

The Mental Impairment Process: Where is the victim?

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In South Australia there are two broad options for a matter to proceed in relation to mental impairment for a major indictable offence. Briefly in lay people's terms, the two processes are to establish 1. whether a person was mentally competent to commit an offence and/or 2. whether a person is mentally unfit to stand trial on the charge of an offence. In addition, the objective elements of the offence must be established, that is there is evidence that the crime was committed by the accused. When this is the case, the court must then find the defendant not guilty of the offence but declare them liable to supervision.

There are procedural differences between states, and also between court jurisdictions but we will not be exploring these differences. This paper will focus on the mental impairment court processes within the South Australian criminal jurisdiction. We will focus on two specific case studies where the offence was murder and the accused were both found mentally incompetent to commit the offence, and mentally unfit to stand trial. In both cases the objective elements of the offence were established.

The criminal legal process can be a complex and traumatic experience for many victims. The South Australian Declaration of Principles Governing the Treatment of Victims in the Criminal Justice System goes some way to assist victims to have a meaningful role in the process. Our experience has shown that the complexities and trauma faced by victims are further intensified by some significant procedural differences within the mental impairment court process. This can lead to a diminishing sense of rights and the potential for re-victimisation.

The three key differences we will focus on are;

1. The focus of court proceedings
2. Abstract notions of guilt
3. Next of Kin reports

Setting the scene

Joan and her son Mark

On a spring afternoon in 2005, Mark Saunders was at a friends house after a night out. Mark was in the company of a close friend Anne, and two of her acquaintances. At 3:40 pm, Mark went outside with one of the acquaintances, James Ridley. Once outside, James Ridley assaulted Mark with a length of timber located at the scene. At 3:50 pm, Anne also went outside and found

Mark lying on the ground, bleeding from the head. James Ridley then stated to Anne 'I just killed Mark, I thought I was meant to'.

Mark was conveyed to the Royal Adelaide Hospital by ambulance and was pronounced dead at 7:10pm. The cause of death given was severe blunt force head injury. James Ridley was immediately arrested and charged with murder. He was subsequently diagnosed with paranoid schizophrenia. After 22 months of court proceedings, James Ridley was found unfit to stand trial and was pronounced not guilty of murder based on mental incompetence. He was declared liable for supervision under the Criminal Law (Consolidation) Act for the rest of his life.

Mark Saunders was a 37 year old male. He was an artist, art collector and dealer by trade. Mark was the youngest of 5 children, and was a twin. Mark shared an intense, close bond to his mother Joan, as they shared a passion for art.

Joan began accessing support from a counsellor at Victim Support Service (VSS) approximately a month after the murder of her son to assist her to manage with the devastating impact of the crime.

Donna and her ex husband Dale

Dale Smith had recently purchased a bushland property in the South Australian Riverland where he was hoping to develop a marron and yabby farm. He had previously moved around the state for many years, working as a builder and craftsman in wood. He generally made his home where his work took him. He maintained close, albeit sporadic, contact with his ex wife Donna, their 5 adult children and Donna's partner. Donna remained Dale's main support person and source of stability. He had experienced many difficulties in his life and had developed empathy for the underdog. His general philosophy was to help people out and try to provide sanctuary to those who struggled to live in the mainstream world. On his property he often provided free lodgings to passers by. Dale had offered this support to Alan Brown when he came to the area after being contacted by an acquaintance who asked Dale if he could help.

In September 2001 Alan Brown attacked Dale with a knife. He stabbed him in the chest resulting in massive haemorrhage and death. Alan Brown then covered Dale's body with a sleeping bag and dragged him into the bushland. Friends of Dale's became concerned when they had not heard from him and his dog and car were still at his home. They eventually contacted a local Police Officer, who went to Dale's property and found Alan Brown. After a short time questioning him, Alan Brown eventually confessed to the police officer he had killed Dale. Upon the discovery of fire equipment, the police officer deduced that Alan Brown intended to burn Dale's body.

Alan Brown was found to suffer from chronic paranoid schizophrenia and was in a florid state at the time he killed Dale. His condition had been present for at least 6 years prior (presumably much longer) as he had been previously

detained under a supervision order for committing a serious assault. It might be worth noting that during the proceeding regarding Dale's murder, it was mentioned that "the forensic psychiatrists were critical that no effort was made, it seems, by the Mental Health Service to ensure, or try to ensure, continuing medication of [Mr Brown] after he was released" (*transcript of court proceedings.*) This went on to be the subject of a Coronial Inquest, the outcome of which unfortunately moves too far outside the focus of this paper.

In early January 2003 Alan Brown was found not guilty of murder and declared liable for supervision under the Criminal Law (Consolidation) Act for the rest of his life.

The focus of court proceedings

Generally, in a murder trial, the court will hear evidence that outlines some detail of the crime itself. The judge or jury will hear the facts in open court and will deliberate on whether they constitute grounds for a guilty or not guilty verdict based on the legal requirement of proof 'beyond reasonable doubt'. Where an offender pleads guilty, the court will again hear the 'facts' of the case in the sentencing process.

However, in cases of mental impairment, the court process is insular and almost irrelevant to the crime. The focus of the court proceedings is almost entirely on the mental state of the accused, not on the lengthy argument of the actual events of the unlawful killing.

Does that imply then that where a person was not accountable for their actions and was then found not guilty of the crime, that the killing was not **unlawful**? What subsequent effect does that have for the victims of that crime?

For Joan, it led to a watering down of the criminal act – the murder of her son, to merely an 'event or incident'. Joan only ever spoke of the crime itself as 'when my son died', rather than 'when my son was murdered'. She was never given the formal acknowledgement and validation which may be achieved through the examination of the facts – that the unlawful killing of her son had occurred. She was also never given the chance to identify with the meaning of the word 'murder', yet she knew that this was what had happened to her son. This had a significant impact on how she came to terms with her devastating loss as her grief was compounded further.

The process left Donna struggling to believe that it was actually Dale who had died unlawfully and did little to bring her to a sense of belief and reality of what had happened. Like Joan, Donna had little contact with Major Crime Detectives (as the case was clear) which resulted in minimal information about the objective elements of the case. The object elements of the case consisted of 3 sentences during the trial, which briefly described what had happened, naming Dale only once. She saw no physical evidence of his

murder and questioned 'is it really him?', 'what has actually happened'? The lack of reality of the situation resulted in Donna believing that she saw Dale out of the corner of her eye and she began to imagine the circumstances of his death to assist her to 'make it real'. She was not able to gain a sense of closure or finality that many other victims describe through the court process. The first real sense of reality came for Donna when she was finally able to read the reports after the trial was completed. She then with collaborative support from her VSS counsellor and Witness Assistance Officer, viewed some of the crime scene photos; a distressing yet comforting experience for her.

How can there be an appropriate balance created between the needs of the victim and the needs of the offender within the focus of court proceedings? That is, a balance between the exploration of the mental competence of the offender and an exploration of the objective elements of the case within an open court forum, for the purpose of public and personal validation and acknowledgment for the victim.

Given the limited focus on the actual crime throughout this process, the understanding of why and how this process occurs becomes paramount for the victim. Throughout both of these cases, the role of collaboration between agencies supporting victims and agencies working within the legal system is essential. The need to be informed is crucial for victims of crime given their inherent alienation throughout the mental impairment process.

Donna was unaware of any support services available to her and her family until almost 12 months after the murder. During this time, she regularly waited around the court house, hoping to find someone who could give her some information about the case. This left her feeling excluded, isolated and very confused about the actual court processes. Accessing an appropriate victim support counsellor assisted her in managing the trauma. Carefully considered supportive counselling that acknowledged her feelings of exclusion within the complex court process, and allowed her to address her feelings of disbelief and lack of reality of the situation was essential. Donna's counsellor also acted as a catalyst for activating other useful resources to enable her to gain an understanding of the process she was participating in.

Complex legal information which is difficult to grasp in normal circumstances, must be broken down into understandable terms particularly when explaining them to a highly traumatised victim. It may take a number of times for information to be adequately processed by a victim, given they are trying to process so much of their grief at the same time. When agencies work together to find ways to take into account the complexity of the information and the particular trauma responses which impact on a victim's ability to process information, this task can become somewhat easier as evidenced by Joan's counsellor and Witness Assistance Officer on a number of occasions.

Collaborative working arrangements can also allow for containment of how and when information is delivered to victims. From our experience as victim

advocates, this is essential. The impact of crime can result in victims feeling overwhelmed and out of control. Something as simple as having a choice in the time and place to receive information can have a profound effect.

For Donna, it was difficult for her to receive information over the phone as this was how she was informed of Dale's death. Phone calls relating to the court proceedings became a significant trigger point for Donna's trauma. Given that, arrangements were made that information would be written, and then discussed in a meeting if required. To help alleviate her trauma, it was also agreed that her VSS counsellor would be notified when information was going to be relayed to enable the extra support needed for Donna. This process was extremely helpful for Donna.

Collaborative working relationships enables workers to share important information (with the appropriate consent) whilst not putting the victim in the position of having to repeat their story or experience or to explain their current needs. This inevitably provides for a safer environment for the victim.

Should victims going through the mental impairment process have the automatic right to clear legal information and to be systematically made aware of support services? Victims would then have the right to choose not to engage in these services, rather than try to find their way through the maze of confusion on their own. Certainly this would assist to minimise the further re-victimisation experienced by some.

Abstract notions of guilt

As previously stated, where the offence is murder and the accused is found mentally incompetent to commit the offence and/or mentally unfit to stand trial, and the objective elements of the offence have been established, then the court will find the defendant not guilty of the offence but declare the defendant to be liable to supervision. This was the case for both Joan and Donna and this further complicated their experience.

Joan expressed an overwhelming need for 'somebody to take responsibility' for the murder of Mark directly after his death. She felt that the court outcome effectively relinquished James Ridley from this formal responsibility and therefore left Joan and her family without a sense of accountability taken for the murder of her son. It was never disputed that James Ridley had committed the crime, or that Mark was deceased as a result, yet James Ridley was pronounced not guilty of the offence.

The victims – the family and friends – need an opportunity to voice the impact of their loss. Such an opportunity would be society's mark of recognition that a life has passed and was taken through violence. For Joan, rather than having the opportunity for public recognition of the mental anguish she and her family have suffered as a result of the murder, she was left without acknowledgement. Joan was subsequently left feeling very confused, with a strong sense of injustice and anger at the system.

This can be one of the most difficult concepts that victims grapple with. For there to be 'guilt' there must be 'intent' and for there to be 'intent' there must be mental capacity to have 'intent'. There is no disputing this requirement. Yet are there ways for the mental impairment court to acknowledge that a person has been killed at the hands of another? The courts can provide a public forum for 'justice' and it is seen by many victims as the one legitimate place where such things are addressed.

On hearing the court outcome (not guilty of the offence) both Joan and Donna described their difficulties coming to grips with the concept of not guilty and finding a sense of justice. Both asked; where is the accountability and who then is responsible for the crime? Joan knew James Ridley would never have her son's murder on his record, when in actual fact, he had carried out the killing. Reconciling this was extremely difficult for Joan.

For Donna the court process was short and impersonal, and the finding of not guilty meaningless. Who was then guilty of stabbing Dale to death? This outcome provided no recognition by the courts that someone had died unlawfully. Donna felt this outcome then relieved the offender from any future sense of accountability. Both Donna and Joan talked of the need for the offenders to work toward some recognition of what they had done. Hopefully, whilst under supervision, and receiving appropriate medication for their conditions, they would realise the devastating impact of their actions when unable to manage their mental health.

Donna felt she was forever connected to Alan Brown. He had unwelcomely become part of her family. She could not think of Dale without thinking of Alan Brown. Did he think of her family? She had no access to information about him, or his treatment. She asked to have some report on his progress but was denied any detailed information. On the surface this seemed understandable. What about Alan Brown's privacy? But it begs the question as to whether this is reasonable. Alan Brown was not accountable for his actions at the time he was in a florid state, but now that this was contained and he was seeking relaxation to his supervision conditions, was it not reasonable that he should bear some accountability to the victims of his crime? Legally he was not guilty of the crime, but could he feel remorse? Donna would never be allowed to know.

Next of Kin report

An important enhancement of victims rights was the introduction of Victim Impact Statements in the sentencing processes. These statements allow victims to provide either a verbal or written submission to the judge, and the broader court, regarding the impact of the crime on their lives. Victims are able to use their own words to express their feelings. Many victims describe this as their first and only opportunity to be heard in court and acknowledge the importance of this as the judge takes their words into account when sentencing the offender.

In the mental impairment court process, victims can participate in the Next of Kin reports as requested by the judge as part of 'dispositions of persons liable for supervision'. That is, after the defendant is declared liable for supervision, and whenever there is an application for variation or revocation of supervision. A third party (Forensic Mental Health social worker) is required to prepare and present a single report for the court on behalf of both the victims and offenders' next of kin.

Joan and her family met with the forensic social worker to compile their Next of Kin report. Whilst the impact of the crime on each family member was well captured, it represented a structured, formal and depersonalised account of the impact of the crime. The sense of emotional connection and personal ownership of the contents of the report was lost for Joan. The completed report was simply handed over to the judge and did not receive any public acknowledgement or validation within the courtroom. This acted as a final point of silencing for Joan.

Donna had similar concerns and reactions to the lack of ownership and emotional connection throughout this process, although her experience of the Next of Kin report was not so orderly. Donna was not approached to contribute to a report at the point of setting supervision conditions, as was Joan's case. There was confusion about the Next of Kin report process from within the Office of the Director of Public Prosecutions itself. Initially Donna was told she and her family would need to complete a 'Victim Impact Statement' and was then subsequently told the report might not be required. A time was set for her to meet with 'someone' to prepare what was still being referred to as Victim Impact Statement. Finally the meeting was cancelled and Donna was told her contribution would not be needed as the matter was one of mental impairment, Alan Brown would be found not guilty and there was subsequently no place for a Victim Impact Statement within the process. Donna still remembers the 'rollercoaster' of emotions this process caused. Eventually she and her family were not afforded the opportunity to provide information for the Next of Kin report that they were entitled to at the time of the trial.

Donna was however, approached when the offender wanted to vary his supervision conditions. She and her family were informed with very little notice and this resulted in a sense of rushing and no control over her participation in the Next of Kin report. Donna found herself confronted by having to discuss the impact on her and her family over the phone, without time for preparation and with someone she had never met. This was the way she first heard of the death of Dale; a phone call out of the blue.

On the second occasion where Alan Brown applied for variation to his supervision conditions, Donna was required to meet the person writing the report at Glenside Mental Health facility, the place that Alan Brown resided. The potential re-traumatising impact of that event was unfathomable. Donna felt the system that was responsible for not providing Alan Brown with the

support he needed not to commit this crime in the first place, the Mental Health System, was now guardian of him again. It was this very system that acted as the gate keepers between her and her ability to be 'heard' in the continuing proceedings regarding variation to supervision conditions.

The Next of Kin report is the one opportunity victims have to be involved in the process and to be 'counted' in the decisions that are made. Why are these reports prepared by the people who are administering the offender? How appropriate is it that people should be expected to speak about their views and their feelings to someone they have never met? How must it feel to have a third party who has no connection or relationship with them, to then represent their thoughts and feelings at this important time? Donna's experience specifically demonstrates how inappropriate this can be. In both instances the short time frame meant she did not have an opportunity to see what was written until after the court hearing. She struggled to have faith in the outcome given the traumatic process she was put through in compiling the reports. She was left feeling unsure as to the purpose of the reports and how they would be used.

In Joan's situation her counsellor and the Forensic Mental Health social worker negotiated to have the Next of Kin report sent to the counsellor so that Joan was able to read the report (before court) in a quiet and supportive environment. Joan was then able to request that amendments were made through her counsellor before the report became a formalised court document. How different this experience was to what Donna had to endure. These inconsistencies highlight the need for clear processes which offer options to victims in the first instance, which can then be declined by the victim if not required. This shifts the emphasis from the reliance on the particular awareness and professional knowledge of the workers involved at the time. These safeguards should be a right rather than a request by victims who are in a situation where they are already overwhelmed and potentially confused.

Victims should be given the opportunity to prepare these reports with the assistance provided by a victim support representative (if requested) in a timely and appropriate manner and in an appropriate environment. Joan's victim support counsellor was able to request that the worker preparing the victim Next of Kin report attend the home rather than providing an interview over the phone. Joan's trauma and grief would have significantly impacted on her ability to engage in the required processes. Therefore information was also provided regarding length of time required for the interview, and other potential barriers to effective communication. In this way, the counsellor was able to contain the potential level of re-victimization throughout this process.

Donna struggled with the very term "next of kin" as it was the same term used for Alan Brown's family. Similarly Joan felt further ostracized by the collaborative representation of the impact on both the victims and offenders family within the same document. These feelings were further exacerbated when James Ridley's family were supplied with a full copy of the report by the defence counsel, whilst Joan and her family were only able to view the

sections pertaining to their own impact. What further compounded the trauma experienced by Joan was that she seemingly was not afforded the same rights as James Ridley's family.

There was little said to Joan or Donna about their right to be heard directly or through their own legal representation, in the proceedings. In Donna's case, the Judge made clear mention, after being informed she was in the court at the time, that this was her right. The process, timing and potential cost made this option feel impossible.

Is there therefore a place for a legislated victim's representative, such as a Commissioner for Victims' Rights, to assist where victims feel they would benefit from representation in this process?

At the very least, clear information about purpose, guidelines about process and choice as to how to complete these reports should be mandatory. The title of the Next of Kin report should be changed to reflect the distinction between victim and offender families' impact statements as this is a further source of confusion and potential insult for victims. These statements should not be a combination of affects for both parties but an individual account. This would assist victims like Joan and Donna to feel that they, and the death of their loved one, received some personal acknowledgement in the system.

Conclusion

There are currently legislative amendments proposed within South Australia that may go some way to lessen re-victimization within the mental impairment process. Current proposals include the incorporation of these victims into the existing victims register currently operational through the Department of Correctional Services. This would mean that victims would be formally and routinely notified each and every time an application to vary a supervision order occurs. This may minimise the trauma experienced by victims such as Donna from the adhoc and disorganised ways of contacting (or not contacting) her at times of supervision revision for the offender. It may offer victims peace of mind and work towards rebuilding a sense of trust in the system by consulting with victims and keeping them informed.

Current amendments also propose that all registered victims can subsequently nominate a third party as a contact point for information about the offender. Certainly this would ease the pressure on victims such as Donna and Joan to be prepared at anytime for contact without warning. It would also enable information to be received on behalf of the victim by someone who could translate the information to the victim at an appropriate time and place, thus preventing further re-victimisation.

However, these legislative amendments are not comprehensive enough to address the additional sources of re-victimization outlined in this paper. Many of these issues would not occur if there had been clear processes in place which would enable consistency, regardless of an individual's particular

understanding or interest. Where there was opportunity for processes to be informed by an understanding and acknowledgement of the victims experience, it was possible for victims to have a meaningful experience in this system. Donna expressed uncertainty about what it meant that Alan Brown would be 'in' a mental health facility and whether she could feel safe, given the recent media reports of people walking out of some mental health wards and committing crimes. She and her victim support counsellor decided it might be useful to speak with the forensic social worker and visit the facility where Alan Brown would reside. This proved to be an extremely important meeting for Donna, enabling her to feel safe, and to gain first hand information about the process. She was also able to begin a relationship with the person who would be writing the Next of Kin reports on her behalf. This had a significant impact on Donna. For a period of time she had some sense of 'faith' in the system, albeit time limited. Yet this had to be requested and negotiated by the victim. Rather, it should be an automatic right that the victim can then choose not to engage in if preferred.

For victims like Joan and Donna, when justice and counselling agencies worked together to comprehensively support them in the process, it contained any further trauma caused by the system. Yet for Donna she was without this support for much of the time. There must be clear processes that ensure victims like Donna do not fall through the gaps in the system. We would suggest that it is important for victims to be automatically offered appropriate supports, which they can accept or deny.

The rights that currently exist for victims in this system, such as representation in the variation for supervision order hearings, must be made available in a routinely accessible way, regardless of resources. These victims must at least have the same rights as other victims to be heard in court in their own words and to be able to utilise what ever supports necessary to enable them to access this right.

Finally, how can the courts acknowledge that victimisation has occurred? This public forum serves many purposes in our society. It offers a measure of what is, or is not acceptable and provides public accountability when a crime has been committed. It enables public acknowledgment of victims' trauma, mental anguish and grief. For Joan and Donna, this was not the outcome. How can we find ways for the courts to afford them the same opportunity as any other person whose loved one has been unlawfully killed at the hands of another?

** For the purpose of this paper, the names of all parties have been changed. Signed consent has been obtained from the clients of Victim Support Service involved.*