CRIME, KIN AND COMPENSATION: THE LAW AS ACCESSORY TO PAYBACK

T. E. Barnett*

After reading Dr Strathern's account of the second of the two Mount Hagen trials under discussion it is clear that the solemn and objective procedure which is so firmly entrenched in the administration of British criminal justice failed to favourably impress the Hageners. As far as they were concerned the trial concentrated on issues of minor relevance, was conducted in an incomprehensible formal manner which gave no scope for local rhetoric and it ignored the very issue which they considered most important: the liability of the offender's social group to compensate that of the victim. This case is by no means an isolated instance: the criminal courts, administering Australian criminal law in New Guinea, usually remain somewhat aloof from the expectations and the political and emotional needs of the local public. The courts are particularly vulnerable to criticism about the appropriateness of their methods for dealing with homicide and serious woundings in the more recently contacted two thirds of the country. With this in mind, it is worth examining these Mount Hagen cases more closely from a lawyer's viewpoint in the hope that they may throw light also on wider issues concerning the administration of the criminal law in general.

The Papua and New Guinea Supreme Court is composed of Australian judges who have obtained their considerable experience at the Australian bar. None of the present judges was born in the Territory but some have served here for several years. The court is not assisted by any form of local jury or assessor system and for local knowledge of tribal systems, politics and customs must depend on expert witnesses. Judges no doubt also rely on their assessment of native witnesses in the box and on "outside" information from such sources as discussions in the club, personal contacts with Papuans and New Guineans and their reading of "New Guineana".

For serious crimes the law applicable in Papua and New Guinea is basically the Queensland *Criminal Code* which was adopted into each Territory soon after the commencement of Australian rule. In Papua the adopting legislation imported the Code in toto and so did the New Guinea legislation with the addition of the qualification that its provisions were adopted only so far as they were "applicable to the circumstances" of New Guinea. In fact the Territory courts have rarely taken the opportunity offered by this qualified adoption of the *Code* to modify it by interpretation to suit local needs. The rigid distinction, which evolved in England during centuries of legal history, between criminal and civil wrongs has been retained in Papua and New Guinea. Thus if a citizen unlawfully injures another it may give rise to a civil action for compensation which should be brought in a civil court following rules of civil procedure and applying the

* Fellow, University of Papua New Guinea Law School.

civil law of tort. The basis of liability will be proof that the injury was caused deliberately or negligently. Only in rare circumstances will absolute liability be recognised so that a person must compensate his victim regardless of questions of fault. If the act falls within the scope of the criminal law, which it usually does if the injury was caused intentionally or recklessly, then it is heard as a separate case in a separate criminal trial, at which the criminal law will be administered. This will be done according to special rules of evidence and procedure which put the prosecution at a disadvantage, thus ensuring that the accused person is not convicted unfairly but only on the clearest evidence of guilt. The purpose of the criminal trial is to ensure that no person is punished by the police or the executive until an independent court has decided which person or persons did the forbidden criminal offence. If guilt is proved beyond all reasonable doubt the criminal court will decide on the appropriate sentence bearing in mind that its main aim is to deter the public and the particular offender from committing crime. Under this system punishment is utilised, in the form of imprisonment, corporal punishment (including death) or a monetary fine to the state, to inflict suffering on the individual offender. The aim of the criminal court is not to compensate the victim of the criminal offence or his relatives.[1]

The criminal law relies heavily on the Christian principles of free will and individual responsibility for wrongful acts; this is the basis for criminal responsibility. Much earlier English legal concepts of community or kin-group responsibility for the wrongs of its members were eased out of the system during the middle ages and they were never officially introduced into Papua and New Guinea where, as will be argued below, they would seem to be extremely relevant to contemporary society. By adopting the Queensland *Code* not only were Melanesian concepts of group responsibility relegated to the sidelines, for unofficial administrative action only, but existing customary offences were denied the forum of the official courts for enforcement. Only statutory offences are made punishable, so that for instance although all tribal groups recognise an exogamous group within which sexual intercourse is forbidden as a heinous offence, "customary incest" cannot be punished unless it also falls within the range of forbidden relationships proscribed by the *Criminal Code* which to the Melanesian is astonishingly limited. Nor is there any general defence that an act, for example the killing of the second-born of twins, is excused by native custom. The defences to criminal charges are set out in the *Code* itself and custom cannot create new defences, though it may be taken into account indirectly when considering whether or not one of the permitted defences has been made out.

The court's attitude towards native customs in criminal cases is now officially governed by the *Native Customs (Recognition) Ordinance* 1963 which limits their application to a minor role. Customs can be taken into account when deciding the severity of a sentence or in deciding what was the state of a man's mind at a particular time or the reasonableness of an excuse.

[1] There is provision in section 660 of the *Criminal Code* for the Supreme Court to award costs and compensations to the prosecutor for time lost in bringing the criminal prosecution. If he wants to obtain an order for damages for injuries sustained however he must commence a separate civil action. He will have to call witnesses and again prove that the defendant caused the injury, even though this has already been proved before and the defendant has already been found guilty of the criminal offence.

Thus it is no defence to a wilful murder charge to claim that a killing was sanctioned by custom as retaliation for a previous killing perpetrated by the victim's kin group. In other cases however it may be possible to claim a defence of provocation within the definition of that term set out in the *Code* and to have the court take into account a particular native custom in order to satisfy the prescribed test that it was reasonable for the native defendant to lose his self control in such circumstances.

In considering the procedures and verdicts in the Mount Hagen trials under discussion it must be remembered that the court is bound by the present rules of criminal law and procedure. It is concerned strictly with the *criminal* responsibility of the *individual* offender. This must be judged after a highly formalised inquiry into the exact degree of "guilt" of the offender's mind. The only defences available will be those provided under the *Code* which itself was designed for Queensland not for Papua and New Guinea.

Thus the initiating 1967 attack on the driver who knocked down the old pedestrian would be neither excused nor mitigated under the *Code* unless his driving amounted to an unlawful assault and his attacker, being a close relative of the pedestrian, lost his self-control and attacked immediately. The later attack on the Council President was premeditated and without any justification under the *Code*, even if the attacker's claim that Perua had previously insulted him and advised reduction in compensation were true. The young man who chased and beat the President's assailant had no defence under the *Code*. He could not claim provocation because he was not a close relative of the President and anyway, as hitting the assailant with a fence picket was likely to cause grievous bodily harm it fell outside the scope of that defence. Finally the three men who attempted to kill Kerua had no defence in the last of the Supreme Court trials because it was straight out "pay back". They had no defence under any of the *Code* sections. In particular the defence of provocation could not assist them as their attack was after cold-blooded premeditation.

Dr Strathern's main criticisms were directed at the second trial concerned with the wounding of Kerua. As the counsel for the three accused had already indicated their willingness to plead guilty to wounding with intent to cause grievous bodily harm the only point at issue was whether or not they intended to kill their victim.[2]

As this issue went to trial the judge had to decide whether each of the three men did the wounding, with what intention and how serious was the resulting wound. The doubt about their intention to kill arose because each of the three defendants turned their axes and hit with the back of the axe-head, not the blade.[3] The medical evidence showed that the wounds were serious, causing a linear fracture, but would probably not have been mortal even without medical attention. The accused each told the investigating police officer that they intended to kill but as the statements were made in the Melpa language then translated into Pidgin by a Melpa/Pidgin inter-

2 As the accused had already pleaded guilty to a charge of wounding with intent to cause grievous bodily harm the whole two day trial was in fact concerned with this question; to see whether they should be convicted of attempted murder or wounding with intent to cause grievous bodily harm. As both carry a maximum sentence of life imprisonment many tax payers would probably join the tribesmen in wondering if the extended trial was justified.

3 An explanation suggested is that it used to be customary to kill an unimportant man with the back of the axe as a sign of disrespect.

preter and then into English by the police officer there was room for confusion.[4]

The identity of the accused was not substantially in issue, nor was their motive as all this had been admitted to the police and at the earlier preliminary inquiry, to the magistrate. Following the strict rules of legal relevance in deciding whether to *convict*, the judge was not interested in the fact of the earlier attack on the council president, except in so far as it might provide a motive for the later attack. To him it was a separate issue as none of the accused persons had witnessed the attack and Kerua was in no way personally involved in it, except by reason of his kinship and tribal connections. It certainly could not be relevant in any way as a defence. Nor therefore was he interested in any question of compensation for the attack which may subsequently have been discussed. His investigation, at this stage of the trial, was strictly limited to the facts at the time of, and immediately before or after, the attack on Kerua. Thus it was also irrelevant to the judge whether compensation was being prepared for presentation to Kerua. Such activity could not help him decide who attacked him or why, unless some compensation offer made by an accused person could amount to an admission. In the end the judge was satisfied that they really did intend to kill Kerua and that, accepting the Crown version of the interpretation of their confessions, this is what they had been trying to say all along.[5]

Having determined what offence to convict them of, the judge turned his attention to the question of sentence. The Supreme Court is still basically following the sentencing policy stated so eloquently by the renowned Mr Justice Gore in 1929.[6] The aim is to deter crime but a balance must be maintained between harsh penalty and justice when dealing with primitive tribal groups in a state of cultural confrontation. If a man kills who is subject to strong tribal pressures and socially predisposed to react to his predicament by this violent means, he is considered less morally culpable than his more civilised counterpart. This is in fact merely a slight variation on accepted penalogical theory that punishment must be tailored to fit the particular individual; that although the court must never lose sight of the goal of general deterrence of potential killers in the community, this must be balanced by careful consideration of the culpability and circumstances of the individual offender. In Papua and New Guinea this is done by considering the accused's age, formal education, previous record and employment history, the government and mission activity in the accused's area, and the degree of mission influence on the accused and any native customs or beliefs relevant to the particular offence. This information is usually put before the judge in the form of an antecedent report which has previously been shown to counsel for the defence, and with his consent. Such procedure was followed in this case so the judge was made aware that the defendants all lived within about one and a half hours walk of the headquarters of the Dei Council, established twenty years ago, and within one hour's walk

4 Such translations are particularly confusing as the pidgin word "kill" can mean hit, knock unconscious or "cause death" depending on the context. Similar ambiguity can also occur in the Melpa language of the defendants.

5 It was never satisfactorily explained why they had used their axes in the reverse position. Perhaps in the failing light it reduced the chances of inflicting merely a glancing blow especially as they were inexperienced in axe warfare, having matured since peace was imposed.

6 Territory of Papua Annual Report 1929-1930 pp. 20-22.

of a Baptist Mission Station, established sixteen years ago. Each was about thirty-five years old and baptised but none had received any formal education. Each of the accused was given the opportunity to speak on sentence. Two spoke at length recounting the story again and tracing it back to the 1967 killing of the driver, the attack on the Council President and their own attempt to pay back that attack. They showed no remorse whatsoever and stated that if the matter was to be settled it would have to be by compensation.

In deciding sentence it is also permissible to call witnesses as to character, native custom or other relevant circumstances. Dr Strathern was called to give evidence of the previous history between the groups concerned and the customs about paying compensation. He did not know the individual accused persons and in fact, having worked for many years in the area, shared the local view that the actual attackers, as individuals, were of only minor significance except as representatives of their group. The judge on the other hand was faced with individuals who had broken the law, a law which is based on the notion of free will and individual responsibility for criminal offences. He was concerned in his brief stay in Mount Hagen, as elsewhere throughout the country, to deter people from attacking each other; to make them desist from self-help and to encourage them to resort to the civil courts to settle their differences. The judge was not interested in yet another detailed history of previous inter-group conflicts and paybacks. His task was clear. Attempted murder is a serious offence and must attract a substantial sentence. He could see however that the particular accused were reacting in the grip of emotions caused by what they believed was the unjustified killing of their Councillor earlier the same day. Centuries of conditioning had prepared the Hageners to give way to this emotion and local public opinion was certainly not a deterring factor. The only factors which could have acted as a restraining influence were their rather weak connection with a mission and their general knowledge of law and the administration. Luckily the victim suffered no permanent ill effect and so the appropriate sentence seemed to be three years imprisonment. One can sense the judge's impatience with this persistent anthropologist. More detailed knowledge of inter-group relations would not be likely to affect this sentence. Certainly the fact that an earlier attack by the other side had attracted a ten year sentence would seem a most improper consideration. Each case must be considered on its merits and this judge had no knowledge of what influenced the sentence in the other case.[7]

Dr Strathern criticises the second judge for not seeking out the local political situation even if only to enable him to announce his three year sentence in a way which would show people that the court had considered their situation. He compared the second judge unfavourably with the judge in the first trial who had gone out of his way to call people close and to explain himself carefully before performing his legal duty. Whilst agreeing that, even within the present system, it is highly desirable for a judge to try and express his decision so that the public can understand and relate it to the social and political realities as they see it, my own criticism is directed more at the system itself and the nature of the judge's legal role.

[7] It seems likely that the fact that it was a more premeditated attack, that it was upon an important official at a semi-official occasion and that the injury inflicted was more serious would provide ample legal justification for the differences in sentence.

The first point is that it is useless for the courts to seek to deter self-help and to urge people to resort to civil courts when there is no easily available civil remedy. There are of course civil courts which are theoretically open to all races whatever the value of the amount claimed. Cases such as these however, where the amount of compensation claimed exceeds $2,000, must be brought in the Supreme Court and this requires the services of professional and expensive lawyers.[8] Whatever the amount claimed there is a general lack of awareness of civil rights and little or no encouragement to bring civil claims before courts as, once again, all courts are more or less fully occupied dealing with criminal prosecutions brought by the police. The most serious bar to successful civil litigations is that the claim must be brought against the offender personally. Even if it is successful it is most unlikely that he will have sufficient personal funds to meet any judgment for substantial damages. There is no provision for enforcing payment by his kin group as this is not recognised as a legal entity. Even if it were, the courts have never yet recognised a kin group's customary obligation for the wrongs of its individual members, though it is clear, from the fact that $2,000 compensation had been collected in these cases, that the Hageners themselves recognise this obligation.

The case of the injured pedestrian and the subsequent killing of the driver in 1967 raises a different issue. Had the victims relatives contained their homicidal emotions sufficiently to have allowed the commencement of a civil action against the driver, and assuming the car was registered, the driver's lack of funds would not have been a bar to recovery of damages. The provision of funds would have been assured by third party insurance. The obstacle to this claim may well have been the necessity of proving that the accident was caused by the driver's negligence. The law of tort applicable in Papua New Guinea does not recognise absolute liability in such cases. Liability to pay compensation to the victim is almost always dependent on proof of fault (negligence) and this cuts right across traditional concepts which favour compensation to the victim regardless of fault. Failure of the law to recognise this may in fact partly account for the apparent increase of attacks on drivers after accidents involving death or personal injury.[9]

The second major criticism is that the Supreme Court, by concentrating exclusively on deciding the criminal issue and making no attempt to settle the question of compensation, is just not dealing with the major issue. Even the judge in the first case, whom Dr Strathern so highly praised, was in the long run obliged to move on leaving the compensation issue uninvestigated and up in the air, despite his knowledge that the attack had arisen from dissatisfaction over an earlier compensation payment. It is ludicrous that we have slavishly followed the concept of strict separation between criminal and civil remedies to the extent that the Supreme Court can deal only with the near irrelevancy of the identification of the individual offender, his exact state of mind and his punishment, leaving the Administrative officers to get down to business of arranging inter-group

[8] The Public Solicitor is theoretically available to give assistance in this type of case but as he gives priority to defending all natives charged with criminal offences in the Supreme Court he does not have the resources to assist their victims. It was however recently announced that an officer would be sent to Mt. Hagen specifically to try and explain to Hageners that civil remedies are available through the courts.

[9] The Secretary for Law recently announced that the question of introducing a limited form of no fault liability for road accident deaths was under consideration.

compensation after the court has gone. It is quite likely that by dodging the compensation issue the court is itself encouraging the very payback killing which is condemned.

After a killing the relatives of the victim feel a sense of grievance which can be assuaged either by a substantial compensation payment or by a payback killing in retaliation. Under the present system the police (and therefore the law) are seen to be exclusively concerned with apprehension of the killer and the court is apparently concerned only with imprisoning him (and then only sometimes, because quite often he is acquitted for lack of sufficient proof of guilt). The extremely strong demand by the victim's kin group for retribution could possibly be satisfied by the court imposing much harsher penalties but this would also require a one hundred percent conviction rate for they would certainly not be happy if he were acquitted. The alternative is for the court investigating the killing to also be obliged to consider the question of inter-group compensation. The compensation order should not be entirely dependent upon conviction of the actual killer as the mere fact of causing the death is sufficient to raise the need for compensation regardless of whether the circumstances would make the defendant criminally, or even civilly, liable for the death. As things stand the criminal trial leaves the victim's relatives frustrated and dissatisfied and no means of obtaining civil compensation appears readily available. It is not surprising that they therefore simply take the law into their own hands by the method of payback: a solution to which they have been predisposed by centuries of tradition.

For courts to involve themselves in questions of group compensation would of course oblige us to consider the difficult questions of kin group liability for the wrongs of group members.

In early Anglo-Saxon times the English law had techniques for accepting the fact of a kin group's responsibility for its members and enforcing it. In those days compensation was paid by and to groups and, in its absence, vendetta was allowed.[10] As this is so clearly similar to the existing social system throughout all but the most highly westernised sectors of Papua New Guinea, how has the law refused to recognise it for so long? There may of course be disagreement from the new "westernised" educated young man who feels himself emancipated from his kin group but such are few and those still living under the tribal system are many. There are two problems for lawyers to work on. How to arrange for kin groups to pay and receive compensation in suitable cases as part of the criminal trial, and how and when to oblige a kin group to pay a fine to the government for a crime committed by a member.[11] Once criminal courts start putting this sort of pressure on kin groups it is likely to have a dramatic deterrent effect on payback killings and crimes in rural areas generally.

10 Dorothy Whitlock *The Beginning of English Society* Penguin 1965 pp. 38-42. The author also points out that in later stages when the strength of the kin group was no longer sufficient to maintain social control artificial groupings of ten men, a tithing, were created to shoulder responsibility for the behaviour of each other (p. 46). The Australian Administration seems to have taken the opposite view; that no progress is possible until the power of the kin group is broken.

11 This idea of fining the kin group seems little different in principle from (say) making the licensee of a hotel liable for a criminal offence committed by a barman without his knowledge or fining the company (and thereby the shareholders) for a crime committed by the manager.

The final criticism concerns the constitution of the Supreme Court itself. The time when it could continue as an all-white and alien tribunal is long since past. Even though the first local lawyers are beginning to appear as counsel, and later no doubt as judges, this does not alter the basically alien nature of its personnel and procedures. These local lawyers are not members of the local communities they visit on circuit and are barely more competent to comprehend them than their Australian counterparts. On top of this all who appear in the Court are trapped, by its procedural rules and the nature of the game, into participating in a legal debating society, skating cynically (or in genuine ignorance) over the real issues and emotions vital to the parties before them. Surely the solution is to let members of the local communities participate in deciding the fate of their own criminals. This could be done by using local assessors, juries, lay associate members or a full bench of laymen with a professional chairman. Any of these measures would require simplifying the procedures. There would be a good argument for making the language of the court Pidgin English. Even more substantial local participation could be successful if the law relating to injuries to the person and to property (civil and criminal) were simplified and brought into line with Melanesian social values. In such courts Dr Strathern's evidence about past relationships between the groups would already be before the court, but as part of the background knowledge of the tribunal, which surely is as it should be.

The present system seems to satisfy no one, except perhaps a proportion of the lawyers involved who feel that the application of "objective justice" is an end in itself and that any number of startlingly wrong acquittals is merely the price, willingly paid, of ensuring that not one innocent man should be convicted. Already the frustrated bewilderment of the general public is being heard in the House of Assembly where, predictably, the remedy being suggested is harsher punishment for the convicted criminal. Proposals are being made that judges be *obliged* to sentence a man convicted of wilful murder to death and that the prerogative to commute the death sentence be transferred to the Territory's Administrator's Executive Council. There is a strong body of opinion in favour of hanging and, metaphorically at least, the gallows are now being prepared.

Under the present system the court is breaking one of its own strict rules; as most people are unable to understand and accept the purpose and procedures of the criminal trial, justice is not being seen to be done. Should this continue into the period of independence, an increasingly bewildered and frustrated government is highly likely to take steps to ensure decisions and sentences which it understands. This could involve weighting the rules of evidence and procedure against the accused, imposing harsh minimum sentences, or even by-passing the courts altogether. Perhaps it would be better for the lawyers to put their own house in order by re-examining the imported laws in the light of Melanesian needs and above all by involving the people in their own court.