

Victims' Mitigating Views in Sentencing Decisions: A Comparative Analysis

Annette van der Merwe* & Ann Skelton†

Abstract: This article explores the arguments for and against victims' mitigating opinions on sentence. It describes a recent South African appeal case, compares it with a similar New Zealand appeal court judgment, and then investigates the legal position in England and Wales. It appears that, as a general rule, victims' recommendations as to penalty must be avoided. However, unlike in South Africa and New Zealand, the jurisprudence in England and Wales has developed exceptions in this regard when certain categories of victims request a more lenient sentence. Several case studies from England and Wales reveal that, through considering the harms and needs of victims and ameliorating the sentences accordingly, a restorative justice approach is blended with a just deserts requirement for the protection of lower limits in sentencing. This ensures that the principles of proportionality, certainty and consistency are still adhered to. It is concluded that, had the South African court taken proper cognisance of these comparative legal developments, it would, at very least, have created a better precedent by providing guidelines to inform the complex, but important, process of considering victims mitigating opinions in the sentencing process.

Keywords: just deserts, restorative justice, victim impact statement, victim's mitigating view in sentence

1. Introduction

The use of victim impact statements during sentencing is a widely debated issue. Nevertheless, it is currently part of sentencing practice in many jurisdictions and considered by some as a source of aggravating factors¹ and useful in understanding the true and total degree of harm inflicted by criminal acts.² In addition to victims telling the court about the impact the criminal event had on their lives and those of their families, they may on occasion wish to express their views on sentencing. Whether the victim impact statement should include the victim's opinion regarding sentence is a thorny issue, and there appears to be no consensus on this point. For example, in England and Wales³ and the Netherlands⁴ such a practice is generally discouraged while in the USA, most states allow presentations from victims in this regard.⁵ In South Africa the law provides no clear guidance on the issue of victims' suggestions on sentencing.⁶

It is usually assumed that the majority of victims will be vengeful, and that their views will have an aggravating effect on sentence. However, sometimes victims' opinions may have a mitigating effect. Should this make a difference to the admissibility of their statements, and if so, on what theorized basis? Arguments for and against the practice of allowing victims' opinions on sentence are presented in this article. Case law that grapples with this question from South Africa, New Zealand, and England and Wales is considered. These judgments are analysed against restorative justice and just deserts approaches. It is observed that while these paradigms are generally seen as competing, there is evidence of a blending of the paradigms in the case law examples.

2. Different Victims

The sentence is the culmination of the criminal trial and is perceived as symbolic of what the offender deserves as a punishment for his or her crime. Not all victims are interested in expressing their views on sentencing. Where they do wish to do so, they may differ dramatically in their attitude towards the nature and duration of sentence, depending on the type of offence, its impact on them, their own life experiences and their personalities. A vengeful victim may desire for the offender never to leave prison and 'live a life full of nothingness'.⁷ Such a retributive attitude is not, as a general rule, taken into account during sentencing decisions.⁸ The neutral victim, on the other hand, may be open to accept whatever sentence the court imposes and may thereby make the court's task easier.⁹ For a few victims it may be important that the sentence is mitigated and that the offender receive a non-custodial sentence. The cases discussed in this article indicate that this type of request is more often conveyed to court where the victim is or was in a personal relationship with the offender or within the same family. In a country such as South Africa, where there is no crime victim compensation scheme, the fact that the offender is the sole breadwinner, sometimes motivates such a request. Victims who are not punitive may also be open to restorative justice processes as part of the sentencing process or the sentence itself.¹⁰

3. Arguments For and Against Consideration of Victims' Opinions on Sentence

There are several arguments against including victims' opinions about sentence. The first argument is that criminal matters, unlike civil cases, are public cases that are dealt with in the name of the state. According to this view, the courts' power must be constrained by settled

principles that uphold citizens' rights to equal respect and equality of treatment.¹¹ It is thus not only the victims' interests that must be considered, but those of the broader society. Second, allowing such evidence might raise the expectations of victims, only for them to become more disillusioned with the criminal justice system where their recommendation regarding sentence is not followed.¹² Third, recommendations regarding a specific sentence may also be seen by the presiding officer to be inappropriate because the victim has no legal background or might simply be seeking revenge.¹³ There is a danger that in such a case the sentence could be 'skewed into an exclusively retributive mode' when the court relies on the vengeful victim's opinion of what the appropriate sentence should be.¹⁴ In addition, presiding officers might perceive such evidence as a way of dictating to them, thereby infringing on their sentencing discretion.

In response to the first of the above objections against a court considering sentence recommendations from victims, Hoffmann has pointed out that victims now rightfully occupy a special place within the criminal justice system.¹⁵ The development of a victims' rights movement, together with the concomitant rise in the theory and practice of restorative justice have shifted the debate.¹⁶ Since at least the 1970s when Niels Christie made his seminal statement that the state had 'stolen' conflicts from victims, there has been an increasing interest in providing victims a more significant role in the processes responding to the crime they experienced.¹⁷ The notion that crime is the sole domain of the state is being steadily reinvented to allow for victims' private interests to be considered part of a broader public interest in relation to criminal matters.¹⁸

With regard to the second criticism, that victims should not have their expectations raised only to be disappointed, research has shown that a victim's need for involvement fulfils an expressive rather than purely instrumental function, and that victims still submit statements even

if they do not think it will impact strongly on sentence.¹⁹ The statement may often relate to telling the offender that what he did was wrong and how the criminal act impacted on him or her,²⁰ or asking for some form of compensation.²¹ Further, in some cases, notably those involving more serious crimes, victims often experience a severe and on-going sense of loss of control.²² By providing them with ‘even a small degree of control over the defendant’s fate, it may be possible to help them to regain their sense of agency in general’.²³ Erez highlights that the victim movement aimed to overcome victims’ sense of powerlessness and to reduce the feeling that the system is uncaring.²⁴

In relation to the third argument, that victims know nothing about the law and may be seeking revenge, it must be noted that victims are not always punitive.²⁵ The argument in favour of allowing a victim to make recommendations to the presiding officer regarding an appropriate sentence seems feasible if such a practice is indeed qualified by a provision that the presiding officer is under no obligation to follow the recommendation.²⁶ Apart from providing clarity for the victim that it is the court’s responsibility to decide on sentence, this practice also contributes to minimising the perception that there is interference in the presiding officers’ sentencing discretion.

However, these arguments in favour of the victim’s opinion being considered in decisions about sentence do not provide a properly theorized approach. On what basis might courts disregard the vengeful views of some victims, whilst according some weight to the merciful views of others? An analysis of case law is instructive in this regard. In 2011 the South African Supreme Court of Appeal overlooked an important opportunity to provide a clearly theorized answer to this difficult question. Had the court taken into account some helpful jurisprudence from England and Wales, the resultant precedent set might have been different. The article now

moves on to consider the general approach to sentencing and to victim impact statements in South Africa, before discussing the Supreme Court of Appeal case.

4. South Africa

In general, South African courts have a discretion to determine the nature and extent of the punishment to be imposed for all offences. The application of this discretion involves making a choice with regard to the type and measure of the sentence imposed. This discretion may, however, not be exercised arbitrarily, and is controlled, first by statutory upper limits as well as, since 1998, discretionary minimum sentences prescribed by the Criminal Law Amendment Act 105 of 1997.²⁷ Despite the failure of the minimum sentence legislation to have the envisaged curbing effect on the prevalence of serious offences, sentences are nevertheless longer than they used to be. This legislation, in line with recommendations from the South African Law Reform Commission²⁸ and academic opinion²⁹ certainly signals retribution to be the main objective of punishment. However, it appears that South African courts, to a large extent, display a hybrid character in their sentencing practice in justifying legal punishment, blending deterrence, rehabilitation and occasionally, restorative justice measures into the mix.³⁰

In terms of the court's general power to receive relevant information during sentencing procedures, the state has always, particularly in rape and murder cases, had the option to submit impact evidence.³¹ In recent years precedent has encouraged the use of victim impact statements³² and during 2010 victim impact statements were statutorily introduced within the child justice context, but without any specific guidelines on their use.³³ The crime victim's right to provide information to the sentencing court is also highlighted in clause 2 of the Service

Charter for Victims of Crime in South Africa 2007.³⁴ The practice of providing information about the after-effects of a crime, has however, been criticised as being implemented haphazardly, leaving courts without the holistic picture of the crime and diminishing the victim involved.³⁵ Unlike the position in England and Wales, there is no practice memorandum on the use of victim impact statements, and this contributes to the current lack in uniform judicial approach.³⁶

As highlighted above, it is recognized contemporary practice in South Africa to allow for victim participation in the form of impact statements during the sentencing process. However, the victim who is non-punitive at the sentencing stage may find it difficult to make any meaningful contribution to the court's task of balancing conventional principles such as the seriousness of the offence and the community interest during the sentencing decision, particularly in serious matters. Restorative justice has been legislated in respect of child offenders³⁷ but not for adults. However, restorative justice for adult offenders has found application in some judgments.³⁸ The existing avenues for compensation for victims of crime have proved to be inadequate to address this issue successfully in court, except where the payment is made a condition of correctional supervision to be served in the community.³⁹ In a recent matter of stepfather rape the South African Supreme Court of Appeal in *DPP, North Gauteng v Thabethe*,⁴⁰ was confronted with the dilemma of how to handle the victim's request for a non-custodial sentence based on the fact that the offender was the sole breadwinner of the family.

The facts of the case were that a girl who was just a couple of weeks away from her 16th birthday was fetched by her stepfather after she had been away from home without permission. On the way home, she asked her stepfather not to tell her mother that she had been at her

boyfriend's house. He coerced her into sex in return for keeping her secret. The next day she reported that she had been raped. The stepfather admitted the offence, which is considered a very serious one because rape of a child below 16 years of age carries a minimum sentence of life imprisonment.⁴¹ The fact that it carried a minimum sentence, at the time, required the oversight of a High Court.⁴² Mr Justice Bertelsmann was presiding, and he was struck by a remark made by the victim of the crime (18 years old by the time of the hearing) that she did not want the offender to go to prison. Although she still felt hurt by the fact that she had been subjected to rape by a man she had trusted, she was no longer afraid of him and had in fact, at some point after the offence, returned to live in the same household with him and the rest of the family. She requested that he should not be sent to jail because the entire family depended on his income. One of the siblings was ill and he was paying for the medication. Bertelsmann J referred the matter to a probation officer and asked that she facilitate a victim-offender conference between the victim, her mother and the stepfather. The victim-offender conference results were positive. The probation officer reported back to court that the victim was satisfied that the offender used the programme effectively to apologize for what he did to her, that she had accepted the apology, and that she would accept any sentence the court might give though her wish was not to see the offender sentenced to imprisonment.⁴³

Under South African law, a minimum sentence is not mandatory, but substantial and compelling circumstances must be present for a court to depart from the prescribed measure.⁴⁴ In his judgment, Bertelsmann J set out a long list of factors which he found to be substantial and compelling circumstances, permitting a departure from the minimum period of life imprisonment. The sentence he handed down as an alternative was, in fact, a radical departure from the minimum sentence. It was a period of ten years imprisonment, wholly suspended for

five years coupled with a number of conditions. These included the usual clause that he should not again be convicted of a crime involving a sexual or violent offence, but also an unusual requirement that he should remain in the employment of his current employer unless he is laid off through no fault of his own, and that he must spend at least 80% of his salary on the support of the victim and her family. In addition, he was required to attend a sex offenders' programme and to perform 800 hours of community service. Bertelsmann J stated that if restorative justice is to be recognized in South Africa, then it must find application not only in respect of minor offences but also, in appropriate circumstances, in suitable matters of a grave nature. He went on to say that 'the present case is an instance in which restorative justice provides a just and appropriate sentence that punishes the accused, restores the victim, helps to heal the damage done by the commission of the crime and benefits society by ensuring the rehabilitation of the offender and rendition of community service'.⁴⁵

The Director of Public Prosecutions of North Gauteng took this sentence on appeal to the Supreme Court of Appeal (hereafter SCA).⁴⁶ The SCA was of the view that there were mitigating factors in this case that were sufficiently substantial and compelling to permit the court to depart from the statutorily prescribed minimum of life imprisonment. However, the SCA was of the view that the court *a quo* had misdirected itself by making too much of the mitigating factors whilst ignoring certain aggravating factors such as the fact that the accused had violated a relationship of trust, and that the victim had suffered serious psycho-emotional harm. The court set aside the sentence and replaced it with a sentence of ten years imprisonment, no portion of which was suspended.⁴⁷

Bosielo J highlighted the fact that victims' voices, in particular impact statements, should be heard during sentencing and he referred to an earlier judgment of the court, *S v Matyityi*⁴⁸

suggesting that in that case too, the court had grappled with the problem of what weight to attach to victim's views on sentencing. However, although the *Matyityi* judgment did emphasize the rights of victims to participate and offer information during sentencing that was because there was a complete absence of any information about the victims of the crimes of murder and rape before the court. Thus the *Matyityi* judgment should be read as a call for increased involvement of victims in the sentencing process. In *Thabethe* there **was** involvement of the victim, but the SCA failed to find a rational basis to evaluate or deal with the victim's views on sentence.

On the issue of restorative justice, the Court observed that restorative justice was gaining ground in the courts and has even received the recognition of the Constitutional Court.⁴⁹ Bosielo JA went on to state that he had no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. However, he found its use inappropriate in the context of the serious crime of rape. He accordingly held that:⁵⁰

[w]ithout attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a sentencing option.

It is perhaps understandable that the SCA balked at the use of restorative justice that resulted in a totally non-custodial sentence in a case concerning the rape of a 15 year old girl by a trusted family member. As mentioned in the judgment, South Africa has a serious problem with crimes against women and children. The court was probably also discomfited by the possible power

imbalance inherent in a restorative justice process that involved a girl who was, together with her family, financially dependent on her stepfather. It is disappointing, though, that the court did not engage squarely with these difficult issues.

The judgment of *Thabethe* left unanswered certain controversial questions relating to the relevance of victims' (mitigating) views in the determination of an appropriate sentence. Should the victim influence the type of sentence or the length of imprisonment? What does it mean that 'a just penal policy is also victim centred', as the case of *Matyityi* had held? In what way should victims' needs be addressed during sentencing in serious cases? What should the relationship be between the personal and public dimensions of harm in crimes of personal violence? Despite its reiteration that victims' voices must be heard, the court omitted to provide any constructive guidelines in this regard. This article now considers comparable cases from other jurisdictions in search of answers to these questions.

5. Comparative developments

A. New Zealand

The general approach to sentencing in New Zealand, like most common law systems, leaves sentencing broadly in the domain of judicial discretion, with Parliament setting certain maximum sentences. Sentencing is dealt with on an individualised basis, and judgments have set guidelines that are followed by the courts.⁵¹ Victim impact statements are used in terms of the Victims of Offences Act 1987, but these generally should not include suggestions about sentencing.

A comparison can be made with regard to the courts' treatment of mitigating views on sentence between the *Thabethe* judgment of the South African SCA, and the New Zealand judgment of *R*

v Clotworthy.⁵² In both cases the court referred the matter to a ‘restorative’ process. In *Clotworthy* a young family man, after a day of drinking, stabbed another man in an uncharacteristic display of aggression. The wound was serious since it was close to the heart, and left an unsightly scar. The offender was charged with wounding with intent to cause grievous bodily harm, and in the ordinary course, this offence was punishable by a maximum of 14 years imprisonment.

Prior to passing sentence, the sentencing judge referred the case to two barristers in Auckland who at that time organized restorative conferences.⁵³ There was a ‘rich and emotional restorative justice meeting’⁵⁴ between the two men and the victim (who had previously spent time in prison himself) indicated that he could see no value to himself or to society in the offender going to prison. There was an agreement reached that the offender would pay a substantial amount for the victim to undergo plastic surgery to repair the scarring, and that he would undertake two hundred hours of community work. In the light of this the sentencing judge passed down a sentence of two years imprisonment, wholly suspended, on the condition that the terms of the agreement were carried out. On an appeal by the Crown, the Court of Appeal replaced the sentence with one of three years imprisonment, no portion suspended. The Court did not express any general opposition to the concept of restorative justice (essentially the policies behind ss 11 and 12 of the Criminal Justice Act 1985), but rather advocated that these principles, particularly in cases of serious violence, should be balanced against other more traditional sentencing policies, such as those inherent in s 5 of the same Act.⁵⁵ The Court explained as follows:

Which aspect should predominate will depend on assessment of where the balance should lie in individual cases. Even if the balance is found, as in this case, to lie in favour of s 5 policies, the restorative justice application can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome that way.

Some restorative justice writers viewed this judgment optimistically, as being supportive of restorative justice. Thorburn, for example, expresses the opinion that '*Clotworthy* at least cemented confidence that restorative justice was a recognized concept and that its principles could be validated'.⁵⁶ Boyack acknowledges that *Clotworthy* legitimized restorative justice, but he expresses disappointment that the court chose to substitute a deterrent sentence for a reasonable and merciful one.⁵⁷ Morris and Young are decidedly more critical. They complain that the Court of Appeal seemed to view restorative justice in very narrow terms, as amounting to little more than reparation.⁵⁸ This fails to reflect the importance of the involvement of victims, offenders and their communities in making decisions about how best to deal with the offending. They observe that the approach of the court focussed only on the offence and the offender. Morris and Young do not see restorative justice merely as 'mitigation' according to the standard sentencing rules, but rather as a different value system that seeks to substitute the usual sentencing rules. Braithwaite is also critical of the *Clotworthy* judgment, but he believes the case reveals an important issue for restorative justice, namely that 'the retributive presumption tends to be empirically wrong'.⁵⁹ What Braithwaite means by this is that there is a general presumption, promoted by just deserts theorists, that victims will demand more punishment than the courts consider to be appropriate. In fact, the emerging evidence has shown that the victims sometimes demand less than the courts deem appropriate.⁶⁰ Ashworth presents the 'just deserts'

view that the victim's involvement in sentencing is problematic, whether they are vindictive or merciful.⁶¹

A significant difference between the *Clotworthy* and *Thabethe* appeal judgments is that the *Thabethe* court made no mention of the role the restorative interactions between the victim and offender played in the appellate sentence outcome. Although the *Thabethe* court found reasons to depart from the minimum sentence, these were based on the facts of the case, and not on the basis that a restorative justice process had been held.

Despite the fact that the balance in *Clotworthy* tipped in favour of a term of imprisonment, the court held that substantial weight should be given to the offender's offer for compensation and the victim's acceptance of that as expiating the wrong. But, finally, 'a wider dimension must come into the sentencing exercise than simply the position between the victim and defendant'.

The *Thabethe* and *Clotworthy* cases were both appeals where the court below had attempted to apply a restorative justice approach during the sentencing process and had factored the opinions of victims into the sentence itself. However, it was the State or the Crown that appealed, on the basis that victim's views should not carry such weight, and they wanted to see the lenient sentences replaced with heavier penalties. This indicates that as bearers of the public interest responsibility to see crime punished, prosecution authorities tend to override the views of the specific victims involved in the case, in favour of a more generalized view of the need to protect victims and society at large.

The next group of cases to be considered differ from the pattern of *Thabethe* and *Clotworthy* in that these were appeals from cases where no attempt had been made to consider

victims' views in the sentencing process, and the offenders appealed their sentences with support from the victims' families, with the exception of Perks, where the victim's relative wanted a more punitive sentence, but it is included in this article because of the important principles that the appeal court laid down.

B. England and Wales

The general approach to sentencing in England and Wales has long been characterised by wide judicial discretion.⁶² Traditionally, this was only limited by appellate decisions and a certain number of statutorily required minimum sentences. Various developments have occurred during the past decade that have introduced a more structured approach to sentencing, including sentencing guidelines.⁶³ However, sentencing guidelines say nothing about the role of victim's views in sentencing. Victims of crime are entitled to make Victim Personal Statements. However, the Crown Prosecution Service guidelines explain that '[t]he court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim. The opinions of the victim or the victim's close relatives as to what the sentence should be are therefore not relevant, unlike the consequence of the offence on them.'⁶⁴ The guidelines go on to say that if victims nevertheless give opinions about sentence in the statement, the court should pay no attention to them. Despite this discouraging general outlook, case law has carved out some space for the consideration of victims' mitigating views in sentencing.

In *R v Nunn*⁶⁵ the accused had caused the death of someone through dangerous driving. The mother and sister of the deceased, in contrast to the father and brother, pleaded that the sentence

was too long and was making it difficult for them to cope with the trauma, as they also knew the offender and felt he had suffered enough. The court, however, emphasized that their opinion of the desired level of sentence to be imposed on the offender should play no role. However, the Court identified an exception to that rule where the sentence is causing anguish of the victim:⁶⁶

The court is concerned ... with the clear evidence, which we accept, that by its very length the sentence on [the victim's] friend is adding to the grief and anxiety which they are suffering ... We do not think that these adverse consequences of this particular sentence should be disregarded. In mercy to them we shall reduce the sentence as far as we can, consistent with our continuing public duty to impose appropriate sentences for those who cause death by driving dangerously under the influence of a drink.

Not long after *Nunn* the Court of Appeal heard a case with very similar facts. In *R v Roche*,⁶⁷ the appellant's cousin had been killed in a car accident when the car, driven by the appellant, crashed at high speed. The mothers of the victim and offender were sisters. They stated to the court that the sentence of four years imprisonment was adding to their grief and preventing their healing. The court reiterated that a 'cardinal principle' of sentencing is that it is for the court to pass sentence, having regard to the circumstances of the offence and the offender. The court stated that the victim can neither call for a vengeful sentence nor for one well below the level of sentence ordinarily passed. The court did, however, distinguish between calls for vengeance and calls for mercy – stating that a court can never become 'an instrument of vengeance, nonetheless it can in appropriate circumstances, and to some degree, become an instrument of compassion'. The sentence was reduced from four years to three.

*R v Mills*⁶⁸ involved attempted rape by a former partner of the victim. In this matter the court considered the importance of evidence of an improving relationship between the defendant and the victim (who had previously been married to one another and then divorced). The sentence was reduced from 6 to 3 years:⁶⁹

It is clear that the victim in this case has chosen to forgive the perpetrator of the crime, and has said so in terms, perfectly genuinely. That cannot decide the appropriate level of sentence, but we take her evidence into account as indicating the current context of the impact of this particular crime on the victim. Having considered the matter in the light of the information before us, we have come to the conclusion that the sentence ... was too long.

*R v Perks*⁷⁰ was a case in which the husband of a robbery victim urged the court to send an offender to prison, to make an example of him – yet ironically it is the case that sets out the best theorized account of the circumstances in which a court can take account of victims’ mitigating views. The Court of Appeal rejected the call by the victim’s husband, explaining that the opinion of the victims and the victims close relatives should not, as a general rule, be taken into account by a sentencing court which must make an objective determination on sentence. The court then set out two exceptions to this general rule:⁷¹

The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, subject to two exceptions (i) Where the sentence passed on the offender is aggravating the victim’s distress, the sentence may be moderated to some degree. (ii) Where the victim’s forgiveness or unwillingness to press charges provides evidence that his or her psychological or mental suffering must be very much less than would normally be the case.

Nunn, Roche, Mills and *Perks* take a balanced approach to victim's views, remaining firm on the importance of objectivity in sentencing, but confirming that when a victim's anguish is increased by the sentence, then the sentence can be reduced in recognition of this. The victims' testimonies must be weighed objectively so that the information given by them does not directly determine the actual sentence imposed.⁷² Edwards has suggested that allowing victims to state their preference in the sentencing of the offender is restorative. However, he remains concerned about issues of proportionality, consistency and objectivity in sentencing which are key concerns of a just deserts approach.⁷³ In the next section these approaches will be considered in relation to the four judgments under review.

6. Does the Approach in England and Wales Case Law Accord with Restorative Justice or a Just Deserts Approach?

In the early writing about modern restorative justice theory, the approach was often explained by contrasting models of retributive and restorative justice. Howard Zehr's contrasting models of retributive and restorative justice, which he presented in 1990,⁷⁴ were subsequently criticized.⁷⁵

Zehr later acknowledged these criticisms and admitted that this 'polarization' may have been misleading.⁷⁶ He recognized that both retributive and restorative theories of justice acknowledge 'a basic moral intuition that a balance has been thrown off by the wrongdoing'.⁷⁷ Where the two approaches differ is on the currency that will right the balance. Retribution as punishment seeks to vindicate and reciprocate, but it uses pain or punishment as its measure. Restorative justice theory, on the other hand, vindicates crime through acknowledgment of

victims' harms and needs and encourages offenders to take responsibility and to redress the behaviour. Roche has pointed out that while the contrast between the approaches was useful as a rhetorical tool to introduce people to restorative justice it is an oversimplification that distorts both approaches.⁷⁸

So, while the early years of restorative justice debates were marked by intense exchanges highlighting the differences between the retributive and restorative justice approaches, former critics then began a way to reconcile the two approaches after the turn of the century. In 2003 von Hirsch et al published an entire book dedicated to the question of whether restorative justice can be reconciled with modern retributive approaches.⁷⁹ Duff makes a valiant attempt to reconcile the two approaches, although he remains steadfast in his approach that restorative justice should include punishment.⁸⁰ Braithwaite was persuaded to write a chapter for the same book.⁸¹ This might have been surprising to anyone who followed the robust exchanges between Braithwaite and Pettit on the one hand, and von Hirsch and Ashworth on the other, during the 1990s.⁸²

Braithwaite differed from many of the other contributors to the book, particularly on the issue of whether restorative justice embraces retribution, and the question of whether restorative justice includes punishment. He nevertheless found some common ground: what liberal modern retributivists such as von Hirsch, Ashworth and Duff have in common with most restorative justice advocates is that they are all reductionists when it comes to punishment. They would all wish to place upper constraints or limits on the kinds of punishments that can be meted out for certain kinds of crimes, so that severe punishments, such as the use of imprisonment, should only be used for serious crimes.⁸³ However, just deserts theory would also require the setting of lower limits, so that proportionality can be maintained, whilst restorative justice theorists would not

require punishment, relying instead on the participants in the process to decide on the outcome. A ‘pure’ restorative justice approach would allow mercy and opportunity for healing to trump proportionality.

With this in mind, is it correct to characterize the *Nunn, Roche and Mills* appeal judgments as being ‘restorative’? The courts appear to at least partially recognize the harms and needs of the victims in their judgments, which accords with a restorative approach. However, the courts assiduously declined to allow the victims’ views – whether they were aggravating or mitigating – to be dispositive of the outcomes. The courts were prepared to ameliorate the sentences to some degree, but held fast to the principles of proportionality, objectivity and consistency. This falls short of a purist approach to restorative justice, which tends to view crime as harm to a person and would accord more weight to the victim’s views. There are, however restorative justice advocates who do recognize the importance of the public dimension of crime.⁸⁴

The judgments accord with a just deserts approach which places upper limits on punishment, but also retains lower limits. In *Nunn*, for example, the appeal court pointed out that although ‘in mercy’ to the victim’s family members they would reduce the sentence as far as they could, they remained firm that their public duty required them to impose ‘appropriate sentences’ for those who cause death by drunk driving. Thus the guidelines laid down for the consideration of victims’ views in sentencing in *Nunn, Roche and Mills* represent a reconciliation of the two paradigms. Ironically, although the *Thabethe* and *Clotworthy* cases began in courts that were highly sensitive to restorative justice, the appeal courts balked at the sentences arising from the restorative justice processes that had occurred. Although both of those appeal courts

paid some lip service to the value of restorative justice, both retreated into a just deserts mode and failed to find a rational way to accommodate victims' views.

The *Nunn*, *Roche* and *Mills* cases, however, arose in the standard, retributive system. The efforts of the victims to have their voices heard in sentencing bore fruit through the court recognising that adding to their pain would not serve the interests of justice. This added a restorative justice perspective to the matters. The mitigating views of victims were considered, their harms and needs were evaluated by the courts, and the sentences were ameliorated. However, the courts retained a public interest goal through refusing, in any of the cases, to reduce the sentence to an entirely non-custodial one. The victim's views were not granted a general relevance in sentencing, as the courts made it clear that the limited circumstances in which they would consider victims views were situations where it was shown that the impact of a specific sentence on the victim or the victim's family would create additional hardship or where the victim may have been less negatively affected than might be expected.

7. Conclusion

This article has explored the arguments for and against victims' mitigating opinions on sentence. After describing a recent South African appeal case, and comparing it with a similar New Zealand appeal court judgment, the article investigated the position in England and Wales. It appears that, in all these jurisdictions the general approach is that victims' recommendations as to penalty must be ignored. Although the courts in all three jurisdictions allow for victim impact statements, and recognise their cathartic, communicatory and participative value, there is an unwillingness to provide a direct role for victims in the determination of a sentence. However,

the England and Wales jurisprudence has developed exceptions in this regard when certain categories of victims request a more lenient sentence. The standard set by the courts of England and Wales confines this to cases where the suffering of the victims is increased by the sentence set by the courts, or where the forgiveness of the victim indicates that he or she is less negatively affected than might be expected. This approach has, however, only led to a reduction in the custodial sentences imposed in the relevant matters, and not a replacement of the custodial sentence with a non-custodial one. This indicates the general sentencing mode is retributive and the approach of the appeal courts in England and Wales does not amount to a full application of restorative justice. However, through considering the harms and needs of victims and ameliorating the sentences accordingly, a restorative justice approach is blended with a just deserts requirement for the protection of lower limits. This ensures that the principles of proportionality, certainty and consistency are still generally adhered to. It is concluded that, had the *Thabethe* court taken proper cognisance of comparative legal developments, it might have found a way to incorporate the victims' views on sentence. It is, however, possible that concerns for proportionality and consistency would have prevented the non-custodial outcome that she desired. Nevertheless, had the court noted and applied the developments in the case law of England and Wales would, at very least, have created a better precedent by providing guidelines to inform the complex, but important process of considering victims mitigating opinions in the sentencing process.

*[†] Faculty of Law, University of Pretoria, South Africa. Email: annette.vandermerwe@up.ac.za;
ann.skelton@up.ac.za

¹ Julian Roberts and Marie Manikis, 'Victim Impact Statements: The Relevance of Ancillary Harm' (2010) 15(1) Canadian Criminal Law Review 131.

² Alyson Cole, 'Victim Impact Statements - A Matter of Principle' (2010) 15 Canadian Criminal Law Review 145.

³ See <<http://www.sfo.gov.uk/media/44645/making-a-victim-personal-statement.pdf>> 3-4, accessed 1 March 2012, where guidelines to victims are provided in this regard. The Crown Prosecution Service, 'Legal Resources (Legal Guidance)' <http://www.cps.gov.uk/legal/v_to_z/victim_personal_statements/#a06> accessed 18 September 2012 .

⁴ Sonja Leferink, *Verbouw of nieuwbouw? Hoe slachtofferrechten meer recht aan slachtoffers kunnen doen* (Slachtofferhulp Nederland 2012) 43.

⁵ Douglas Beloof and others, *Victims in Criminal Procedure* (Carolina Academic Press 2010) 597; Nicholas Kittrie and others, *Sentencing, Sanctions, and Corrections* (Foundation Press 2002) 288.

⁶ The issue of victims' opinions on sentencing is not explicitly addressed in any of the legal instruments dealing with victim participation in sentencing. For example, the topic is noticeably absent from the Service Charter for Victims of Crime <<http://www.justice.gov.za/VC/docs/vc/2007%20Service%20charter%20ENG.pdf>> accessed 1 July 2013, *Minimum Standards on Services for Victims of Crime* Part II <<http://www.justice.gov.za/VC/docs/vcms/vcms-eng.pdf>> accessed 1 July 2013 (for implementing the Service Charter), as well as the legislation providing for the use of victim impact statements in child justice matters (Child Justice Act 2008 s 70).

⁷ Expressed by the character Esposito in the Argentinian film 'The secret in their eyes' (2010). See also Frans Willem Winkel 'Post-traumatic anger: Missing link in the wheel of misfortune' Inaugural lecture (2007). <http://www.tilburguniversity.edu/research/institutes-and-research-groups/intervict/publications/oratiefww.pdf> who explains that angry victims are the ones that display injustice-related entitlement.

⁸ For example, see, the Canadian case *R v Gabriel* [1999] O.J. No. 2579, 43 W.C.B. (2d) 147 where several victims in a drunken driving case where a girl was killed, sought revenge in their victim impact statements. The Ontario Superior Court of Justice rejected their claims for excessively retributive sentences.

⁹ Ian Dearden, District Court of Queensland 'Therapeutic Jurisprudence in the District Court' Unpublished paper *Non-adversarial Justice: Implications for the Legal System and Society* Conference Melbourne Australia 4-7 May 2010 highlighted the unusual attitude of the surviving spouse in a homicide case where her husband was killed in a car accident. In her victim impact statement she indicated that she accepted that it was an accident, that she did not want her children to grow up hating another person and that the family would accept whatever sentence the court found to be appropriate.

¹⁰ Antony Pemberton and others, 'Taking Victims Seriously in Restorative Justice' (2007) 3(1) International Perspectives in Victimology 4.

¹¹ Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 43 British Journal of Criminology 578.

¹² Donald Hall, 'Victims' Voices in Criminal Court: The Need for Restraint' in Martin Wasik (ed), *The Sentencing Process* (Dartmouth 1997).

¹³ Joseph Hoffmann, 'Revenge or Mercy? Some Thoughts about Survivor Opinion Evidence in Death Penalty Cases' (2003) 88 Cornell Law Review 530.

¹⁴ Johnathan Burchell and John Milton, *Principles of Criminal Law* (Juta 2005); Stephen Walker and Dap Louw 'The Bloemfontein Court for Sexual Offences: Perceptions of its functioning from the perspective of victims, their families and professionals involved' (2004) 17 SACJ 306.

¹⁵ Hoffmann (n 13).

¹⁶ Kelly Richards, 'Taking Victims Seriously? The Role of the Victims' Rights Movement in the Emergence of Restorative Justice' (2009) 21(2) Current Issues in Criminal Justice 302; Simon Green, 'The Victims' Movement and Restorative Justice' in Gerry Johnstone and Daniel Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2007); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press 2002).

¹⁷ Neils Christie, 'Conflicts as Property' (1977) 17(1) British Journal of Criminology 1.

¹⁸ Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of "Their" Offenders' [2002] Criminal Law Review 689.

¹⁹ Julian Roberts and Marie Manikis, 'Victim Personal Statements: A Review of Empirical Research' (Report for the Commissioner for Victims and Witnesses in England and Wales) (2011) 20 <<http://www.justice.gov.uk>> accessed 30 June 2013.

-
- ²⁰ Annette Van der Merwe, 'Aspects of Sentencing in Child Sexual Abuse Cases' (PhD Thesis, Rhodes University 2005) 83.
- ²¹ Peggy Hora, 'Smart Justice' (2010) 42 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809719> accessed 20 June 2013 refers to a study indicating that some victims prefer shorter sentences coupled with compensation orders to longer terms of imprisonment without any financial benefit; Annette van der Merwe 'A new role for crime victims? An Evaluation of Restorative Justice Procedures in the Child Justice Act 2008' (2013) De Jure 1037 n 121 <http://www.dejure.up.ac.za/images/files/vol46-4-2013/Chapter_10.pdf> accessed 23 January 2014 highlights that compensation for medical cost might be essential for victims of assault during restorative justice interactions .
- ²² Lynne Henderson, 'The Wrongs of Victim's Rights' (1985) 37 Stanford Law Review 937.
- ²³ Hoffmann (n 13). Although the argument is presented with regard to survivor impact evidence in capital cases in the United States of America, it is also applicable to other victims, such as those in sexual offences.
- ²⁴ Edna Erez, 'Who is Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' (1999) 49(26) Criminal Law Review 545.
- ²⁵ Harry Blagg, 'Restorative Justice in a Crowded Marketplace of Ideas: Challenges and Opportunities for Relevant Practice in Coming Years' (2013) 14(1) Newsletter: European Forum for Restorative Justice 1.
- ²⁶ See this practice for example in Government of South Australia (Commissioner for Victims' Rights) *Victim Impact Statement: Information and Form 3*: 'Sometimes the victim's view on a fair and appropriate sentence is useful. However, this is for the court to determine'.
- ²⁷ Section 51 of the Act prescribes four different categories of imprisonment, with life imprisonment as the most serious sentence for offences such as pre-meditated murder and child and gang rape.
- ²⁸ SALC Report on Sentencing (A New Sentencing Framework) Project 82 (May 2000) Pretoria.
- ²⁹ Stephan Terblanche 'Judgments on Sentencing: Leaving a Lasting Legacy' 2013 (76) *THRHR* 96. It is pointed out in n5 that the *Thabethe* judgment serves as an example of a court that is unaware of retribution, as opposed to deterrence, being the modern approach to punishment.
- ³⁰ Thaddesu Metz 'Legal Punishment' in Christopher Roederer and Darrel Moelendorf (eds), *Jurisprudence* (Kluwer 2004) 577.
- ³¹ Section 274 of the Criminal Procedure Act 51 of 1977.
- ³² *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205e; *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 16; *S v Olivier* 2012 (2) SACR 178 (SCA) at para 8).
- ³³ Section 70 of the Child Justice Act 75 of 2008.
- ³⁴ At <http://www.justice.gov.za/VC/docs/vc/2007%20Service%20charter%20ENG.pdf> (accessed 20 December 2013).
- ³⁵ Karen Müller and Annette van der Merwe (2006) 'Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court' *SAJHR* 647; *S v Matyityi* 2011 (1) SACR 40 (SCA).
- ³⁶ Compare for example the negative attitude of the court in *S v M* 2007 (2) SACR 60 WLD to those judgments affirming evidence of harm to the victim as relevant and important during sentencing such as *S v Abrahams* 2002 (1) SACR 116 (SCA); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA); *S v Matyityi* 2011(1) SACR 40 (SCA).
- ³⁷ Child Justice Act 2008.
- ³⁸ *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC); *S v Maluleke* 2008 (1) SACR 49 (T); *S v Shilubane* 2008 (1) SACR 295 (T); *S v Saayman* 2008 (1) SACR 393 (E).
- ³⁹ Applying s 300 of the Criminal Procedure Act is avoided by presiding officers in the light of the additional administrative burden it creates in the case of non-compliance of compensation orders relating to loss of or damage to property. Linking it as a condition to a suspended sentence is viewed in the same manner.
- ⁴⁰ 2011 2 SACR 567 (SCA).
- ⁴¹ In terms of the Correctional Services Act, 1998, the practical implication of life imprisonment is that a prisoner may only apply for parole after a period of 25 years has been served. Exceptions may occur, for example when the prisoner has served 15 years of the sentence at the age of 65 years he or she may apply earlier for parole or he or she may qualify for medical parole at any stage (see Annette van der Merwe 'Justice "Outside" the Law in *The Secret in their Eye: Victim and Offender Rights in the Post-sentencing Phase*' in Frans Viljoen (ed) *Beyond the Law: Multidisciplinary Perspectives on Human Rights* (PULP 2012).
- ⁴² The Criminal Law Amendment Act 1997 s 51(1).
- ⁴³ The mother of the victim only attended the first meeting where she demanded the truth from *Thabethe*. It was during the second meeting when the offender faced the victim alone (though in the presence of the probation officer)

that he apologised to her. According to the probation officer the family had at the time largely managed to work through the trauma on their own (Personal communication Girlie Nyundu, November 2011, Pretoria, South Africa).

⁴⁴ Criminal Law Amendment Act 1997 s 51(3).

⁴⁵ *Thabethe* (n 40) [40].

⁴⁶ This is the penultimate court – the Constitutional Court is the highest court in constitutional matters, but the judgments of the SCA nevertheless bind all lower courts.

⁴⁷ The sentence should be explained in the light of the shortcomings in the charge sheet. Precedent has developed that prevents the imposition of life imprisonment when the charge sheet omits to refer to the correct legislative provision, thereby informing the accused that in the event of a conviction, life imprisonment will be considered as a possible sentence. In the *Thabethe* matter there was only reference at the time of charge to the second category of rape in the minimum sentence legislation which carries a sentence of ten years.

⁴⁸ *S v Matyityi* (n 32).

⁴⁹ The Court referred to *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *S v M* (n 30); *The Citizen v Mc Bride* (Johnstone and Others, Amici Curiae) 2011 (4) SA 191 (CC). For a discussion of these and other cases see Ann Skelton, 'The South African Constitutional Court's Restorative Justice Jurisprudence' (2013) 1 *Restorative Justice: An International Journal* 122.

⁵⁰ *Matyityi* (n 32) [20].

⁵¹ Ministry of Justice, New Zealand, 'The Sentencing Structure'. Available at <http://www.justice.govt.nz/publications/s/sentencing-policy> accessed on 10 June 2014.

⁵² (1998) 15 CRNZ 651 (CA).

⁵³ Allison Morris and Warren Young, 'Reforming Criminal Justice: The potential of Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (Ashgate 2000).

⁵⁴ Stan Thorburn, 'Observing the Application of Restorative Justice in the Courts of New Zealand: A Brief Survey of Cases over 10 Years' (Latest Developments in International Criminal Justice Reform, Peoples Republic of China August 2005) 3 <<http://www.restorativejusticescotland.org.uk/Shenzxen.pdf>> accessed 20 June 2013.

⁵⁵ *Clotworthy* (n 40) 661. It should be noted that the Criminal Justice Act 1985 was repealed on 1 July 2013 by section 411 of the New Zealand Criminal Procedure Act 2011 (2011 No 81).

⁵⁶ Thorburn (n 54). It should be noted that Thorburn was the sentencing judge in *Clotworthy*.

⁵⁷ Jim Boyack, 'How Sayest the Court of Appeal?' in Helen Bowen and Jim Consedine (eds), *Restorative Justice: Contemporary Themes and Practice* (Ploughshares Publications 1999).

⁵⁸ Morris and Young (n 53).

⁵⁹ John Braithwaite, 'In Search of a Restorative Jurisprudence' in Lode Walgrave (ed), *Restorative Justice and the Law* (Willan Publishing 2002) 150.

⁶⁰ Gabrielle Maxwell and Allison Morris, *Family, Victims and Culture: Youth Justice in New Zealand* (Victoria 1993) 156.

⁶¹ Ashworth (n 11).

⁶² Andrew Ashworth, 'The Sentencing Guideline System in England and Wales' (2006) 19 *South African Journal of Criminal Justice* 1.

⁶³ Sentencing Commission Working Group, *Sentencing Guidelines in England and Wales: An Evolutionary Approach*; Andrew Ashworth, 'Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council' [2010] *Criminal Law Review* 389; Julian V Roberts, 'Sentencing Guidelines and Judicial Discretion: Evolution of the Duty of Courts to Comply in England and Wales' (2011) 51 *British Journal of Criminology* 997.

⁶⁴ The Crown Prosecution Service, 'Victim Personal Statements: Legal Guidance' available at http://www.cps.gov.uk/lega/v_to_z/victim_persona;_statements/ accessed on 10.6.2014. See further *R v Perkins; Bennett; Hall* [2013] EWCA Crim 323 for further guidance by the Court of Appeal on the use of VPS.

⁶⁵ [1996] 2 Cr App R (S) 136.

⁶⁶ *Ibid* 140-141.

⁶⁷ [1999] 2 Cr App R (S) 105.

⁶⁸ [1998] 2 Cr App R (S) 252.

⁶⁹ *Ibid* 254.

⁷⁰ 2001 1 Cr App R (S) 19.

⁷¹ *Ibid* 20.

⁷² Tyrone Kirchengast, 'The Landscape of Victim Rights in Australian Homicide Cases: Lessons from the International Experience' (2011) 31(1) *Oxford Journal of Legal Studies* 133.

-
- ⁷³ Ian Edwards, 'Restorative Justice, Sentencing and the Court of Appeal' [2006] *Criminal Law Review* 110.
- ⁷⁴ Howard Zehr *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990).
- ⁷⁵ Lucia Zedner 'Reparation and Retribution: Are they Reconcilable?' (1994) 57 *Modern Law Review* 228; Kathleen Daly and Russ Immarigeon, 'The Past, Present and Future of Restorative Justice: Some Critical Reflections' (1998) 1(1) *Contemporary Justice Review* 21.
- ⁷⁶ Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002) 58.
- ⁷⁷ Howard Zehr, 'Journey to Belonging' in Elmar Weitekamp and Hans-Jurgen Kerner (eds) *Restorative Justice: Theoretical Foundations* (Willan Publishing 2002).
- ⁷⁸ Declan Roche, 'Retribution and Restorative Justice' in Gerry Johnstone and Daniel Van Ness (eds), *Handbook on Restorative Justice* (Willan Publishing 2007).
- ⁷⁹ Andrew von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Irreconcilable Paradigms?* (Hart Publishing 2003).
- ⁸⁰ Duff (2003) Anthony Duff 'Restoration and Retribution' in Andrew von Hirsch and others (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart Publishing 2003).
- ⁸¹ John Braithwaite, 'Principles of Restorative Justice' in Andrew Von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Irreconcilable Paradigms?* (Hart Publishing 2003).
- ⁸² John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon Press 1990); Andrew von Hirsch and Andrew Ashworth, 'Not Not Just Deserts: A Response to Braithwaite and Pettit' (1992) 12 *Oxford Journal of Legal Studies* 83; John Braithwaite and Philip Pettit, 'Not Just Deserts, Even in Sentencing: A Reply to von Hirsch and Ashworth' (1992) 4 *Current Issues in Criminal Justice* 225; Andrew Ashworth and Andrew von Hirsch, 'Desert and the three Rs' (1993) 5 *Current Issues in Criminal Justice* 9.
- ⁸³ In fact, a large part of the exchanges between Braithwaite and Pettit and Von Hirsch and Ashworth (ibid) have been dedicated to arguing whose theory (republican democratic (restorative) or 'just deserts') provides the most coherent framework for the establishment and operation of those upper limits.
- ⁸⁴ Lode Walgrave, 'Integrating Criminal Justice and Restorative Justice' in Gerry Johnstone and Daniel Van Ness (eds), *Handbook on Restorative Justice* (Willan Publishing 2007).