking someone's life. I expect that system to work as the court determines Raymond's consequence. He has taken every future choice that should have existed for Samantha and me and the rest of her family and friends as far as our relationship with her.. . . . .It terrifies me to think that Raymond Gabriel may be back on the streets in short time and be in a position to cause more harm to other innocent peoplein ***[page7]*** this or some other manner. Based on his prior offences, it's obvious he shuns the law. So if his punishment is deemed to be removal of his license, he's the type that would drive anyway without one. I have worked hard all my life and I've paid my taxes faithfully -- I contribute financially into this country in order that among other things, I and my family can be protected. The judicial system exists to protect those who honour it, not those who shun it. Let's not make a mockery of our system and Samantha's life by not allowing Raymond to pay the true debt he owes. [Emphasis of original.] . . . . .I trust that you will show Raymond Gabriel the same regard that he showed for our dear Samantha. . . . . .I am distressed that in spite of a huge publicity campaign against drinking & driving that there are still criminals that ignore these laws. To be so intoxicated and consciously decide to drive a motor vehicle is the same as pointing a loaded gun at a crowd and firing. I would request that a maximum sentence be imposed to help deter others from considering such actions. I do not feel safe on the roads with drivers like this on the road. . . . . .Those who breach the law

are irresponsible and don't deserve the privilege of driving. I abhor the fact that so much leniency is shown for alcohol abusers. Everyone who was with this man or who served him drinks is responsible for Sam's death. At every family get together we've missed her, at Christmas, her birthday, mother's day. Please help stop this type of crime happening to another family. . . . . .Your Honourable Judge, as a distraught family member, as a concerned teacher and as a law abiding member of our society, I implore that you will use your authority to uphold the law and send an indisputable message to Mr. Gabriel and others who choose to drink and drive that with every choice comes a proper consequence and equally important - - that the worth of a soul is great! . . . . .Your Honour, you have within your authority, the ability to do something that as a family we are unable to do. In your sentencing, you are able to send a clear message to drunk driving offenders, that such behaviour will not be tolerated. Your words can console, and your actions can acknowledge the enormous loss of a precious child, if you will help to prevent similar such tragedies. I petition to you for a message of intolerance and personal accountability in order that we may reduce such tragic and needless losses in the future. Thank you. [Emphasis of original.] . . . . .I will miss her dearly and love her very much. With this case of the drunk driving, I think that murder is murder. This man did something that killed another. He should be punished as others are punished for shooting or stabbing ***[page8]*** somebody. Hopefully this man will be punished according to this devastating crime. . . . . .To see all this destroyed by a drunk driver is criminal.Murder is defined as the unlawful and deliberate killing of another human being. This drunk driver, Raymond Gabriel, for all intents and purposes murdered Samantha Hunt. For a drunk to get behind the wheel of 2 tons of steel and travel at excessive speeds through the City of Brampton is a deliberate act. Perhaps he did not say to himself, tonight I will kill someone, but to drive a vehicle drunk is in my mind a premeditated act of violence against other human being. To be a drunk driver shows a complete lack of respect or regard for another human being. It would be a mockery of the value of human life and a travesty of justice for this murder to go unpunished. Raymond Gabriel must be made to pay, to feel the pain and regret of a lost life. Nothing will bring Samantha Hunt back to life, nor soften the loss of such a beautiful and giving person, but the penalty for this crime must make people stand up and take notice that it is not acceptable and not responsible human behaviour to commit murder. For Raymond Gabriel to have no respect for his own life, is sad, however to have no respect for the lives of others is criminal.Driving in

this country is a privilege not a right. We must get the message across that drinking and driving is criminal. We have the right to life, Samantha had the right to life but this drunken murderer took that from her and negatively effected [sic] the lives of many.It is evident that something must be done to put an end to these senseless deaths. You as a representative of our legal system have the power to make people take notice of this heinous crime. The excellent efforts by organizations such as MADD can only be sustained if the legal system shows drivers, and the victims, support by severe and equitable punishment.It is within your power as an Honourable Judge of our legal system, to make the public especially, Raymond Gabriel stand up and take notice that murder is not acceptable behaviour. He was not in fear for his life. His life was not threatened by anyone other than himself. He maliciously and with premeditation killed another human being. He must be responsible for his crime. You as a judge have the power to make the effect of this crime felt and to say enough with the drunk drivers, enough with the disregard for human life. The penalty for such a crime must be commensurate with the loss. The next child killed could be your own. I plead with you not to show leniency in this case. Stop irresponsible drunk drivers. [Emphasis of original.] . . . . .I have many doubts now since drunk drivers are not properly punished by the law. More strict laws need to be in place, to prevent those who make the decision to drink and drive without caring about the risks of killing innocent people. There are no excuses for the driver's behaviour, or any other drunk drivers. Everybody knows the risks, TV, News Papers, Advertising talk about how dangerous it is. . . . . ***[page9]*** No sentence for Mr. Gabriel can bring Samantha back to us -- this we know. But we want to know that the forces of justice in Canada are prepared to make a strong statement. We pray that Canada will declare that it is NOT prepared to allow itself to become a place where decent human lives are fair game, to be destroyed by careless and criminally irresponsible people, with no fear of consequence. If Mr. Gabriel is not punished to the maximum allowed by the law, it will demonstrate that the suffering he has caused -- suffering which will continue for many years -- means nothing. It will show that Canada does not care about the fate of its brightest and most promising asset -- its youth! . . . . .The lesson, that the crime he has committed will not be tolerated in a decent society, must be fully impressed upon him with a just, and adequately severe sentence. [Emphasis of original.]

Analysis

Victim Impact Statements

Prior to codification, there existed mixed judicial reaction to the admissibility of victim impact statements. However, the trend was toward acceptance of evidence, at least from the direct victim of the offence. In R. v. Swietlinski (1994), 92 C.C.C. (3d) 449 (S.C.C.) at 465, Lamer C.J.C. observed: "It is well known that the victim's testimony is admissible at a hearing on sentencing . . .".

As a general rule, in criminal cases, harm cannot be presumed.1 In Ontario, in civil proceedings, by virtue of the standard set out in the Victims' Bill of Rights, S.O. 1995, c. 6, s. 3(2), emotional distress is presumed to have been suffered by a victim of a sexual assault.1 As an aggravating feature of sentencing, loss or harm is to be established by the prosecution: R. v. McDonnell (1997), 114 C.C.C. (3d) 436 (S.C.C.) at para. 22-38, per Sopinka J.; Criminal Code, s. 724(3).

Assessment of the harm caused by a crime has long been an important concern of the law of sentencing and evidence of specific harm relates to assessment of an offender's moral culpability and blameworthiness: Payne v. Tennessee, 501 U.S. 808 (1991) at 2605-6, 2608 per Rehnquist C.J.

The victim impact statement regime was first introduced into the Criminal Code in 1988 (section 735). The sentencing court was afforded a discretion as to whether it would consider any tendered victim impact statements.

The current statutory scheme, enacted in 1995 with the major revisions to Part XXIII of the Code, reads:Victim impact statement 722(1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence ***[page10]*** describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.Procedure for victim impact statement (2) A statement referred to in subsection (1) must be (a) prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction; and (b) filed with the court.Other evidence concerning victim admissible (3) A statement of a victim of an offence prepared and filed in accordance with subsection (2) does not prevent the court from considering any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged pursuant to section 730.Definition "victim" (4) For the purposes of this section, "victim", in relation to an offence (a) means the person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

Accordingly, the following essential features should exist in order for a victim impact statement (the statement) to be admissible:

(1) the statement is to be prepared in writing,

(2) the statement is to be in the form and in accordance with procedures established by a program designated for that purpose by the province,

(3) the statement is to be authored by a person meeting the definition of "victim" (s. 722(4) of the Code),

(4) the statement is to describe the harm done to, or loss suffered by, the victim arising from the commission of the offence,

(5) the statement is to be filed with the court,

(6) the clerk of the court is to provide a copy of the statement to the prosecution and the defence (s. 722.1 of the Code).

Where a statement is admissible, it "shall" be considered by the sentencing court acting under Part XXIII of the Criminal Code. ***[page11]***

Section 722(3) of the Code affords the sentencing court a discretion to consider other evidence concerning the victim of an offence beyond that contained in a victim impact statement.

The victim impact statement serves a number of purposes, including:

(1) Nature of the Offence

The court receives relevant evidence as to the effect or impact of the crime from the person(s) able to give direct evidence on the point. The evidence is not filtered through a third party reporter. The evidence is relevant to the seriousness of the offence which in turn assists the court in imposing proportionate punishment (s. 718.1 of the Code).

(2) Victim Reparation

Sections 718(e) and (f) recognize that a just sanction by the court should have amongst its objectives reparation for harm done to victims and the promotion of acknowledgement by the offender of harm done to a victim. Resort to the best evidence on the subject of victim loss, the victim himself or herself, not only assures an accurate measure of any necessary compensation but also serves to bring home to the offender the consequencesof the criminal behaviour.

(3) Repute of the Administration of Criminal Justice

Victim participation in the trial process serves to improve the victim's perception of the legitimacy of the process. The satisfaction of being heard, in the sense of a direct submission to the court, enhances respect for the justice system on the part of the harmed individual, and over time, the community itself. Incidental to the victim impact statement process is the ability of the victim to secure a sense of regaining control over his or her life and the alleviation of the

frustration of detachment which can arise where the victim perceives that he or she is ignored and uninvolved in the process.

(4) Parity of Identity

A significant concern of the sentencing hearing is finding a disposition tailored to the individual offender in an effort to ensure long range protection of the public. As a consequence, much becomes known about the accused as a person. In this process, there is a danger of the victim being reduced to obscurity -- an intolerable departure from respect for the personal integrity of ***[page12]*** the victim. The victim was a special and unique person as well -- information revealing the individuality of the victim and the impact of the crime on the victim's survivors achieves a measure of balance in understanding the consequences of the crime in the context of the victim's personal circumstances, or those of survivors.

The victim impact statement is not, however, the exclusive answer to the civilized treatment of victims within the criminal process. Communication with victims of crime by prosecutorial authorities, victim/offender reconciliation projects, and community support initiatives for victims, are as, or more, essential.

Victim impact statements contribute significantly to a just sentencing process. Sentencing is a reasoned, not an arbitrary, exercise. Context remains important. It is to be remembered that there is a civil justice system to address actionable wrongs between individual citizens. The criminal court is "not a social agency" (R. v. M. (E.) (1992), 76 C.C.C. (3d) 159 (Ont. C.A.) at 164, per Finlayson J.A., in dissent in the result).

Without, in any fashion, diminishing the significant contribution of victim impact statements to providing victims a voice in the criminal process, it must be remembered that a criminal trial, including the sentencing phase, is not a tripartite proceeding. A convicted offender has committed a crime -- an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing.

The historic lack of legislative codification, and a similar silence in Bill C- 79 -- An Act to Amend the Criminal Code (Victims of Crime),2 Bill C-79 is currently before the Senate having passed 3rd reading in the House of Commons on May 28th, 1999.2 as to the procedural circumstances of the introduction of a victim impact statement tends to foster a victim's expectations that he or she is a party to the proceeding and not a witness. Who is responsible for identifying the victim of the crime? What searches ought to be made to provide notice to all victims of the crime? Is there judicial authority to limit the number of statements filed, or which may be read under the pending amendments? It is implicit that a victim statement constitutes evidence to be considered in arriving at a fit and just sentence. Accordingly, is the statement, where written, or if read in court, under oath? subject to cross-examination? subject to the introduction of extrinsic contradictory evidence adducedby the offender?3 It would seem that victim impact material capable of influencing the sentencing disposition is susceptible to contradiction by the accused: Booth v. Maryland, 482 U.S. 496 (1987) at 506-7, per Powell J.3 In the court's exercise of its supervisory jurisdiction to ensure a fair trial and to control its own proceedings, ***[page13]*** can the court edit an impact statement in terms of inflammatory, overly

prejudicial or irrelevant content?4 Apart from common law authority to control its own process, should Bill C-79 pass in its present form, the preamble to the new legislation may reveal Parliament's intent on this point. The preamble is a permissible aid to interpretation: Interpretation Act, R.S.C. 1985, c. I-21, s. 13; R. v. Darrach (1998), 122 C.C.C. (3d) 225 (Ont. C.A.) at 237, per Morden A.C.J.O. (as he then was) (leave to appeal to S.C.C. granted (1998), 124 C.C.C. (3d) vi). The preamble to Bill C-79 states in part: "Whereas the Parliament of Canada, while recognizing that the Crown is responsible for the prosecution of offences, is of the opinion that the views and concerns of the victims should be considered in accordance with prevailing criminal law and procedure, particularly with respect to decisions that may have an impact on their safety, security or privacy. . . ". [Emphasis added.]4 Should the court not be able to intercede to halt what is in effect a mini-trial within the sentencing hearing designed to supplement the record in parallel civil proceedings between victim and offender?

The dangers of a runaway model for victim participation in the sentencing process can, in the long run, serve to defeat the very objectives of victim input.

Retribution remains an important sentencing objective in sanctioning the moral culpability of the offender: R. v. M. (C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.) at 365-369, per Lamer C.J.C. Vengeance, however, has no place in a humane sentencing regime: R. v. M. (C.A.), supra, at 368-370; R. v. Sweeney (1992), 71 C.C.C. (3d) 82 (B.C.C.A.) at 95, per Wood J.A.; R. v. Lauzon (1940), 74 C.C.C. 37 (Que. C.A.) at 52, per Walsh J.A. At page 368 of the M. (C.A.) decision, the Chief Justice stated: However, the meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with "vengeance" in common parlance . . . But it should be clear from my foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing . . . Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk- taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. As R. Cross has noted in The English Sentencing System, 2nd ed. (London: Butterworths, 1975), at p. 121: "The retributivist insists that the punishment must not be disproportionate to the offender's deserts." [Emphasis of original.]

Accordingly, the victim impact statement regime should not be structured so as to foster or encourage any element of personal revenge on the part of a victim. This is a very real danger. In "Two Scales of Justice: The Victim as Adversary" (1993), 35 C.L.Q. 334, Steven Skurka observed at pages 340 and 341: By asking a victim to express his comments and concerns without any further guidance, invariably this category will be used by many victims to vent ***[page14]*** their feelings about such matters as the nature of the crime, the offender, the failings of the criminal justice system and the appropriate sentence to be imposed on the

offender.. . . . .Equally, it cannot be denied that many victims, perceiving themselves as real adversaries, will use such an opportunity as a platform for revenge against the accused.

Clayton Ruby, in his book review comment on E.A. Fattah's text, From Crime Policy to Victim Policy: Reorienting the Justice System, noted at (1987-88), 30 C.L.Q. 126 and 127: The principal danger is that victims may turn to "offender-bashing campaigns". "Get tough criminal policies have combined nicely with an apparent concern for the victim." Victim groups, their criminologists and their political spokesmen not only demand a better lot for those who are victimized but, along with these demands and often overshadowing them, call for harsher penalties and more severe treatment for offenders. In some mystical way, this is seen as important for redressing the wrong done to the victim. For Professor Fattah, the danger is of transformation to a backlash against criminals that would reverse the humanization of criminal justice policy.

In an article, "Charter Protection Against Law and Order, Victims' Rights and Equality Rhetoric" (in The Charter's Impact on the Criminal Justice System (1996), Carswell, Jamie Cameron (ed.) page 327 at 335), Professor Don Stuart observed:Although there are often now calls to recognize legal and even constitutional rights for victims and assertions that the accused have too many rights, there is room for considerable caution. A criminal trial is about the just punishment of the accused, not about personal redress for victims. What, for example, if the input of victims were to be determinative on the issue of sentence? It surely wouldbe unjust to have the length of a prison sentence determined by whether the victim wants revenge or compassion. It seems clear that a general right of representation of victims at trial, even on the determination of guilt, would hopelessly burden and confuse an already overtaxed and underresourced criminal justice system.

There must be guidelines to ensure that victim statements "only contain relevant information": R. v. Swietlinski, supra, at 465. The guidelines need to limit the statements to what the Code authorizes: R. v. Barling, [1995] B.C.J No. 2225 (QL) (C.A.) at para. 9 [reported 106 W.A.C. 317] per McEachern C.J.B.C.

In Ontario, under the prior discretionary scheme, it was recognized that it was proper to consider a victim impact statement in sentencing: R. v. W. (H.W.), [1992] O.J. No. 2407 (QL) (C.A.) at 2 ***[page15]*** [reported 59 O.A.C. 317] per curiam. Concern was expressed that undue reliance not be placed upon such material: R. v. Smith, [1994] O.J. No. 3899 (QL) (C.A.) at para. 1, per Lacourciere J.A. Improper statement contents has led to partial consideration of submitted victim impact materials: R. v. Barling, supra, at para. 7-9; R. v. Ohlenschlager, [1994] A.J. No. 510 (QL) (C.A.) at para. 3, per MacKenzie J.A.

Impact statements should describe "the harm done to, or loss suffered by, the victim arising from the commission of the offence". The statements should not contain criticisms of the offender, assertions as to the facts of the offence, or recommendations as to the severity of punishment.

Criticism of the offender tilts the adversary system and risks the appearance of revenge motivation.

Attempts to state, or presumably to restate, the facts of the offence usurps the role of the prosecutor and risks inconsistency with, or expansion of, prior trial testimony, or facts read in, and agreed to, on the guilty plea appearance. Such was the case in R. v. McAnespie (1993), 82 C.C.C. (3d) 527 (Ont. C.A.) (reversed (1994), 86 C.C.C. (3d) 191 (S.C.C.)), where additional disclosure by the complainant, relating to the offence, was made by the complainant in her victim impact statement.

The Attorney General represents the public interest in the prosecution of crime.

Recommendations as to penalty must be avoided, absent exceptional circumstances, i.e. a court-authorized request, an aboriginal sentencing circle,5 While in R. v. Gladue, [1999] S.C.J. No. 19 (QL) [reported 133 C.C.C. (3d) 385] Cory J. did not refer to sentencing circles, at para. 94 he did refer to the trial judge's failure to consider "the possibly distinct conception of sentencing held by . . . the victim's family".5 or as an aspect of a prosecutorial submission that the victim seeks leniency for the offender which might not otherwise reasonably be expected in the circumstances.6 It has been recognized, for example, that a complainant's view that an offender ought not to be jailed, in circumstances where incarceration would not be an unfit disposition, is worthy of consideration: R. v. Grant, [1998] O.J. No. 1511 (C.A.) at para. 2, 3 [summarized 38 W.C.B. (2d) 144] per curiam; R. v. R. (M.), [1998] O.J. No. 737 (QL) (C.A.) at para 6 [reported 107 O.A.C. 233] per curiam.6 The freedom to call for extraordinary sentences, beyond the limits of appellate tolerance, unjustifiably raises victim expectations, promotes an appearance of court-acceptance of vengeful submissions, and propels the system away from necessary restraint in punishing by loss of liberty (s. 718.2(d) of the Code; R. v. Gladue, supra, at para. 40, 41, 57, 93). It has been suggested that frequently the victim's limited knowledge of available sentencing options may lead the victim to rely on more severe options: H.C. Rubel, "Victim Participation in Sentencing Proceedings" (1985-86), 28 C.L.Q. 226 at 240-241. The independent neutrality of the judiciary requires that the court not react to public ***[page16]*** opinion as to the severity of sentences: R. v. Porter (1976), 33 C.C.C. (2d) 215 (Ont. C.A.) at 220, per Arnup J.A.

Some mention is necessary as to circumstances where the written impact statement can be presented orally. In Mr. Gabriel's sentencing hearing, leave was given to two of the "victims" to read their victim impact statements in the courtroom. There is a discretion to do so: R. v. Selig (1994), 134 N.S.R. (2d) 385 (C.A.) at 391, per Roscoe J.A. There is, however, at present, no statutory or constitutional obligation to permit this: R. v. Coelho (1995), 41 C.R. (4th) 324 (B.C.S.C.) at 327-330, per Saunders J. Indeed, it is not infrequent, in this courthouse, that a victim has emotionally disintegrated while reading his or her statement or has improvised beyond the four corners of the statement directing accusations and personal invectives toward the offender. In yet other instances of victim allocution, disturbances have erupted in the public area of the courtroom. However, a sensible exercise of discretion is warranted, having regard to the totality of the circumstances, including the health and stability of the victim, the nature of the crime(s) committed, concerns as to control of the courtroom, and the number of statements filed.7 Bill C-79, subject to any residual overriding discretion to control the process, would remove the court's ability to prevent a victim reading an impact statement. The new s. 722(2.1) would read: "722(2.1) The court shall, on the request of a victim, permit the victim to read a statement prepared and filed in accordance with subsection (2), or to present the statement in any other manner that the court considers appropriate."7

The statute does not directly speak to the mechanism by which a victim impact statement is filed. Since s. 722.1 of the Code refers to the clerk of the court providing a copy of a filed victim impact statement to the "prosecutor", there is some parallel to the pre-sentence report which is submitted directly to the court with copies to the parties. The tradition has generally been that Crown counsel tenders the victim impact statement(s) on the sentencing hearing as opposed to direct line access to the court for a victim. Regardless of whether the prosecution office, or the personnel administering the program designated by the Province of Ontario (under s. 722(2)(a) of the Code), is principally involved with the victim(s), there should be some pre-filing gatekeeper function exercised in terms of ensuring that the victim impact statement(s) comply with the Criminal Code requirements. In this way, victim disappointment will be avoided.

The Ontario Program

Section 722(2) of the Code requires that, to be admissible, a victim impact statement "must be prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose" by the province. ***[page17]***

In Ontario, the designated program is the Victim Witness Assistance Program (VWAP) of the Ministry of the Attorney General.

By virtue of this approach, the written victim impact statement is not itself a prescribed form -- it is the program (responsible for designing the form) which is designated.

The established form in Ontario mandated by the VWAP is appended to these reasons together with the government-generated Information for Victims instruction sheet provided to victims.

The February, 1994 form, apparently still in use, is not the form employed by any of the "victims" in the Gabriel case. I will return to this observation in due course.

The VWAP documentation is disturbing in several respects, including:

(1) The form requests information relating to physical injuries and to financial impact resulting from the crime. No reference is made to emotional loss (s. 722(4)(a)) or to other forms of harm done to the victim (ss. 722(1), 722(4)(b)), i.e. psychological or social impacts or effects.

(2) The form invites, through broad and open-ended titlage (Personal Reaction; Other Comments), statements by the victim relating to the offender, the facts of the offence, and the suggested punishment. Despite the admonition in the information circular: "Please avoid recommending a sentence", the form is cast in very broad terms. I agree with Steven Skurka's observations ("Two Scales of Justice: The Victim as Adversary", supra, at pages 340- 341) that this type of unfocused direction leads to improper material in victim impact statements.

(3) The accompanying information sheet, also of 1994 origin, states:The judge will decide whether or not to consider the Victim Impact Statement when determining the sentence.

While this statement was a correct description of the 1994 legislation, specifically s. 735(1.1) of the Code (". . . the court may consider a statement . . ."), the amendment proclaimed September 3, 1996 (S.C. 1995, c. 22), s. 722(1), assures judicial consideration of an otherwise admissible victim impact statement (". . . the court shall consider any statement . . .").

In some instances, along with the victim impact statement form, a victim may receive a two-page document entitled, Victim Impact ***[page18]*** Statement An Information Guide, also appended to these reasons. For those who receive this additional material, the following advice is provided:Please remember that the Victim Impact Statement is about you, not the accused. Please avoid vengeful comments; instead, concentrate on providing a description of the impact of the crime on your life. Suggestions about the penalty are not helpful since it is entirely up to the judge to make that decision, You may, however, wish to express any concerns you have about probation conditions. For example, it may be important for you to say whether you do or don't want contact with the accused.

It would appear that many of the victims in this case were not provided, or failed to abide by, this direction.

As to the non-compliance in the Gabriel case with use of the very form utilized by the VWAP, s. 722(2)(a) speaks in mandatory terms requiring the designated program form to be the one filed with the court -- in this instance, the established form which, apart from accompanying informational supplements, invites the inadmissible contents encountered in the sentencing hearing. This point was not argued by the defence. Accordingly, whether on the basis of substantial compliance with the designated form, waiver, or receipt through the vehicle of s. 722(3) of the Code, the statements are admissible subject to excision of some of their contents.

Application of Principles to this Case

Much can be said for an interpretation of "victim" in s. 722 of the Code which limits the production of a victim impact statement to the direct victim of the crime: see R. v. Curtis (1992), 69 C.C.C. (3d) 385 (N.S.C.A.) at 391-393, per Stratton J.A. Similarly, a restrictive view is warranted regarding s. 722(4) (b) of the Code where a victim impact statement is received in a case where the crime has caused death.

In this case, statements were filed beyond the category of "spouse" or "relative" as "victim" is defined in s. 722(4)(b) of the Code. "Victim" is likely to be interpreted in the plural: Interpretation Act, R.S.C. 1985, c. I- 21, s. 33(2); R. v. Phillips (1995), 26 O.R. (3d) 522 (Gen. Div). Assuming that more than one relative of the deceased is authorized to file a victim impact statement pursuant to s. 722(4)(b) of the Code, it does not assist the court to have 20 relatives do so. I note that in at least one case the court considered a joint victim impact statement: R. v. F. (R.), [1994] O.J. No. 2101 (QL) (C.A.) at para. 3 [summarized 24 W.C.B. (2d) 639] per curiam. While some discretion exists, by virtue of section 722(3) of the ***[page19]*** Code, to expand the receivable scope of victim impact statements, the number filed here far surpassed what was helpful to the court.

In a case of a crime resulting in death, human experience, logic and common sense surely go some distance to presuming the existence of profound grief, loss and despair. It has been observed that "the criminal law does not value one life over another" (R. v. M. (E.), supra, at 164, per Finlayson J.A.) and that "A consideration of the measure of loss of a human life is not only a demeaning process but also leads to a potentially egregious weighing of the worth of an individual's life" (S. Skurka, "Two Scales of Justice: The Victim as Adversary", supra, at page 343).

Also, with respect to the statements, authors, either unidentified in their connection to the deceased, or remote in connection, are not of assistance.

Statements purporting to refer to the facts of the offence were inaccurate.

Statements speaking of the offender were not informed views of the background circumstances of the offender.

Suggested penalties were made without regard to the "worst offence/worst offender" sentencing principle.

A number of statements promoted eye-for-an-eye retributive justice only, without regard to other overarching principles and objectives of sentencing.

The labelling of the impact statements as involving a "killing" is inflammatory and jeopardizes the desired restraint of the sentencing hearing.

In a couple of instances, the offender's crime was wrongfully equated to "murder". A similar problem arose in R. v. Lecaine, [1990] A.J. No. 360 (QL) (C.A.) [reported 105 A.R. 261 at p. 262] drawing disapproval from the court. Stevenson J.A. (as he then was) stated at page 2: Those statements feelingly portray the grief of the mother and brother of the victim at the loss of the victim. One cannot help but have very great sympathy for these people, for their loss. We point out, however, that these statements show an understandable misapprehension of the function of the criminal law in the punishment process. The mother says that her son's life was worth "a twelve month sentence to his murderer". This accused was not his murderer. The brother says "Thou shall not kill". This accused was not a killer in the sense of being a murderer. Murder is intentional killing and this accused was not convicted of intentional killing. ***[page20]***

In the end result, the court considered only the contents of victim impact statements which described the harm done to, or loss suffered by, the identifiable victims in this case.Order accordingly.

APPENDIX

[See paper part for graphic.]

[See paper part for graphic.]

[137 C.C.C. (3d) p. ***[page21]***

[See paper part for graphic.]

[See paper part for graphic.] ***[page22]*** [See paper part for graphic.]

Information for Victims -- Please read this before completing this formIf you are unable to read this information sheet and the Victim Impact Statement form, translation services may be arranged in your language. Please speak to, or have someone on your behalf, speak to the investigating officer.The purpose of the Victim Impact Statement is to let the Crown Attorney (prosecution), defence lawyer, accused and judge know how you were affected by the crime. You are not required to fill out this statement. Doing so is entirely voluntary.The Victim Impact Statement may be used during the sentencing hearing.Depending on the circumstances of the case it may also be used at other points during the criminal process -- eg. Bail Hearings, plea discussions and Parole Hearings.The judge will decide whether or not to consider the Victim Impact Statement when determining the sentence.Your statement must only describe how the crime has affected you. Please avoid recommending a sentence.In some cases the judge may order payment for your losses or expenses, The value of lost or damaged property, health care costs and income lost as a result of a crime are the only costs which can be recovered. You may also be required to bring receipts and/or proof of medical expenses.Compensation can be ordered by a judge only after the accused is found guilty and the amount of loss can be clearly and easily determined.Please note, once you have given a Victim Impact Statement to the police, you will not be able to withdraw it. Copies will be given to the accused and his/her lawyer and you may be questioned in court about the contents of the statement.Once you have completed this statement, you may wish to give additional information to the court. If so, please contact the investigating officer. You may fill out another form which will be added to your original form.In addition, you may wish to apply to the Criminal Injuries Compensation Board at: Criminal Injuries Compensation Board 439 University Avenue, 4th Floor Toronto ON M5G 1Y8 Telephone: (905) 326-2900 (collect) Fax: (905) 326-2883For more information about compensation for victims of crime, please contact DIAL-A-LAW: Toronto: (905) 947-3333 Ottawa: (613) 283-7941 1- 800-387-2920 for area codes 519, 613 or 705 1-800-668-8525 for area code 807Information from the Criminal Injuries Compensation Board and DIAL-A-LAW are provided free of charge. ***[page23]*** épage24ê Please remember that the Victim Impact Statement is about you, not the accused. Please avoid vengeful comments; instead, concentrate on providing a description of the impact of the crime on your life. Suggestions about the penalty are not helpful since it is entirely up to the judge to make that decision. You may, however, wish to express any concerns you have about probation conditions. For example it may be important for you to say whether you do or don't want contact with the accused.May I ask someone to help me complete a Victim Impact Statement?Yes. If you are having difficultly with your Victim Impact Statement (or if the victim is a child), a victim support group or family member may help. It is important to remember that this is your Statement and that it should be in your own words.If I provide a Victim Impact Statement, will I be questioned about it in court?Not usually. Your Victim Impact Statement may be filed in court and be used by the Judge and defence lawyer. If your Victim Impact Statement is filed in court, occasionally the defence lawyer may wish to cross- examine you, that is, ask you questions about your Statement. You may be asked to come to court to testify about the effect the crime has had on you. The Crown Attorney will

make every effort to take into account your feelings about this matter.Will I receive compensation for the financial impact I describe in my Victim Impact Statement?Providing information about the financial impact of a crime will not necessarily lead to compensation for you. A Crown Attorney, a victim support group, your lawyer, or the Criminal Injuries Compensation Board office may be able to provide you with information and assist you.Where should I return my Victim Impact Statement?Your Statement should be returned to the police or the Crown Attorney responsible for the case.May I update my Victim Impact Statement?If you have new information about the effects of the offence, you may update your Victim Impact Statement by contacting the police or Crown Attorney responsible for the case.For further assistance, please contact:Ministry of the Attorney General, Victim Witness Assistance ProgramPhone: (416) 326-2429 Fax: (416) 326-2857Assaulted Women's Helpline: (416) 863-0511Women's Shelters: Listed in the White Pages of the Telephone DirectorySexual Assault/Rape Crisis Centres: Listed in the White Pages of the Telephone DirectoryCommunity Legal Clinics: Listed in the White Pages of the Telephone Directory under Legal Aid or in the Yellow Pages under Lawyers -- Legal AidLawyer Referral Service: Toronto (416) 947-3300 1-800-268-8326Criminal Injuries Compensation Board: (416) 326-2900 1-800-372- 7463Kids Help Phone: 1-800-668-6868 ***[page25]*** [THIS PAGE CONTAINS ENDNOTES IN THE PAPER VERSION.] ***[page26]***