

VICTIM IMPACT STATEMENTS AND THE NATURE AND INCIDENCE OF OFFENDER REMORSE

Findings from an Observation Study in a Superior Sentencing Court

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Scholars have argued that disclosure of the impact of the crime on the victim through victim impact statements has the potential to produce an emotional response in offenders that creates an opportunity for offenders to express remorse and apologise to crime victims in the sentencing hearing. Implicit in this claim is the concept that the incidence of such victim-focused remorse is a virtue and a positive restorative element of VISs. Drawing from data largely generated by observation of eighteen sentencing hearings of homicide offenders and semi-structured interviews with fourteen family victims, this article examines this claim by exploring offender response to victim impact statements, and the nature and incidence of offender remorse observed in the courtroom.

A marked feature of contemporary criminal justice policy in many common law jurisdictions such as Australia is the prominence of the perceived interests and concerns of crime victims.¹ In an effort to reduce victim marginalisation and dissatisfaction with criminal justice,² administrative and legislative reforms have targeted key areas, including support, information, protection and participation in the legal process. While increased services and facilities for victims have generally been welcomed, changes to established sentencing practices that enable crime victims to participate in sentencing hearings through victim impact statements (VISs) have been more controversial.³

Typically, a VIS is an account of the harm sustained by a victim as the result of an offence. When first introduced, VISs were written documents, prepared by a designated third party – the victim or victim representative – and submitted to the court by the prosecution during the sentencing hearing. Increasingly, however, provision is being made for VISs to be read aloud to the court by the victim-author or representative and/or presented in new forms such as victim impact videos or DVDs (VIDs).⁴ The functions of VISs

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¹ See Henderson (1985); Garland (2001); Jackson (2003); Goodey (2005); Walklate (2012).

² See Shapland et al (1985); Goodey (2005).

³ Henderson (1985); Ashworth (1993); Bandes (1996, 2009); Hoyle et al (1998); Erez (2000); Booth (2007); Kirchengast (2011); Hoyle (2011); Rock (2010).

⁴ See Austin (2010); Rock (2010); VSA (2009).

are generally articulated in instrumental or expressive terms. From an instrumental perspective, some proponents of VISs contend that VISs are useful sentencing tools that provide information to assist decision-makers in formulating more proportionate and accurate sentences.⁵ The relevance and use of VISs in the determination of penalty, however, has been a controversial issue in common law jurisdictions – particularly in the context of sentencing homicide offenders⁶ – and many scholars argue that VISs are irrelevant to the purposes and legal goals of sentencing.⁷ This debate will not be pursued further; instead, the subject of this article is the expressive function of VISs.

According to Erez,⁸ the expressive function of VISs is largely victim focused, and aims to redress the former exclusion and marginalisation of victims in the sentencing hearing as well as improve their courtroom experiences. Some scholars argue that the expressive capacities of VISs, especially oral VISs, can bring restorative elements into the sentencing hearings that benefit victims.⁹ For scholars such as Roberts and Erez,¹⁰ and Cassell,¹¹ a large part of the restorative value of a VIS is its communicative potential. Through VISs, victims can recount their experiences and express their feelings about the crime to both the court and the offender.¹² In response, emotions are elicited in offenders that facilitate feelings of remorse and empathy.¹³ This emotional transformation can lead the offender to accept responsibility for the crime, express regret for their actions and apologise to the victim.¹⁴ Roberts and Erez describe this sequence as ‘reciprocal communication’. Scholars suggest that the benefits of apology for victims in the criminal context include a lessening of anger and resentment such that forgiveness might be possible, and this can be significant for psychological healing; repair of relationships; and a restoration of self-worth.¹⁵

This reciprocal communication potential of VISs is a claim that has yet to be tested empirically. The aim of this article is to contribute to the gap in the literature through an analysis of data drawn from a small qualitative study of observation of victim participation in homicide sentencing hearings in New South Wales and interviews with family victims. At the outset, it is important to acknowledge the challenges of assessing the incidence and nature of offender remorse in this study. I did not interview offenders

⁵ Sumner (1999); Kirchengast (2008); Roberts and Manikis (2010); Shackel (2011).

⁶ Booth (2007); Bandes (1996); Schuster and Proppen (2010).

⁷ Ashworth (1993); Sanders et al (2001); Henderson (1985).

⁸ Erez (2004).

⁹ Erez (2004); Roberts and Erez (2004, 2010); Hoyle (2010); Erez et al (2011).

¹⁰ Roberts and Erez (2004, 2010).

¹¹ Cassell (2009).

¹² Cassell (2009); Roberts and Erez (2004, 2011).

¹³ Stubbs (2007), p 169; Roberts and Erez (2004), p 232.

¹⁴ Roberts and Erez (2004), p 232.

¹⁵ Blecher (2010), pp 97–8; Petrucci (2002), 352; Bibas and Bierschbach (2004), p 8.

involved in the hearings, so cannot make claims with regard to the subjective emotional states of the offenders observed. Nor can claims be made with regard to the genuineness or otherwise of any remorse that was demonstrated. Instead, using a conceptual framework developed for this purpose, this article analyses the incidence and nature of offender remorse *as demonstrated and observed* in the hearings by other participants, and particularly the family victims involved. This research makes an important contribution to a limited empirical literature on the dynamics and effects of VISs in the courtroom, as well as the victim–offender communication dyadic in the sentencing hearing.

The first section considers how VISs in sentencing hearings can be viewed as restorative measures. Methodological issues related to the study, including the conceptualisation of offender remorse, are then outlined and details of the findings presented. Analysis of the findings reveals that there is little to support the claim in this particular group of hearings; in fact, there is a basis for querying whether the demonstration of such offender remorse in the sentencing hearing – at least of homicide offenders – is indeed a virtue as envisaged by Roberts and Erez in this particular context.¹⁶

Victim Impact Statements as Restorative Measures in the Sentencing Hearing

The aim of this part is not to explore or critique the concept of restorative justice, but to consider how VISs in sentencing proceedings might be considered part of this field. According to Daly, ‘restorative justice is a contested concept, with different political agendas ... and it has increasingly become an idea without boundaries or limits. The restorative justice field is dynamic, evolving and extraordinarily varied.’¹⁷ While a precise definition of restorative justice is elusive, it can be conceived broadly in terms of values, aims, processes and outcomes;¹⁸ its essence is the recognition that key stakeholders in a criminal matter are the offender, the victim, their communities and the wider community.¹⁹ Restorative values include fairness, restoration/healing, inclusivity, collaboration, respect, dignity, support, safety, democracy, empowerment, accountability, responsibility and reparation.²⁰

Unlike conventional adversarial criminal proceedings, which are offender focused, many restorative justice practices can be described as victim oriented.²¹ The very nature of a restorative justice approach requires that victims be recognised and treated as key stakeholders in the resolution of the dispute. Victims are encouraged to speak about their experience and the harms

¹⁶ Roberts and Erez (2004, 2010).

¹⁷ Daly (2011), p 4.

¹⁸ See Braithwaite and Strang (2001); Strang (2002); Shapland et al (2006); Dignan (2007); Walklate (2007); Hoyle (2010).

¹⁹ Strang (2002); Hoyle (2010).

²⁰ Strang (2002); Dignan (2007); Hoyle (2010).

²¹ Shapland (2006); Goodey (2005).

caused by the crime, and the concomitant expression of emotions by victims is regarded as 'natural' as they recount the effects of the crime – unlike traditional legal processes that work to 'disparage and control such emotions'.²²

Victim-centred outcomes of restorative events include offender accountability for the crime as well as material and/or 'symbolic' reparation.²³ Material compensation for harm caused to the victim is a 'visible and largely unambiguous part of the process', whereas symbolic reparation is a more complex outcome that follows a particular sequence of events.²⁴ The first stage of symbolic reparation is about offender accountability and remorse. The offender acknowledges the harm done to the victim by the crime, takes responsibility for their actions, communicates remorse and apologises to the victim.²⁵ Whereas studies show that expressions of remorse and apology by the offender are common events in restorative justice processes, such features are relatively rare in legal proceedings.²⁶ The second stage of 'symbolic reparation' looks to the response from the victim that might indicate forgiveness.²⁷ For many scholars in the field, victim forgiveness is controversial, however,²⁸ and research in the context of restorative programs has demonstrated that victims infrequently accept apologies and offer forgiveness in the course of restorative events.²⁹

In contrast to the 'inclusive and collaborative nature' of restorative justice processes,³⁰ traditional criminal proceedings are focused on the offender and punishment, unable or reluctant to deal with victims' needs and concerns.³¹

Miers' approach to restorative justice provides a useful starting point to consideration of VISs as restorative measures in legal proceedings.³²

In broad and simple terms, restorative justice signifies those measures that are designed to give victims of crime an opportunity to tell the offender about the impact of the offending on them and their families, and to encourage offenders to accept responsibility for and to repair the harm they caused. Its general aims are to reduce the offending, to restore the relationship between the victim and the offender that was disturbed by the offence and to improve victims' experiences with the criminal justice system.

²² Shapland et al (2006).

²³ Daly (2011); Szmania and Mangis (2005).

²⁴ Daly (2011), p 28.

²⁵ Strang (2002); Shapland et al (2006); Walklate (2007); Szmania and Mangis (2005).

²⁶ Szmania and Mangis (2005); Shapland (2006); Bibas and Bierschbach (2006).

²⁷ Dignan (2007); Shapland et al (2006); Daly (2011).

²⁸ Stubbs (2007).

²⁹ Dignan (2007), p 321

³⁰ Hoyle (2010), p 2.

³¹ Szmania and Mangis (2005); Hoyle (2010).

³² Miers (2001), p 8.

Two significant features of a restorative measure are revealed by this approach: victim voice; and offender responsibility and accountability. With regard to a voice for victims in the resolution of the offending, clearly the expressive capacities of VISs provide victims with an opportunity to express their feelings and tell the sentencing court and offender about the personal impact of the crime.³³ Furthermore, this opportunity will be enhanced if VISs are read aloud to the court by victims or their representatives.³⁴ Studies have found that a majority of victims value VISs for their expressive capacities, and are more likely to submit their statements to have a voice in the proceedings.³⁵ As to victim satisfaction, research suggests that generally crime victims have positive views about the utility of VISs – that VISs can be empowering and cathartic and provide an opportunity to be heard in the process.³⁶

Nonetheless, there are scholars who suggest that such a voice is also problematic. Gewirtz argues that presenting a VIS to the court is a ‘risky and anxious activity’ because there is always the chance that the story may not be told effectively, thereby imposing ‘risk and anxiety on an already vulnerable group of people’.³⁷ For Rock, VISs might be damaging rituals for victims because the courtroom audience does not constitute a group of ‘like-thinking, like-feeling, supportive and sympathetic insiders’.³⁸ Research into victim satisfaction with having a voice in the hearing suggests that negative experiences of presenting their VISs to the court and a lack of control over content and reception of VISs in court can detract from any potential restorative virtues.³⁹

Commentators such as Hoyle and Dignan are circumspect in relation to the restorative qualities of VISs.⁴⁰ Although Hoyle describes VISs as ‘restorative practices’ that bring victims into the sentencing process,⁴¹ she argues that in contrast to the ‘dynamic and relational’ dialogic processes of restorative justice where people talk to each other, VISs do not facilitate victim–offender dialogue in the courtroom.⁴² In the courtroom, VISs are delivered as monologues; during the process, court officials and victims rarely talk to each other, and victims and offenders do not speak to each

³³ Roberts and Erez (2004); Szmania and Gracyalny (2006); Booth (2012).

³⁴ Szmania and Gracyalny (2006); Victim Support Agency (2009); Rock (2010); Roberts and Manikis (2011); Booth (2012).

³⁵ Erez et al (1994); Chalmers et al (2007); Victim Support Agency (2009).

³⁶ Roberts and Manikis (2011), p 25; Erez et al (2011).

³⁷ Gewirtz (1995), p 882.

³⁸ Rock (2010), p 219.

³⁹ Meredith and Paquette (2001); Victim Support Agency (2009); Rock (2010); Erez et al (2011); Booth (2011).

⁴⁰ Dignan (2007); Hoyle (2010).

⁴¹ Hoyle (2011), p 15.

⁴² Hoyle (2011), p 14; see also Dignan (2007), p 311.

other at all.⁴³ For Dignan, this absence of dialogue means that VISs cannot be characterised as restorative processes.⁴⁴

As to the second feature of a restorative measure, offender responsibility and accountability, Roberts and Erez argue that victim disclosure through VISs can elicit emotions in offenders that encourage them to accept responsibility, express remorse and seek to repair the harm caused, most notably through an apology to the victim. There is a lack of published research regarding offenders' subjective responses to VISs⁴⁵ as well as the incidence and nature of offender remorse in relation to VISs in sentencing hearings. Until very recently, the dynamics of victim participation in the sentencing hearing itself were generally not the subject of study.⁴⁶ First-hand accounts of VISs presented in the courtroom have usually come from journalist's reports,⁴⁷ court transcripts⁴⁸ or a digital recording of a sentencing hearing.⁴⁹ Exceptions are recent observation studies of sentencing hearings from the United States⁵⁰ and the United Kingdom,⁵¹ and publication from my own work drawn from this study.⁵² None of the work published so far has addressed the offenders' responses to VISs, and more particularly the incidence of offender remorse. This article seeks to address this gap in the research.

The Study

The study, conducted by the author as sole researcher, was limited to the participation of a discrete group of crime victims – the family of the deceased victim, or 'family victims' – in the sentencing of homicide (murder or manslaughter) offenders in the New South Wales Supreme Court. Section 26 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*CSPA*), defines a family victim as being a member of the deceased's 'immediate family'. Since 1997, family victims in New South Wales have been entitled under legislation to submit a written VIS to the sentencing hearing in matters where the primary victim has died as a result of the offence. More recent amendment in 2003 provides family victims with an opportunity to read their VISs aloud to the sentencing court. There is no prescribed VIS form, and no agency designated to prepare VISs on behalf of the deceased's family. In contrast to other common

⁴³ Hoyle (2010), p 15; see also Booth (2012).

⁴⁴ Dignan (2007), p 311.

⁴⁵ Roberts and Manikis (2011).

⁴⁶ Shapland and Hall (2010).

⁴⁷ Logan (2008).

⁴⁸ Logan (2008).

⁴⁹ Szmania and Gracyalny (2006).

⁵⁰ Proppen and Schuster (2008, 2010).

⁵¹ Rock (2010).

⁵² Booth (2012).

law jurisdictions,⁵³ VISs from family victims are of no relevance in the determination of penalty in New South Wales.⁵⁴

A primary object of this study was to produce a rich and rounded picture of victim participation in the sentencing of homicide offenders that explored the expressive capacities of VISs, including the incidence and nature of any offender remorse. The findings presented draw from an analysis of data generated by the observation of eighteen sentencing hearings of homicide offenders in the New South Wales Supreme Court (including 30 VISs read aloud to the court) and interviews with fourteen family victims.

The hearings were observed in the New South Wales Supreme Court between July 2007 and December 2008. This sample did not capture all homicide sentencing cases heard during this period; rather, it constitutes all relevant hearings that I was able to attend. I identified appropriate matters by their description in the court lists as ‘sentencing submissions’ or ‘sentencing hearing’, published by the court the afternoon before the hearing.⁵⁵ Of these hearings, seven offenders had been convicted of murder, ten offenders had been convicted of manslaughter and one offender had been convicted of being an accessory after the fact to murder. A total of 38 VISs were received by the courts in these hearings, of which 30 were read aloud. Observations were recorded in field notes and transcribed within a few hours of the hearing. These notes were later supplemented with digital copies of the transcripts of sixteen of the eighteen hearings and 24 of the 30 VISs read aloud in those hearings.

I interviewed fourteen family victims from fourteen discrete cases between April 2007 and October 2008.⁵⁶ Twelve of the fourteen interview participants were recruited through the Homicide Victims Support Group (HVSG). The New South Wales Police and HVSG have a memorandum of understanding whereby, in the case of homicide, the deceased’s family members are put in touch with the HVSG and provided with support and assistance as required. Although there is bias inherent in being a victim support group, given the memorandum of understanding with the New South Wales police, the HVSG was the first port of call for most family victims in New South Wales, and it maintains a large membership with whom it keeps in regular contact. Furthermore, in at least six cases observed, the families were supported by counsellors from the HVSG. Thus a recruitment strategy through the HVSG promised to reach a wide range of family victims. Of the remaining two participants, one contacted me after reading my article about

⁵³ Kirchengast (2011); Roberts and Manikis (2010).

⁵⁴ *R v Previtara* (1997) 94 A Crim LR 76; for contrasting views of the legal position in New South Wales, see Booth (2007) and Kirchengast (2011).

⁵⁵ Guided by the published court lists, I did attend other hearings but these were not included in my study, because they were adjourned, dealt with a non-homicide matter and/or were closed courts because the offender was a juvenile.

⁵⁶ Only one family victim interviewed was also observed in the courtroom. The focus of this study was the hearings observed; the interview data provided valuable context for victims’ experiences, both inside and outside the sentencing hearing.

family victim participation in the sentencing process published in the *NSW Law Society Journal* (2007) and the other was recruited through another victim support group, Homicide Survivors Support After Murder.

Eleven of the interview participants submitted a VIS to the New South Wales Supreme Court in a homicide sentencing. Of the remaining three cases, in two matters the offender was found not guilty of murder by reason of mental illness and there was no sentencing hearing. The family victims involved in these matters had since submitted VISs to the Mental Health Tribunal review hearings. In the final case, the deceased's family elected not to submit a VIS to the sentencing hearing, although various family members attended each day of the trial and sentencing. The interview participants were predominantly women (n=12), although on two occasions the woman was accompanied by her male partner who also contributed to the discussion. At the time of the interviews, seven participants lived in Sydney and seven lived in rural or coastal areas of New South Wales. A grounded theory model using a constant, comparative approach was adopted as a basis for analysis of these data.⁵⁷

An important caveat is that as a small in-depth study of victim participation in homicide sentencing in the New South Wales Supreme Court, the extent to which the results can be considered to be of more general application is limited. The study is not intended to be representative of victim participation in the sentencing of homicide offenders more generally; rather, its nature is exploratory and designed to illuminate the nature and dynamics of participation of family victims in select sentencing hearings. The findings will highlight issues for future research in New South Wales and other common law jurisdictions.

The Conceptualisation of Offender Remorse

The first step was to devise a conceptual framework within which to explore the nature and incidence of offender remorse in the hearings observed. Initial analysis suggested a distinction between two concepts of offender remorse, characterised as 'offender-focused remorse' and 'victim-focused remorse'.

Offender-focused remorse is a legal construct. According to sentencing law, evidence of contrition demonstrated by the offender with regard to the offence can be presented to the court aiming to mitigate punishment. If accepted as genuine, the sentencing judge can reduce the severity of the penalty imposed. Section 21A(3) of the *CSPA* provides that in order to mitigate penalty, the offender must provide evidence of remorse indicating they have:

- (i) accepted responsibility for his or her actions; *and*
- (ii) acknowledged any injury, loss or damage caused by his or her actions and/or made reparation for such injury, loss or damage.

⁵⁷ Charmaz (2006).

Remorse as a mitigating factor must be established by the offender on the balance of probabilities,⁵⁸ and the degree to which the offender has demonstrated remorse – if at all – is a question of fact to be determined by the sentencing judge.⁵⁹ According to the New South Wales Court of Criminal Appeal in *Georgopolous v R*, ‘the key notion conveyed by the concept of remorse is a common sense one ... it is regret or sorrow for the wrongdoing’.⁶⁰ Such remorse can be demonstrated by the offender through their sworn evidence, or by other words and conduct such as an early confession, the provision of assistance to the authorities, statements to a probation and parole officer included in a pre-sentencing report, making reparation to the victim and/or a letter of apology from the offender to the victim and/or to the court.⁶¹ The offender can also rely on evidence of their remorse as conveyed through the direct oral evidence of third parties such as expert witnesses.⁶² While it is not necessary for the offender to give oral evidence of remorse to satisfy the section,⁶³ evidence provided in documentary form, such as a letter to the court or conveyed through counsel from the Bar table, may not be viewed by the court as particularly convincing.⁶⁴

For the purposes of this study, such remorse is characterised as ‘offender focused’ because, essentially, it is evidence led to mitigate the severity of the penalty imposed on the offender. The law does not require the offender to also express remorse to the victim before the penalty can be mitigated. Though a contentious sentencing factor in legal scholarship,⁶⁵ the cases suggest that a finding that the offender is remorseful is related to forward-looking goals relevant to questions of offender rehabilitation and desistance.⁶⁶

‘Victim-focused remorse’ is a restorative construct derived from the theory that confrontation with VISs in a sentencing hearing might induce the offender to accept responsibility and apologise to the victim for the harm that has been caused by the crime. For the purposes of this study, such offender remorse is characterised as ‘victim focused’ because it is directed to the victim’s suffering rather than the court or the crime more generally.

The Incidence and Nature of Offender Remorse in the Observation Study

Drawing on the elements of offender-focused and victim-focused remorse discussed above, a scale of offender remorse was designed that comprises three distinct elements: responsibility for the crime, contrition for the killing

⁵⁸ *R v Olbrich* (1999) 199 CLR 270.

⁵⁹ *Alvares v R; Farache v R* [2011] NSWCCA 33 at 65.

⁶⁰ *Georgopolous v R* [2010] NSWCCA 246 at 11.

⁶¹ *Alvares v R; Farache v R* [2011] NSWCCA 33 at 66.

⁶² *Sun v R* [2011] NSWCCA 99.

⁶³ *R v Butters* [2010] NSWCCA 1.

⁶⁴ *R v Elfar* [2003] NSWCCA 358.

⁶⁵ Bagaric and Amarasekara (2001); Bibas and Bierschbach (2004); Tudor (2005).

⁶⁶ *Ali v R* [2010] NSWCCA 35; Bibas and Bierschbach (2004), p 8.

and apology to the family victim for the harm they have suffered. Responsibility or acceptance of guilt is at the lower end of the scale, and relates to the extent to which the offender has ‘faced up’ to their actions in killing the deceased as revealed by the offender’s account of their culpability at trial or during plea negotiation.⁶⁷ Acceptance of responsibility is an element of both offender-focused and victim-focused remorse, and analysis of the hearings has investigated the extent to which the offenders have distanced themselves from the crime by way of defence, justification and/or excuse.⁶⁸ This element is also relevant to the conditions under which remorse is displayed in the hearing.

Contrition is characterised as offender acknowledgement of the harm caused by the offence and demonstration of regret and/or sorrow for the killing. Such contrition is presented to the court as evidence in mitigation, and can include an apology to the court for killing the deceased. For the purposes of this analysis, contrition directed to the court is distinct from an apology directed to the family victim. An apology as conceptualised here is either a communicative act containing the words ‘sorry’ or ‘apologise’ that is directed to the deceased’s family, or other explicit acknowledgement of harm caused to the deceased’s family.⁶⁹

The findings are summarised in Table 1, and include the court response to any evidence of remorse.

Table 1: The nature and incidence of offender remorse demonstrated in the homicide sentencing hearings observed in the study

<i>Case</i>	<i>Acceptance of responsibility</i>	<i>Contrition</i>	<i>Apology</i>	<i>Court response</i>
1	Charge of murder; pleaded G to charge shortly before hearing due to commence; mental illness	None	None	
2	Charge of being accessory after fact to murder; offered guilty plea at earliest opportunity	None	None	
3	Charge of murder; pleaded NG to charge; convicted of	None	None	

⁶⁷ Goffman (1971), pp 109–10.

⁶⁸ Goffman (1971), p 110; Tavuchis (1991), pp 22–3.

⁶⁹ Szmania and Mangis (2006), p 338; Shapland et al (2006), p 514; Goffman (1971), p 109; Tavuchis (1991), p 22.

	manslaughter by jury, substantial impairment. ⁷⁰			
4	Charge of murder; offered guilty plea at earliest opportunity; alleged deceased provocation mental, physical and sexual abuse	Oral evidence of offender Q: Are you sorry for the fact that you killed [the deceased]? A: Yes. If I could, I'd go back and change it, not do it.	Oral evidence of offender: Q: How did hearing [VISs] make you feel? A: I was upset, terribly ashamed of my actions, and I couldn't believe that I have caused so much pain to someone.	Not accepted: 'I am not persuaded that this somewhat belated statement indicates any genuine contrition or even insight into the enormity of what he has done.'
5	Charge of murder; Crown accepted plea to manslaughter on basis of substantial impairment; alleged provocative acts of deceased	Oral evidence of lay witness: 'He is emotional and teary eyed when he speaks about it.' Acknowledged pain caused.	None	Accepted: 'I am satisfied that the offender is truly remorseful and contrite over what he did.'
6	Charge of manslaughter; G plea to manslaughter dangerous act at earliest opportunity; alleged deceased used provocative words	Oral evidence of offender: 'I am shocked that I have done it. I am fully aware of my emotions and where it has led me and the pain I have caused, especially to family and friends'. Oral evidence of lay witness.	None	Accepted: 'I take the view that the offender has displayed remorse. He has expressed it to his mother and to others: and to a lesser extent in court.'

⁷⁰ A finding of substantial impairment under the *Crimes Act 1900* (NSW), s 23A reduced a charge of murder to a conviction for manslaughter.

7	Charge of murder; Crown accepted (late) G plea to manslaughter (unlawful and dangerous act); shifted blame to co-accused; alleged not planner and instigator; alcoholic and dysfunctional family	Through counsel from the Bar table: 'The offender instructs me that he wishes to apologise sincerely to the family of the deceased, to the court, to his parents and to the community generally.'	Through counsel.	Not accepted: 'This is not a submission that I am prepared to accept, not only because the offender was not prepared to frankly say so and be tested on his account ... but because there is substantial evidence to the contrary.'
8	Charge of murder; pleaded NG to charge; no admissions	None	None	
9	Charge of murder; pleaded NG to charge; no admissions	None	None	
10	Charge of murder; G plea to charge at earliest opportunity; intoxication, history of domestic violence	Oral evidence of offender: 'I am really very sorry for what I have done. I am just really, really sorry for what I have done to [deceased].' Letter to court.	None	Accepted: 'There is no question but that the offender is genuinely remorseful about his conduct.'
11	Charge of murder; NG plea to murder (early offer to plead to manslaughter); convicted of manslaughter (by jury) on basis of excessive self-defence	Oral evidence of offender. Pre-sentence report.	Oral evidence of offender: Q: You have heard the VISs read by a woman on behalf of [X], you have heard a VIS read by [dec's mother]	Accepted to an extent: 'I accept that there is some evidence of recent remorse although it is mixed with an element of self-justification.'

			<p>and by [dec's partner]?</p> <p>A: Yes.</p> <p>Q: During the course of the trial, you expressed in terms how you felt about being responsible for [dec's] death?</p> <p>A: Yes.</p> <p>Q: Is there anything else that you want to tell them or the court?</p> <p>A: [crying]</p> <p>Yeah, I am sorry, I am sorry. I have a son and I can only – I couldn't imagine what it would feel like to lose him. I feel for the [dec's partner] so much and [dec's] family. Nothing I do will take it back, I know that.</p>	
12	Charge of murder; NG plea to charge (provocation/substantial impairment); convicted of murder; intoxicated; deceased alleged to be intoxicated and abusive	Oral evidence of expert witness. Q: 'Has offender ... expressed to you remorse for what he did?' A: 'Yes, consistently from	None	Accepted: 'I am satisfied that the prisoner is remorseful.'

		the first time I saw him and it appears to be genuine remorse. He says that he wishes he could turn back the clock that it hadn't happened, that the man hadn't died.'		
13	Charge of murder; G plea to charge before hearing on basis of mental illness; intoxication	Oral evidence of lay witnesses. Medical report; letter to the court.	None	Accepted: 'The prisoner is genuinely remorseful for his actions ... he is suffering substantially for his crime.'
14	Charge of murder; NG plea to charge (early offer to plead to manslaughter); trial for murder, hung jury; Crown then accepted plea to manslaughter on basis of substantial impairment. Alleged deceased violent and abusive.	Oral evidence of offender at trial.	None	Accepted
15	Charge of murder; NG plea to charge (though accepts responsibility for killing); convicted of manslaughter at trial, substantial impairment	None	None	Found that the offender accepting responsibility for the killing did not demonstrate contrition but a willingness to facilitate the course of justice.
16	Charge of murder; NG plea to charge; convicted at trial of manslaughter on basis of	None	None	

	gross negligence			
17	Charge of manslaughter; G plea to charge (unlawful and unlawful act).	None	None	
18	Charge of murder; NG plea to charge (offer to plead to manslaughter); convicted of manslaughter at trial (unlawful and dangerous act); intoxicated; alleged self-defence and provocation	Letter from offender to court	Letter from the offender read to the court: He was 'devastated' and said he was 'sorry' to the deceased's family and his own family: 'this letter comes from my heart'.	Accepted to small extent: 'He (the offender) did not give evidence in the proceedings so the weight to be given to the letter is not great.'

With regard to acceptance of responsibility, two offenders denied responsibility altogether (hearings 8 and 9), while the remaining offenders provided accounts that sought to explain, justify or mitigate their culpability in the killing. In six matters (4, 5, 6, 12, 14, 18), the offenders attempted to shift some of the blame for the crime to the deceased on the basis of provocation and/or self-defence; in hearing 7, the offender attempted to shift the bulk of the blame on to his co-accused on the basis that the latter was the planner and instigator of the crime. Many offenders also sought to mitigate their culpability with a variety of personal circumstances, including mental illness (n=6) and intoxication at the time of the killing (n=4).

It is clear that apology did not play a significant role in the hearings observed, and most of the remorse demonstrated by offenders can be characterised as offender focused.⁷¹ As detailed in the table, evidence of contrition with regard to the killing was led in mitigation by offenders in just over half of the matters (n=10) in a variety of forms: direct oral evidence by offenders (n=5); letter from offender to the court (n=3); direct oral evidence of third parties (n=4); written reports of third parties (n=2); and by counsel (n=1). While ten offenders did express some form of contrition to the court for the killing (offender-focused remorse), victim-focused remorse or remorse directed to the family victims was demonstrated in only four hearings (hearings 4, 7, 11 and 18). Victim-focused remorse was evidenced by the use of the word 'sorry' in relation to the harm sustained by the deceased's family or other expressions of remorse that directly acknowledged the harm that was caused to the deceased's family rather than the deceased or community more generally. Only in hearings 4 and 11 was

⁷¹ Bibas and Bierschbach (2004); Szmania and Mangis (2005).

the word ‘sorry’ uttered personally by the offenders; in hearing 7, the apology was offered through defence counsel; while in hearing 18, the offender’s apology was contained in a letter to the court. It is important to note that these apologies were not offered contemporaneously with the presentation of the VISs – in fact, all were tendered later in the proceedings during sentence submissions and the presentation of mitigating evidence.

This rarity of victim-focused remorse is consistent with a striking feature of most of the hearings observed: the vast majority of offenders were not observed to respond to the VISs at all. Four offenders in the study were not observed to look at the family victims at all as the VISs were read to the court, sitting instead in the dock with their heads bowed or their eyes downcast (hearings 1, 4, 10 and 12). In six other matters (5, 7, 8, 13, 16 and 18), while the offenders were observed to look at the victims or their agents who read the statements to the court, they otherwise remained impassive. These findings are consistent with Rock’s study, in which he found the offenders observed to be largely ‘remote, inscrutable, impassive’ while the VISs were presented.⁷² This does not mean, of course, that offenders did not experience an emotional response to the statements they heard, but what it does mean is that no response from offenders was visible to the family victims and others in the courtroom.

Only three offenders showed any sort of response while the statements were being read (hearings, 9, 11 and 15). During the presentation of VISs in hearing 9, the offender sat in the dock leaning forward, watching the family victims intently as they read, and appearing to listen with interest to their statements. The offender in hearing 15 watched the agent read the deceased’s mother’s statement, and was observed to smirk on one occasion when the reader referred to the deceased’s personal qualities. It was only the offender in hearing 11 who exhibited any outward sign of the emotional transformation posited by Roberts and Erez as he cried audibly while he watched and listened to the family victims read their statements to the court.

These findings are also consistent with the experiences of most of the interview participants; only two interview participants said that the offender apologised to them at the sentencing hearing or otherwise indicated remorse for the loss sustained by the deceased’s families (discussed further below).

Discussion

While these findings make no claim as to the subjective emotional responses of the offenders observed, it is evident that – contrary to the expectations of Roberts and Erez – victim-focused remorse was not demonstrated by the vast majority of offenders, whether in response to VISs or otherwise. The aim of this part is to identify a number of factors that singly or in combination might explain this finding.

First, sentencing hearings are highly structured legal proceedings, the nature of which does little to encourage or even allow meaningful apologies

⁷² Rock (2010), p 219.

and expressions of remorse from offenders to victims.⁷³ In the hearings observed, the oral VISs were read aloud as monologues to the court and did not generate discussion. Judges did not offer offenders the opportunity to respond to the deceased's family after the statements were presented. Nor were offenders provided with opportunities for face-to-face apologies or expressions of remorse directed to the family victims. In those hearings where the offender did offer a verbal apology to the family victims during the hearing (4 and 11), the apologies were mediated by legal representatives, facilitated by the question-and-answer format of oral evidence. Oral evidence is an interaction between the offender and defence counsel for the benefit of the judge to evaluate the offender's credibility. Thus the expressions of remorse were not offered to the victims in the dyadic relation envisaged by Tavuchis, whereby apologies are made directly to the injured party;⁷⁴ instead, the family victims sat behind the business of the hearing with the public.⁷⁵

Second, it might be inferred from the progress of the case that the offender is not sorry at all. In the hearings observed, the conduct of defence cases was more geared to leading evidence of offender-focused remorse because this was what might reduce the severity of the penalty to be imposed, and in homicide cases where potential penalties are harsh, the stakes are high for offenders. Consequently, offender accounts of defence, justification and/or excuse put forward to reduce culpability (and thereby penalty) are unlikely to establish conditions for a meaningful apology to family victims.⁷⁶

Third, the formal and intimidating nature of the courtroom environment might also constrain emotional expression on the part of offenders.⁷⁷ Offenders might lack the personal skills necessary to communicate an apology or remorse to family victims. They might be embarrassed, inarticulate, lack confidence, lack support and/or fear humiliation.⁷⁸ In hearing 12, for instance, while the court accepted that the offender was remorseful, it is likely that his intellectual disability and lack of proficiency in English would have severely hampered his ability to offer express to the deceased's family, even if he had wanted to apologise.

It also might be the case that some offenders did not experience feelings of remorse or empathy in response to VISs. While there is a lack of research regarding offenders' emotional responses to VISs, studies in relation to offenders' emotional responses to victim impact training programs have been done in the United States.⁷⁹ Victim impact training programs (VITs) are

⁷³ Bibas and Bierschbach (2004), p 12; see also Szmania and Mangis (2005), p 341.

⁷⁴ Tavuchis (1991), p 49.

⁷⁵ See also Bibas and Bierschbach (2004), p 53.

⁷⁶ Tavuchis (1991), pp 17–19.

⁷⁷ Szmania and Mangis (2005); Bibas and Bierschbach (2004).

⁷⁸ Szmania and Mangis (2005), pp 340–1.

⁷⁹ Jackson and Bonacker (2006).

designed to teach offenders about the impact of crime on the victim and wider community.⁸⁰ Participation by victims and victim service providers is a key element of the programs. VITs aim to generate emotional responses in participating offenders so that those offenders feel guilt, remorse and shame for their behaviour. It is anticipated that such emotional responses may cause the offender to develop some level of empathy, and thus be less likely to reoffend.⁸¹ Jackson and Bonacker conducted a study of the emotional impact of victim impact training programs in a US jurisdiction on adult offenders on probation or parole. They found that the ten-week course had little or no effect on the development of the offenders' emotional responses and, furthermore, if there was a response, female offenders were more likely to develop an empathic response than their male counterparts.⁸² Extrapolating from these findings, VISA may not produce the desired emotional impact on many offenders.

Finally, a complicating factor in the context of homicide cases might be a pre-existing relationship between the deceased's family and the offender, the nature of which could obstruct adequate and/or genuine apology. In at least six matters observed, prior to the killing the family victims and the offenders had been in family relationships and the obvious antipathy between the parties – particularly in hearings 10 and 13 – was such that an apology would have been unlikely in ordinary social circumstances.

Is Victim-Focused Remorse a Virtue in Sentencing Hearings?

Although for Roberts and Erez the potential for victim-focused remorse is a positive aspect associated with VISs, scholars have pointed out that many of the claims made in relation to apologies in both restorative justice and criminal justice settings have not been tested.⁸³ The findings of this study also raise a question about whether, in fact, victim-focused remorse in the context of homicide sentencing is indeed a virtue for victims. This section will explore, first, the constraints on the adequacy and sincerity of victim-focused remorse in the sentencing hearing and, second, whether the demonstration of such remorse is appropriate at this stage in the context of homicide.

Apologies are such complex and fragile processes that adequate and/or genuine apologies are 'difficult to achieve', particularly in the event of criminal harms.⁸⁴ Merely saying 'I'm sorry' is unlikely to be sufficient or perceived as sincere in the context of more serious wrongs.⁸⁵ Murphy argues:

What works for small wrongs is likely to be unacceptable for wrongs of greater magnitude, however. For grave wrongs, we – both victims and spectators – normally expect more ... something more than mere

⁸⁰ Jackson and Bonacker (2006).

⁸¹ Jackson and Bonacker (2006), p 30.

⁸² Jackson and Bonacker (2006), p 319.

⁸³ Stubbs (2007); Petrucci (2002).

⁸⁴ Daly (2011), p 46; see also Murphy (2006).

⁸⁵ Murphy (2006).

apology. We expect such things as repentance, remorse ... and atonement; and we are generally interested in apologies only to the degree that we believe that there are sincere external signs of repentance and remorse and reliable indicators of future atonement.⁸⁶

Similarly, in a restorative justice context dealing with serious offences, Shapland and colleagues found that more was required from the offender to convey meaningful remorse than just the word 'sorry'; in their view, the offender's remorse should be 'backed up' by actions showing the offender is acting to change their life.⁸⁷

According to Szmania and Mangis, 'given the restriction of the courtroom context both procedurally and interpersonally', even if the offender does attempt to communicate an apology or remorse, 'the effort will likely to be incomplete or inadequate'.⁸⁸ Consistent with this statement, Coral and Sharon, the two interview participants who received apologies in the sentencing hearing, expressed contempt and anger that the offender had apologised at all, and neither considered the apology genuine. Coral was told that because the Crown had accepted the offender's plea to manslaughter, the offender had to apologise to the family for what he had done. Coral admits she had no interest in what the offender had to say, but thought 'I'll kick myself if I don't listen'. As she listened to his apology, she thought 'Bullshit, how dare you insult us more!' Likewise, Sharon was scathing about the offender's apology offered in evidence: 'To have him sit across in his little box and say sorry ... I said sorry is not good enough, I said bullshit. I was angry.'

Neither Coral nor Sharon accepted that the apologies offered by the offenders were genuine in the circumstances. Similarly, the reactions of family victims in hearing 11 (discussed further below) also suggested that they doubted the sincerity of the apology offered by the offender. While there is little research in relation to apologies from offenders to victims in a sentencing context,⁸⁹ recent studies have addressed this issue in the context of restorative justice schemes. Daly's study of two Australian restorative justice schemes found that victim and offender participants interpreted each other's words and actions differently.⁹⁰ While over 60 per cent of the participating offenders said their apology was genuine, only 30 per cent of those apologies were regarded as sincere by the victims. In an evaluation of three restorative justice schemes in England and Wales, researchers found that apologies from offender were common, but 'immediate acknowledgment by victims that they accepted the apology was rarer' because in the context of serious offences more is required of the offender than just words.⁹¹ Following a review of conflicting studies relating to the

⁸⁶ Murphy (2006), p 371.

⁸⁷ Shapland et al (2006), p 514.

⁸⁸ Szmania and Mangis (2005), p 356.

⁸⁹ Szmania and Mangis (2005); though see Strang, (2002), pp 18–19.

⁹⁰ Daly (2005), p 223.

sincerity of apologies, Dignan concludes that ‘there are limits on the victim’s willingness to see offenders in a positive light’.⁹²

In the context of homicide sentencing, it is contended that family victims are more likely to be sceptical and less willing to see the offender in a positive light. First, given the nature of sentencing law, victim-focused remorse could be perceived as self-serving, motivated by a desire to mitigate penalty rather than sincere regret or sorrow for the harm caused to the deceased’s family. In the hearings observed, victim-focused remorse was linked to submissions regarding mitigation of penalty which could have reinforced such an impression. Moreover, it is likely that the conditions established by the progress of the cases worked against the family victims accepting the victim-focused remorse as adequate and/or genuine. In three of the matters (4, 11 and 18), the offenders had sought to shift some of the blame for the killing to the deceased, and in hearing 7, evidence of particularly negative remarks made by the offender about the deceased was presented to the court. In such circumstances, the words ‘I’m sorry’ without additional evidence of remorse or atonement⁹³ are likely to be viewed as self-serving rather than sincere. Certainly the court was not satisfied that the offenders were genuinely remorseful in hearings 4 and 7, and doubt was cast over the adequacy and sincerity of the offenders’ expressions of remorse in hearings 11 and 18 (see Table 1 above).

The delivery of victim-focused remorse in the sentencing hearing through intermediaries is also likely to be inadequate, and militate against a belief that the apology is sincere. According to Tavuchis, it is not possible to ‘delegate or consign’ an apology without altering its meaning,⁹⁴ and for Daly an important aspect of a sincere apology is ‘a genuine display of regret and sorrow’.⁹⁵ Because neither offender in hearings 7 or 18 presented their evidence of victim-focused remorse orally to the court, there was no personal display of regret or sorrow that could be evaluated by the family victims. Even though the offenders in hearings 4 and 11 *did* express their victim-focused remorse in oral evidence, that evidence was not directed to the family victims, who sat behind the court in the public gallery. There was no face-to-face interaction between the offender and victim that Tavuchis argues is so important for a genuine apology.

Thus, in the hearings observed, while the subjective opinions of the family victims are not known, the findings suggest that the victim-focused remorse offered by offenders was regarded with the same degree of scepticism as was shown by Coral and Sharon. Certainly none of the family

⁹¹ Shapland et al (2006), p 514.

⁹² Dignan (2007), p 321.

⁹³ Additional evidence in these circumstances might be contributing to the costs of the deceased’s funeral or offering the deceased’s family an apology in accordance with particular cultural mores outside the court. For an example, see *R v Veatufunga* [2007] NSWCCA 54.

⁹⁴ Tavuchis (1991), p 49.

⁹⁵ Daly (2011), p 46.

victims indicated that they accepted the apology from the offender; the family victims in hearings 4 and 18 cried quietly in the public gallery and the deceased's family looked down in hearing 7. In hearing 11, where the offender also cried as he said how sorry he was, the deceased's family sat dry-eyed and stony-faced in the public gallery, giving the appearance of rejecting the offender.⁹⁶

This discussion raises the final issue as to whether victim-focused remorse is indeed something even sought by family victims in the sentencing hearing. Studies of victim satisfaction with VISs do not appear to have reported on the issue of victim-focused remorse in the courtroom.⁹⁷ The family victims interviewed in this study did not raise victim-focused remorse as an important issue for discussion, nor did they appear generally interested in apologies or other expressions of remorse from the offender. Laura, one of the few interview participants who talked about remorse (and also observed in the courtroom), said that if she had looked for remorse from the offender and it was not forthcoming, she would have felt worse:

As far as I'm concerned he probably did not feel any remorse or anything like that. If I appealed to him and I don't see any signs of remorse it will only make it worse so I was of the opinion that I wasn't going to appeal to him; as far as I was concerned, he was nothing to me.

Turning to research in the restorative justice context, although Strang argues that victims want an apology from offenders,⁹⁸ there are studies that suggest receiving an apology is not a major reason for victims to participate in a restorative event.⁹⁹ Umbreit and colleagues' study of participation of victims of serious violent offences (including homicide) in US victim-offender schemes looked at reasons why victims chose to participate in the programs. At the top of the list was the desire for information and answers (58 per cent) and the second most important reason was wanting to show the offender the impact of the offence (43 per cent); only 18 per cent wanted to know whether the offender was remorseful (18 per cent). While these findings show that some victims of violent crime are interested in communicating with the offender, it does not show how important – if at all – an apology from the offender might be. Thus on the basis of this research and interview findings, it might be inferred that family victims are not necessarily looking for an apology or victim-focused remorse at the sentencing hearing.

Furthermore, Tavuchis argues that there are 'apologetic thresholds' whereby the heinous nature of an offence takes it beyond the purview of

⁹⁶ Tavuchis (1991), p 23.

⁹⁷ I have been unable to find any mention of apology or offender remorse in the review of the existing research relating to VISs by Roberts and Manikis, or in specific studies including the recent report from the Victim Support Agency (2009).

⁹⁸ Strang (2002), p 19.

⁹⁹ Dignan (2007), p 320; Umbreit et al (2006).

apology.¹⁰⁰ While it is not suggested that homicide offences are necessarily so heinous, it may be that the sentencing hearing is not the appropriate forum for expressions of victim-focused remorse. Studies have shown that the legal processes can be disheartening, alienating and require significant energy from crime victims, and these experiences could only be exacerbated in the context of homicide (Rock 1998). At the time the hearings were observed, the killing was still a relatively fresh event and, as they presented their VISs, it was clear that most of the family victims were still grieving and angry, and arguably not ready to hear any expressions of remorse from the offender. For example, in hearing 11 the deceased's sister told the offender:

I am sure there has been a hideously high price paid to secure what you [offender] would see as a favourable verdict for you in this murder trial.¹⁰¹ These are tremendous debts that I myself feel you [offender] are responsible and accountable for. In my eyes, you have not in any shape or form, even begun to pay for these debts.

In the same hearing, the deceased's mother made it quite clear that she was not interested in an apology: 'Your actions are beyond my comprehension, and I will never condone or forgive such an atrocity.'

Research of predictors for participation of victims of violent offences (including homicide) in US victim-offender reconciliation programs suggests that the more time that has passed after the commission of a violent offence, the more likely it is that victims of those offences will participate.¹⁰² In a study of victim-offender mediation programs in two US states, the researchers found that many victims 'who would never have considered such a meeting in the immediate aftermath of the crime changed their minds over the years'.¹⁰³ Because victims of violent crimes are not usually looking for material compensation, Umbreit et al argue that the time lapse is important because victims of violent crimes go through stages of coping and may not be ready to face the offender at an early stage. Although it is impossible to generalise about the needs of family victims, drawing on Umbreit et al's research and the findings of this study, it is suggested that the sentencing hearing is probably too soon in the grieving process for the family victim to be receptive to victim-focused remorse from the offender.

Conclusion

It has been claimed that disclosure of victim suffering as a result of crime through VISs has the potential to produce an emotional response in offenders that creates an opportunity for offenders to express remorse and apologise to crime victims in the sentencing hearing. Furthermore, it is implicit in this claim that the incidence of such victim-focused remorse is a

¹⁰⁰ Tavuchis (1991), p 21.

¹⁰¹ In this case, the offender was acquitted of murder and convicted of manslaughter on the basis of excessive self-defence.

¹⁰² Wyrick and Costanzo (1999); Umbreit et al (2006).

¹⁰³ Umbreit et al (2006), p 45.

virtue and positive restorative element of VISs. Drawing from an analysis of data generated by observation of eighteen sentencing hearings in the New South Wales Supreme Court and supplemented with interviews with fourteen family victims, this study has produced valuable insight into the incidence and nature of offender remorse in the sentencing of homicide offenders and the 'restorative' elements of VISs in this respect. The study findings reveal that, contrary to claims made by scholars, VISs did not appear to generate victim-focused remorse in most cases and in fact, other than one case (hearing 11), offenders appeared largely unresponsive to the statements generally. Consistent with research, it is likely that the form and processes of the sentencing hearings observed, as well as the nature of the subject offences, did not support an environment that encouraged the expression of sincere victim-focused remorse.

The study findings also suggest that in any event, expressions of victim-remorse may not be the virtue envisaged by Roberts and Erez, at least in the context of sentencing homicide offenders. The fragile and complex nature of meaningful apologies means that the form and nature of sentencing hearings and the timing inevitably constrain the making of both adequate and sincere apologies. Studies of participation of victims in restorative practices outside the courtroom suggest that it may be that victims are not looking for an apology from the offender and/or that the sentencing hearing is too soon. In light of claims relating to the 'restorative value' of VISs, this is an important area for future research. Such research should consider utilising courtroom observation, a data source that has been little utilised in this field, and perhaps more controversially, seek the perspectives of the offender whose voice has not been yet heard with respect to this debate.

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