THE INTERNATIONAL SOCIETY FOR THE REFORM
OF CRIMINAL LAW

20TH INTERNATIONAL CONFERENCE
2-6 July 2006 - Brisbane

Plenary 6, 4 July 2006 – Review of Sentence on Appeal

GUIDELINE JUDGMENTS:
It seemed like a good idea at the time.

Nicholas Cowdery AM QC

Director of Public Prosecutions, NSW, Australia
Immediate Past President, International Association of Prosecutors

---

INTRODUCTION

Matters concerning the liberty of the subject, in addition to providing rich pickings for the popular news media, inevitably raise issues of human rights and the just rule of law. In the common law system the matter of the separation of powers also arises from time to time in that context. Prosecutors are just as concerned about such issues as defence representatives, perhaps even more so: after all, defence lawyers represent the interests of only one client at a time – prosecutors in all cases represent the general public interest.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, particularly, contain provisions that prescribe standards to be reached in order to achieve a fair trial by an independent judiciary. It is that judiciary – not the executive arm of government – that should set and impose the penalty upon a duly convicted offender so that the doctrine of the separation of powers is not infringed, the human rights of the prisoner are not violated and justice may be done.

Sentencing is a complex art. Chief Justice Spigelman of New South Wales ("NSW") said in an address to my officers in 1999[1]:

> *"The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just deserts, and of mercy often conflict. Yet we live in a society which values both justice and mercy."*

[1] Address to "Future Directions Conference", Office of the DPP, NSW, 25 June 1999

Punishment also serves the purposes of setting minimal standards of morality and behaviour, as an agency for the expression of public indignation and condemnation and as a cohesive force in society.

Earlier this year the Chief Justice added, addressing the proper identity of the sentencers[2]:

> *"Long experience has established that such tasks* [as sentencing] *are best done by independent, impartial and experienced persons, who are not subject to the transient rages and enthusiasms that attend the so frequently ill informed, or partly informed, public debate on such matters."*

The development of guideline judgments in New South Wales, in which there are no doubt lessons for other jurisdictions, should be considered in the context of a criminal justice system that requires judges and magistrates to carry out that task and to meet those expectations, often in the glare of a hostile, randomly directed spotlight.

A GOOD IDEA

In the middle part of 1998, with a NSW State election due in March 1999, the customary "law and order auction" was warming up. There was talk of legislation directing judges to sentence in particular ways – mandatory sentences, mandatory minimum sentences, guideline (or "grid" or matrix) sentences and so on, in the discredited ways (at that time) of the Northern Territory, Western Australia and some of the United States of America. The most strident calls came from the Opposition. The Government searched for ways to appease the demagogues while at the same time demonstrating its own "toughness" on crime.

On a visit to England in 1998 the Chief Justice had alighted upon the system of guideline judgments that had been in operation there for 20 years or more, prior to the *Crime and Disorder Act 1998*. New Zealand and Canada also had some experience of guideline decisions, but of a slightly different character. There is no statutory basis for the practices in those jurisdictions (see below).

While the NSW State Government cobbled together the *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* (see below), the Court of Criminal Appeal prepared to institute its own regime for the production of guideline judgments on sentences in particular categories of offence. The principal objective was to ensure consistency in sentencing as between courts and judges, structuring – not restricting – discretion, so as to maintain public confidence in the administration of justice. Individualised justice must still be able to be done while equal justice is pursued.

It not only seemed like a good idea at the time, it was a good idea – and certainly better than the alternatives then in prospect.

[2] Address to Parole Authorities Conference 2006, 10 May 2006

The Chief Justice also stated in the 1999 address:

> *"Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice. Guideline judgments are preferable to the constraints of mandatory minimum terms or grid sentencing."*

Guideline judgments were initiated in the 1970s by the English Court of Appeal, providing guidelines that are intended to give authoritative guidance to trial judges in certain areas of sentencing. The guidelines are not meant to be applied rigidly to every case. They are for assistance only. The sentencing judge retains the discretion to move within the guidelines or to depart from them if that is justified (but it is contemplated that the reasons for any such departure will be explained in the remarks on sentence). Sentences in guideline judgments are indicators, just as prescribed maximum penalties are indicators of a different kind.

In the UK some guideline judgments were intended to set a tariff or sentencing range for a particular offence and to differentiate between and analyse the relevant aggravating and mitigating circumstances in relation to the type of offence. Guidelines have also been issued for particular offences, for type of penalty and for type of offender. (In Canada only the former is achieved, by setting down a starting point for sentence for a particular offence; in New Zealand there has been a mixture of approaches, although mostly there has been a bottom-up approach by synthesising pre-existing first instance sentences.)

In *R v Millberry* [2003] 1 Cr. App. R. 396 Lord Woolf CJ commented on the use and limitations of guidelines:

> *"… guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive at the current sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge."*

Somewhat more pithily, Judge LJ in *R v Peters & Ors* [2005] EWCA Crim 605 said:

> *"Guidelines, whether resulting from cases decided in this Court, or produced by the Sentencing Guidelines Council, are guidelines: no more no less."*

Before we invoke the memory of Humpty Dumpty discussing the meaning of words with Alice, the nature of guideline judgments should be examined and their development reviewed.

GUIDELINE JUDGMENTS

A guideline judgment enunciates principles of general application. It may take various forms. In NSW the guideline judgments initially delivered:

- a suggested sentencing range, given certain facts and circumstances;
- an appropriate starting point upon which defined circumstances may build; and
- relevant considerations to be taken into account by way of aggravation or mitigation.

In the initial NSW cases the guidelines were set for one or more of the various common forms of the category of crime before the court. To that extent the guideline sentencing judgments went beyond the usual appellate court approach of determining an individual case by reference to an appropriate tariff for a particular offence. Sometimes guidelines of a more general nature, going beyond the initial three forms above, have been delivered.

Guideline judgments go some way to redressing the unfortunate impression, driven by the media's concentration on specific, aberrant instances of unusually lenient sentences, that sentences in general are too lenient. They can have a tendency to increase sentences for particular offences. They improve consistency in sentencing. They can have a general deterrent effect.

By labelling such judgments as guideline judgments, the guidance given by superior courts in such matters becomes more apparent to the profession and to sentencing judges. Care must be taken, however, as judicial warnings have sounded, not to regard guidelines as prescriptive and as rules of universal application (see generally *Wong* in the High Court – below [2001] 207 CLR 584 – and *R v Ngui and Tiong (2000) 1 VR 579* per Winneke P at 584).

Austin Lovegrove, Reader in Criminology at the University of Melbourne, said in "Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments", Current Issues in Criminal Justice, Vol 14 No 2, p 182 (November 2002):

> *"Guideline judgments demonstrate no more than a crude and partial logic for the purpose of decision making in sentencing".*

[Well, every bit helps…]

(The authority of an appellate court to set guidelines for the exercise of judicial discretion was affirmed quite some time ago in Australia in the family law case of *Norbis v Norbis* (1986) 161 CLR 513.)

GUIDELINE JUDGMENTS IN NSW

1 *R v JURISIC* (1998) 45 NSWLR 209; 101 A Crim R 259
Dangerous driving – a starting point guideline

Late in 1998 the Chief Justice signalled the Court's intention to formulate guideline judgments in appropriate cases and moves were made to identify an appropriate starting category of offence. Dangerous driving causing death or grievous bodily harm was singled out (section 52A of the *Crimes Act 1900*), there being a history of a large

number of Crown appeals against such sentences and an indication that there was indeed some inconsistency of approach by sentencing judges. (It also happened to be a category of crime in respect of which the media commentators had been particularly vocal for some time with consequent growing political interest in the issue.)

There was a Crown appeal pending in the matter of *Jurisic*, so he became the unwitting subject of the first guideline judgment case in NSW on 12 August 1998.

Mr Jurisic had pleaded guilty in the Local Court to three charges of dangerous driving causing grievous bodily harm. He was committed to the District Court for sentence where on the first count he was sentenced to a minimum term of 9 months with an additional term of 9 months, to be served by way of home detention, with his licence disqualified for 12 months. On each of the second and third counts he was put on a recognisance (bond) for 2 years. The Crown appeal was as much about the nature of a sentence of home detention as it was about the terms imposed upon Mr Jurisic.

On appeal he was resentenced on 12 October 1998 by a bench of five judges to a minimum term of one year with an additional term of one year (full time imprisonment) and disqualified from driving for two years.

The Court of Criminal Appeal, without application by or notice to either of the parties, also issued the first guideline for NSW as follows.

> (1) A non-custodial sentence for an offence against s 52A should be exceptional and almost invariably confined to cases involving momentary inattention or misjudgment.
>
> (2) With a plea of guilty, wherever there is present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence (minimum plus additional or fixed term) of less than three years (in the case of dangerous driving causing death) and less than two years (in the case of dangerous driving causing grievous bodily harm) should be exceptional.

A list of aggravating factors was provided by the Chief Justice, including:

- extent and nature of the injuries inflicted;
- number of people put at risk;
- degree of speed;
- degree of intoxication or of substance abuse;
- erratic driving;
- competitive driving or showing off;
- length of the journey during which others were exposed to risk;
- ignoring of warnings;
- escaping police pursuit.

His Honour posed the question: does the relevant aggravating factor manifest, in the circumstances of the case, that the offender has abandoned responsibility for his or her own conduct? The period of three or two years, once the threshold of abandoning

responsibility has been reached, is a starting point. The presence of additional aggravating factors, or their increased intensity, will determine the actual sentence.

The Chief Justice also indicated in this case that:

> *"… guideline judgments should now be recognised in New South Wales as having a useful role to play in ensuring that an appropriate balance exists between the broad discretion that must be retained to ensure that justice is done in each individual case, on the one hand, and the desirability of consistency in sentencing and the maintenance of public confidence in sentences actually imposed, and in the judiciary as a whole, on the other."*

In its Monograph Series 21 in 2002 "Sentencing dangerous drivers in New South Wales – impact of the *Jurisic* guidelines on sentencing practice" the Judicial Commission of NSW reported that, following comparison of sentencing patterns for cases decided in the three years before and three years after the *Jurisic* decision:
1 there was greater consistency of result in the sentences handed down after the decision; and
2 there was a clear and discernible increase in the severity of the penalties imposed.
It was also reported that the number of Crown appeals had dropped.

(Of course, there is no reason in principle why a guideline judgment should not be sought also in circumstances where the pattern of sentencing has become unduly severe.)

2 *R v HENRY et ors* (1999) NSWCCA 111; 46 NSWLR 346
Armed robbery – a sentencing range guideline

The second offence identified by the Court for a guideline judgment was armed robbery (section 97 of the *Crimes Act 1900*). Six Crown appeals were identified as representing a good range of factual circumstances and an appeal by a prisoner was added. The appeals were heard together on 18 and 19 March 1999.

The judgments were delivered on 12 May 1999. The guideline that emerged posited a category of case where there were:

- a young offender with no or little criminal history;
- a weapon like a knife, capable of killing or inflicting serious injury;
- a limited degree of planning;
- limited, if any, actual violence but a real threat thereof;
- the victim in a vulnerable position such as a shopkeeper or taxi driver;
- a small amount taken; and
- a plea of guilty, the significance of which is limited by a strong Crown case.

In such a case, the Court said by majority, a sentencing range (as opposed to a starting point, as provided in the *Jurisic* decision) of four to five years total sentence would be

appropriate. The sentence actually imposed might vary according to the variability of the aggravating factors described or the addition to them of other factors.

On 12 July 1999 applications for special leave to appeal to the High Court were filed by several respondents to this guideline judgment. The grounds relied upon included:

- the court below should have not issued a guideline judgment in relation to the offence of armed robbery;
- the court below erred in taking into account sentences for armed robbery in other jurisdictions without taking into account differences in sentencing legislation in other jurisdictions compared to New South Wales; and
- the court below in re-sentencing the respondent in a Crown appeal should not have taken into account the guideline judgment and fresh evidence tendered in the CCA as evidence in the guideline judgment hearing.

Special leave was refused on 16 June 2000.

In *R v SDM* [2000] NSWCCA 158 the *Henry* guideline judgment was held to be relevant to the sentencing of children, as well as adults. The Court said that guideline judgments were not to be regarded as equivalent to statutory instruments, which would follow if exceptions were grafted onto them. The Court reaffirmed that guideline judgments are intended to provide benchmarks for particular kinds of offence, by way of guidance, while preserving the application of proper sentencing principle which is of general application.

In Sentencing Trends & Issues, No 26 produced by the Judicial Commission of NSW in February 2003: "Sentencing Trends for Armed Robbery and Robbery in Company: the impact of the guideline in *R v Henry*" it was reported that the guideline had apparently been successful in reducing the systematic excessive leniency and inconsistency in sentencing practice in respect of these offences. There had been an increase in the overall proportion of offenders receiving more severe penalties. There was also a decrease in Crown appeals.

ENTER THE COMMONWEALTH

3 *R v WONG; R v LEUNG* [1999] NSWCCA 420

Importation of drugs – a quantitative guideline

The first Commonwealth guideline judgment hearing took place on 30 July 1999 in respect of the offence of being knowingly concerned in the importation of heroin, such offence being committed in NSW.

The respondents to the Crown appeals in this instance sought to challenge the jurisdiction and/or power of the court to promulgate sentencing guidelines in conjunction with Crown appeals in Commonwealth matters. The respondents argued that in determining the appeals the court was exercising Federal jurisdiction vested in the court by section 68(2) of the *Judiciary Act 1903 (Commonwealth).* The jurisdiction so vested cannot extend beyond that which may constitute part of the

judicial power of the Commonwealth arising under Chapter III of the Constitution. It was argued that the judicial power of the Commonwealth does not extend to

(a) the provision of judgments containing guidelines to be taken into account generally in sentencing classes of offenders;
(b) determining principles in relation to the sentencing of offenders, other than in relation to the particular offence and circumstances of an offender in a particular case before the court; and
(c) admitting and taking into account evidence of no direct relevance to the nature of the offence and the circumstances of the offender in the particular case before it.

In the alternative it was argued that the exercise of Federal jurisdiction is limited to such jurisdiction as may be exercised pursuant to an application under section 26 of the *Criminal Procedure Act 1986 (NSW).*

Finally it was argued by the respondents that, to the extent that the court has Federal jurisdiction under Chapter III of the Constitution and a relevant law of a State, the State law, to the extent that it is inconsistent with relevant Commonwealth law (Part 1B and particularly s.16A of the *Crimes Act 1914*) is invalid.

The Attorney General for NSW intervened in the proceedings to submit that the court may consider the formulation of sentencing guidelines in the course of determining Commonwealth appeals.

Judgment was delivered on 16 December 1999, the Court by majority dismissing the respondents' contentions. The Court set out a table of penalties indicated according to quantities (weights) of illicit drugs imported.

In this case special leave was given to appeal to the High Court – ***WONG v THE QUEEN; LEUNG v THE QUEEN*** **[2001] 207 CLR 584**. The Court held that:

(a) the guidelines had materially affected the outcome of the appeals and the decision upon the appeals involved error;
(b) the selection of weight of narcotic as the chief factor in fixing the sentence represented a departure from fundamental sentencing principles because it did not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender and did not address considerations of proportionality;
(c) principles informing the construction of the guidelines were inconsistent with s 16A of the *Crimes Act 1914 (Cw)* which expressed a number of matters to which the court had to have regard when passing sentence on a person convicted of a federal offence.

The Court also expressed a view (per three of the Justices) that the publication of the guidelines was beyond the jurisdiction provided by the relevant State Act.

Exit the Commonwealth.

BACK TO NSW

4 ***Re ATTORNEY GENERAL'S APPLICATION [No 1]; R v PONFIELD et ors*** **(1999) 48 NSWLR 327**
Break, enter and steal – a sentencing considerations guideline

The next category of State offence to be identified as suitable for a guideline judgment was break, enter and steal and the application was made by the Attorney General under the 1998 legislation (see below). The hearing was held on 1 October 1999.

In its judgment delivered on 16 December 1999 (the day of the Court's judgment in *Wong*) the Court held that it was appropriate to formulate a sentencing guideline judgment and to do so by indicating relevant sentencing considerations without establishing a starting point or developing a range.

The following aggravating factors were identified:

- the offence is committed whilst the offender is at conditional liberty on bail or on parole;
- the offence is the result of professional planning, organisation and execution;
- the offender has a prior record particularly for like offences;
- the offence is committed at premises of the elderly, sick or disabled;
- the offence is accompanied by vandalism and by any other significant damage to property;
- the multiplicity of the offence, having regard to the criminality of each individual offence.;
- the offence is committed in a series of repeat incursions into the same premises;
- the value of the stolen property to the victim, whether that value is measured in terms of money or in terms of sentimental value;
- the offence was committed at a time when, absent specific knowledge on the part of the offender (which is a legislatively prescribed circumstance of aggravation), it was likely that the premises would be occupied, particularly at night;
- the actual trauma suffered by the victim (also not being one of the prescribed aggravating circumstances);
- force was used or threatened (with a similar proviso).

The judgment in this case must now be read in conjunction with the legislated standard non-parole periods for such offences (see below).

5 ***R v THOMSON; R v HOULTON*** **[2000] NSWCCA 309; 49 NSWLR 383**
Discount for plea of guilty, contrition, cooperation – a quantitative guideline

Section 22 of the *Crimes (Sentencing Procedure) Act 1999* already provided:

> *(1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account:*
>
> *(a) the fact that the offender has pleaded guilty; and*
>
> *(b) when the offender pleaded guilty or indicated an intention to plead guilty;*
>
> *and may accordingly impose a lesser penalty than it would otherwise have imposed.*

The question had always been: how much should the discount be? It had also become clear enough that many judges were failing to acknowledge the public benefit that derives from an appropriate guilty plea and to reflect that benefit in discounts on sentences. In the judgment delivered on 17 August 2000 the following guidelines were set where a plea of guilty is entered.

(a) A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.
(b) Sentencing judges are encouraged to quantify the effect of the plea on the sentence in so far as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant – contrition, witness vulnerability and utilitarian value – but particular encouragement is given to the quantification of the utilitarian value. Where other matters are regarded as appropriate to be quantified in a particular case, for example, assistance to authorities, a single combined quantification will often be appropriate.
(c) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 per cent discount on sentence. The primary consideration determining where in the range a particular case should fall is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.
(d) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.

The application of this guideline judgment by sentencing judges has provided extremely fertile ground for appeals. See, for example: *R v Harmouche* [2005] NSWCCA 398; *R v Cardoso* [2003] NSWCCA 15; *R v Dib* [2003] NSWCCA 117; *R v Stanbouli* [2003] NSWCCA 355.

6 ***R v WHYTE & Ors*****[2002] NSWCCA 343; 55 NSWLR 252**
Dangerous driving – a numerical (or starting point) guideline

The Court, again constituted by five judges, referred to the High Court's decision in *Wong* and after analysing the various judgments and their effects held that the decision did not require the NSW CCA to overrule *Jurisic* or *Henry* and allowed the

Court to proceed to set guidelines in the instant case (in reliance also upon legislation that had been enacted in the meantime – see below).

In accordance with the new legislation, the Court determined to set guidelines that would operate in addition to the statutory requirements of sentencing, not limiting or denigrating from them. In providing numerical guidelines, the Court described a "typical" case of dangerous driving causing death or bodily harm as:

- young offender;
- of good character with no or limited prior convictions;
- death or permanent injury to a single person;
- the victim is a stranger;
- no or limited injury to the driver or the driver's intimates;
- genuine remorse;
- plea of guilty of limited utilitarian value.

In such a case a custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgment.

Aggravating factors that frequently occur are:

- extent and nature of the injuries inflicted;
- number of people put at risk;
- degree of speed;
- degree of intoxication or of substance abuse;
- erratic or aggressive driving;
- competitive driving or showing off;
- length of the journey during which others were exposed to risk;
- ignoring of warnings;
- escaping police pursuit;
- degree of sleep deprivation;
- failing to stop.

All but the first two impinge directly on the moral culpability of the offender at the time of the offence. Where the offender's moral culpability is high, a full time custodial head sentence of less than three years (in the case of death) and two years (in the case of grievous bodily harm) would not generally be appropriate.

7 ***ATTORNEY GENERAL'S APPLICATION No 1 of 2002***
[2002] NSWCCA 518; 56 NSWLR 146
Taking other matters into account in sentencing – guidelines for proceeding

This application was novel, seeking guidelines for the way in which a sentencing court should approach other offences by the same offender that were not the subject of convictions but which s/he wished to have taken into account in order to "clean the slate". The procedure in NSW is by way of a "Form 1" on which the offences are noted and which forms part of the official record of the case. The Form 1 is in addition to the indictment or other document on which the charges in respect of which

there are convictions are recorded. The procedure for taking this course is set down in sections 32-35 of the *Crimes (Sentencing Procedure) Act 1999*.

The Court determined as follows.

1. The entire point of the process of using a Form 1 is to impose a longer sentence (or to alter the nature of the sentence) than would have been imposed if the primary offence had stood alone. There is no requirement that the additional penalty should be small. Sometimes it will be substantial.

2. The statutory scheme requires the court to focus on "the principal offence". It is no part of the task of the sentencing court to determine appropriate sentences for offences listed on a Form 1 or to determine the overall sentence that would be appropriate for all the offences and then apply a "discount" for the use of the procedure.

3. Use of the Form 1 procedure will generally result in a lower effective overall sentence than would have been imposed in the case of a conviction for the primary offence and convictions for the offences listed on the Form 1, followed by separate sentences for each of those offences.

4. Although a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The court does so by giving greater weight to two elements, inter alia, which are always material in the sentencing process:

> (a) the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged;
>
> (b) the community's entitlement to extract retribution for serious offences when there are other offences for which no punishment has in fact been imposed.

These elements are entitled to greater weight than they may otherwise be given when sentencing for the primary offence. There are matters which limit the extent to which this is so. The express provision in s 33(3) referring to the maximum penalty for the primary offence is one. The principle of totality is another. The important point is that the focus throughout must be on sentencing for the primary offence.

There was much more, besides, addressing the interaction between and weight to be given to competing considerations in relation to the different offences, the way in which offences should be selected for inclusion on a Form 1 and other matters.

8 *APPLICATION BY THE ATTORNEY GENERAL … CONCERNING THE OFFENCE OF HIGH RANGE PRESCRIBED CONCENTRATION OF ALCOHOL…* [2004] NSWCCA 303; 61 NSWLR 305

High range PCA – a sentencing considerations guideline

There developed in the Local Court of NSW (where summary offences are dealt with by magistrates) a deal of inconsistency in the way in which penalties were being imposed for the offence of "high range PCA" – that is, driving a motor vehicle with a

concentration of more than 0.15 grammes or more of alcohol in 100 millilitres of blood. To an extent the discrepancies were geographical, to an extent personal to the magistrates, but inconsistencies there were. The Attorney General applied for a guideline judgment.

The approach followed in the judgment was similar in some respects to that in *Whyte*. The Court posited an "ordinary case" as one where:

- the offender drove to avoid personal inconvenience or because the offender did not believe that he or she was sufficiently affected by alcohol;
- the offender was detected by a random breath test;
- the offender has prior good character;
- the offender has nil, or a minor, traffic record;
- the offender's licence was suspended on detection;
- the offender pleaded guilty;
- there is little or no risk of re-offending;
- the offender would be significantly inconvenienced by loss of licence.

In such an "ordinary case", the Court held:

1. an order finding the offence proven but dismissing it without conviction (by placing the offender on a bond) will rarely be appropriate;
2. a conviction cannot be avoided only because the offender has attended, or will attend, a driver's education or awareness course;
3. the automatic disqualification period will be appropriate unless there is a good reason to reduce the period of disqualification;
4. a good reason might include the nature of the offender's employment, the absence of any viable alternative transport or sickness or infirmity of the offender or another person;
5. in an ordinary case of a second or subsequent high range PCA offence a conviction and placement on a bond would rarely be appropriate, a discharge without conviction would very rarely be appropriate and where the previous offence was of high range PCA, any sentence of less severity than a community service order would generally be inappropriate;
6. the moral culpability of such an offender is increased by:
- the degree of intoxication above 0.15;
- erratic or aggressive driving;
- a collision between the vehicle and any other object;
- competitive driving or showing off;
- the length of the journey in which others were exposed to risk;
- the number of persons actually put at risk by the driving;
7. where the moral culpability is increased:
- a bond, with or without conviction, would very rarely be appropriate;
- where a number of factors of aggravation are present to a significant degree, a sentence of any less severity than imprisonment of some kind, including a suspended sentence, would generally be inappropriate;
- where any number of aggravating factors are present to a significant degree or where the prior offence is a high range PCA offence, a sentence of less severity than full-time imprisonment would generally be inappropriate.

The Judicial Commission of NSW reported in its "Sentencing Trends & Issues" Number 35 in September 2005 that the guideline had apparently resulted in an increase in severity of penalties imposed for these offences, greater consistency in sentences and, even though there was an increase in severity appeals, there was less likelihood of the kind of penalty being altered and a greater likelihood of the term of imprisonment being reduced.

Not every application for a guideline sentencing judgment has been successful. In ***ATTORNEY GENERAL'S APPLICATION No 2 of 2002*** **[2002] NSWCCA 515** the Court was asked to formulate guidelines for offences of assaults on police. It declined to do so for several reasons, one of which was the existence of a legislated standard non-parole period for the main offence under section 60(2) of the *Crimes Act 1900* (see below).

PROSECUTION PERSPECTIVE

The *Jurisic* guideline judgment in 1998 was prompted significantly by a long list of successful Crown appeals against inadequate sentences for dangerous driving causing death or grievous bodily harm. These cases had become a favourite subject for outbursts in the tabloid press, on talkback radio and on tabloid television which highlighted further the inconsistency in sentences for these offences and consequently the injustices being wrought in many cases.

In the four years after the decision in *Jurisic* there was a marked change. Sentencing judges, with some few exceptions, applied the guidelines in the judgment. In the few cases where Crown appeals were required it appeared that the judges involved may have been testing the limits of the operation of the guidelines; but once the parameters were firmly established, those dropped away. *Whyte* assisted enormously in that.

There was also some blessed relief from the hysterical and uninformed outpourings of the media, for which we were all grateful. It is usually the exceptional cases that attract publicity and occasionally that still occurs. Significantly, however, the aggravated form of the dangerous driving offence (section 54A(4)) with its higher prescribed maximum penalty has continued to create difficulties and sentences for those offences have been the subject of continuing Crown appeals and appellate judicial comment (eg. *R v McMillan* [2005] NSWCCA 28).

There are significant benefits for the prosecution from effective guidelines – more consistent and appropriate sentences moulded by reference to known criteria, fewer Crown appeals and less pressure on the executive to respond to media hype. The defence also benefits, being able to predict more accurately just what the offender will receive and how best to take advantage of the guideline considerations.

Henry did not have the same sort of immediate effect at first instance, although it has assisted the conduct of Crown appeals and is helping to bring consistency in that way. *Ponfield* has been useful. *Thomson and Houlton* has been applied very widely but, as noted above, not without a significant degree of appellate attention. The Form 1 judgment sorted out some uncertainties among sentencing judges. Despite the latitude

it gives in so many ways, the high range PCA judgment has been very useful in bringing a greater degree of consistency in sentencing into being, not least through its application in arguments in support of prosecution appeals from the Local Court.

While there have been occasional suggestions of applications being made in relation to other sentencing issues (eg. in what circumstances is it appropriate for a court to suspend a sentence of imprisonment?), because of some of the issues and considerations mentioned below, no further applications have been made by the Crown and the Court has not delivered any guideline judgments of its own motion. Of course, that raises the risk of the Parliament legislating for mandatory sentences, mandatory minima and matters of that kind; although, by and large, its activist zeal has been vented in the legislation that is discussed below.

ISSUES ARISING

As with any innovation in the criminal justice system or processes, fresh issues have arisen in respect of guideline judgments. They include the following.

- How should the categories of offences suitable for guideline judgments be identified?

- How can we ensure that the court has before it a suitable range of matters, both Crown and prisoner appeals, to provide sufficient context for the Court to formulate an appropriate guideline?

- What type of guideline judgment should be sought and/or delivered: the "starting point" guideline (cf *Jurisic*) or the "sentencing range" guideline (cf *Henry*) or the approach that identifies and weighs the relevant considerations or some other approach?

- Should an application always be at the behest of the Crown (and therefore by implication - it is said - be directed always towards increasing the general level of sentences)?

- How should the court inform itself? What is the status of the additional material considered in formulating guidelines?

- How should the effect of guideline judgments be evaluated?

- How should the impact on the offenders concerned be accommodated?

Some of these are addressed below.

IDENTIFICATION OF OFFENCES TO BE THE SUBJECT OF A GUIDELINE JUDGMENT

The purpose of a guideline judgment is principally to encourage consistency in sentencing practice and thereby maintain public confidence in the administration of

justice. It is incumbent on the applicant to establish systematic inconsistency in sentencing practice or systematic leniency [or, quaere, severity] in sentencing practice as a pre-requisite to obtaining a guideline judgment. An important source of information as to sentencing practice is the sentencing statistics produced by the Judicial Commission of NSW. However, for many offences the statistical sample available from the Commission is too small to enable conclusions as to consistency or inconsistency to be drawn.

Another readily available source of sentencing information is the judgments of the CCA itself in relation to particular offences. However those samples, too, have their limitations: the CCA only deals with cases in which the Crown asserts error and/or manifest inadequacy or the prisoner asserts excessive severity. It does not deal with the bulk of cases which are considered by both parties to be "within range" or by the Crown as not manifesting error that is likely to be corrected.

Inconsistency can arise in relation to the approach taken, the outcome or the philosophy applied to reach the outcome. Whichever measure is adopted, it must be acknowledged that for certain offences, inconsistency will be very much in the eye of the beholder. The judgment must be, to an extent, a subjective one.

THE TYPE OF GUIDELINE

The guideline judgments issued to date have adopted the starting point, the sentencing range, the sentencing considerations and general guidelines approaches. The sentencing considerations approach is justifiable where a quantitative measure is not appropriate because of the wide variation in the circumstances of the offence or of the offender.

Where the cases do not "fall into neat groups or lend themselves to the derivation of any precise arithmetical tariff" (see *Brewster* (1998) 1 Cr App R 220 at 225-227) an acceptable approach will be to set out the relevant sentencing considerations but not develop sentencing ranges or a starting point. This was the approach taken in *Ponfield* and the high range PCA judgment, following Bingham CJ in *Brewster*.

This third kind of approach lists the factors relevant to sentencing for the offence and gives an indication of the weight to be attached to each. The criticism which can be levelled at this third approach is that it does not provide the degree of guidance required to ensure consistency and it really gives a sentencing judge licence to impose whatever sentence s/he was inclined to impose anyway, irrespective of the guideline.

LOGISTICAL DIFFICULTIES

Unless the application is of the kind described above in connection with high range PCA or Forms 1, the Court does not wish to deliver guideline judgments in a vacuum. The Court generally wishes to have before it a range of factual situations, preferably by way of both Crown and prisoner appeals so that it has a proper context in which to consider the application for the guideline. However, there is a perception that guideline judgments will invariably raise the starting point or the sentencing range.

This has the practical and understandable result that prisoner appellants are reluctant to have their matters associated with guideline application hearings. The related court proceedings are also more protracted than "ordinary" appeal proceedings. The result may be that guideline judgments continue to be related mainly to Crown appeals although, since the enactment of section 37(3) of the *Crimes (Sentencing Procedure) Act 1999* the Court can no longer give a guideline in the hearing of an individual appeal.

The mounting of a case for a guideline judgment is extremely resource intensive for all concerned, especially the Crown.

THE STATUS OF MATERIAL ADDUCED IN A GUIDELINE HEARING

A difficult issue for the Crown in mounting a guideline application is to decide what additional evidence or information is to be adduced and to what purpose it should be put; ie. should the Crown seek to rely on it only in respect of the guideline judgment, or also in respect of the individual appeal/s included in the guideline hearing?

For example, the Court appears to have given little weight to a report by a clinical psychologist prepared for the purpose of the *Henry* guideline judgment on armed robbery relating to the psychological impact of armed robbery upon its victims. The Court appears to have concluded that such information was already known to it as a matter of general knowledge.

This raises the wider question of how the Court can inform itself for the purposes of policy development. The Chief Justice had indicated that *"the means of acquiring information for the purposes of policy development should not be confined by the rules of evidence developed for fact finding with respect to matters that only concern the parties to a particular case"*. In the United States of America the courts commonly accept *amicus curiae* briefs to assist in this aspect of the inquiry.

GUIDELINE JUDGMENT LEGISLATION

The development of guideline sentencing judgments in NSW must be seen against a backdrop of legislative activity in the area of sentencing generally. Until 2000 sentencing was addressed in a diversity of Acts that included provisions dealing with aspects of sentencing in a piecemeal way. From early 2000 this law was removed into three Acts, the *Crimes (Sentencing Procedure) Act 1999* dealing with procedural matters, the *Crimes Legislation Amendment (Sentencing) Act 1999* abolishing the concepts of felony and misdemeanour and reforming the *Criminal Procedure Act 1986* and the *Crimes (Administration of Sentences) Act 1999* dealing with the practicalities of the administration of sentences.

The *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* had a brief life in the interim, being invoked by the Attorney General in *Ponfield*. The *Criminal Procedure Amendment (Sentencing Guidelines) Act 1999* altered the effect of the 1998 Act by permitting the DPP to intervene independently in proceedings brought by the Attorney General to, inter alia, "inform the court with respect to any relevant

pending appeal with respect to sentence". All this was overtaken by the 1999 legislation that came into force in April 2000.

Division 4 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* which commenced on 3 April 2000 provided for sentencing guidelines. Section 36 defined "guideline judgment" as meaning *"a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders, being:*

> *(a) guidelines that apply generally, or*
>
> *(b) guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders(but not to particular offenders)."*

Section 37 provided that a court could give a guideline judgment on the application of the Attorney General. That might occur in relation to an indictable or summary offence. Sections 38 and 39 gave power to the Senior Public Defender and the DPP to intervene.

By amendment, section 37A which commenced on 18 December 2001 enabled the Court of Criminal Appeal to give a guideline judgment of its own motion and required it to give the Senior Public Defender, the DPP and the Attorney General an opportunity to appear. Section 39A gave to the Attorney General power to intervene in such a case.

One consequence of this legislation has been to remove from the DPP (and from the Senior Public Defender) the power to apply for a guideline judgment. (Presumably s/he would have to rely on his or her persuasive power with the Attorney General or the Court.)

Section 42A, also commencing on 18 December 2001, provided that a guideline is in addition to any other matter that is required to be taken into account on sentencing and does not limit or derogate from any such requirement.

Clause 41 of Schedule 2 to the Act retrospectively validated existing guideline sentencing judgments.

OTHER SENTENCING LEGISLATION

1. A significant aspect of the above legislation is its interaction with Division 1 of Part 3 of the *Crimes (Sentencing Procedure) Act*, sections of which came into effect at different times.

   Section 3A of the Act describes the purposes of sentencing. Section 21A prescribes lists of aggravating and mitigating factors to be taken into account on sentencing, but in subsection (1) stipulates that they are *"in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law"*, thereby preserving all the common law considerations on sentencing.

Section 22 provides that a guilty plea is to be taken into account (cf *Thomson;Houlton*). Section 22A allows a discount for defence pre-trial disclosures. Section 23 allows a discount for assistance provided to law enforcement authorities.

2. On 1 February 2003 Division 1A of Part 4 of the Act commenced, prescribing standard non-parole periods for listed offences, being applicable to instances of such offences in the middle of the range of objective seriousness. Following the decision of the CCA in *R v Way [2004] NSWCCA 131; 60 NSWLR 168* and other cases, however, that exercise has become largely academic. Nevertheless, decisions like *Henry* and *Ponfield* must now be read with section 54D. The interaction of guidelines with standard non-parole periods has become an area of significant tension and this may have contributed to the apparent reluctance of the Attorney General to make and the CCA to entertain further applications for guideline sentencing judgments.

All this has occurred against the further background of an unresolved debate in Australia about whether sentencing should be a process of "instinctive (or intuitive) synthesis" or of a more mechanical process loosely described as the "two stage approach". There may be an element of the latter in the guideline judgment regime – certainly, some of the Justices in *Wong* seemed to think so.

A GOOD IDEA?

The introduction and development of guideline sentencing judgments has not been without controversy, criticism or judicial expressions of disapproval. On the one hand they have served valuable purposes in: forestalling unreasonable sentencing legislation by the Parliament, directing it into avenues that the courts have been able to interpret and manage consistently with continuing judicial independence; ironing out the more obvious inconsistencies in sentencing for particular offences; providing acceptably authoritative guidance for judges in particular situations; and – avowedly an unintended consequence – increasing the sentence tariff for some offences.

On the other hand, some of the High Court Justices and some academic and other commentators have warned against the prescriptive nature of guidelines and the risk of uncritical adherence by judges, the fetters they may impose on judicial discretion in individual cases, the difficulty of reconciling them with common law and recent statutory sentencing requirements and the constitutional problems inherent in their application to Commonwealth offences.

The application of guidelines by sentencing judges can also become a fertile area for further appeals (see above in relation to *Thomson and Houlton*).

A list of further reading is attached for reference. In his article Austin Lovegrove identified seven problems that might arise with guideline judgments generally.

1 They omit many critical factors and "factor effects".
2 There is a danger of the allowance for additional relevant matters as an adjustment to the notional guideline sentence not reflecting their true importance. There is inadequate individualisation.
3 There may be a tendency for judges to ignore matters not mentioned in the guideline judgments.
4 Case factors are left largely to be considered in isolation.
5 Standard sentences are set for specified sets of circumstances. This is artificial and in real cases numerous actual circumstances are present.
6 Where a sentence of imprisonment is provided for, with non-custodial penalties in exceptional circumstances, how is the threshold to be set?
7 The judgments do not provide multiple and systematically related standards as touchstones for the process – the process inhibits a global consideration of the resultant sentence.

DEVELOPMENTS IN OTHER AUSTRALIAN JURISDICTIONS

In Western Australia section 143 of the *Sentencing Act 1995* provides a mechanism for promulgating sentencing guideline judgments, but it has never been used. The WA Court of Criminal Appeal has discouraged their use, even though before that legislation it had issued "sentencing guidance" judgments in a bottom-up fashion.[3] The WA DPP has asked the CCA to issue guideline judgments on four occasions (concerning suspended sentences and sexual relationship offences, fraud, domestic violence and indefinite sentences) and the defence on one occasion (the relevance of mental disorder to sentencing), but without success. Reasons given by the Court for declining to act have included a lack of experience with offences of the particular kind, that there had been no error of principle or inconsistency in the primary judgment, that the way to proceed is well established, that proposed guidelines were wrong or too confined, that the subject matter was not appropriate for a guideline judgment and that there is wide factual variation between cases of the particular offence.

On 1 July 2004 (after a false start following the Starke Sentencing Committee proceedings in 1988) a new Part 2AA of the *Sentencing Act 1991* commenced in Victoria, providing a mechanism for the Court of Appeal to promulgate guideline judgments.

In South Australia there has been discussion of the creation of such a mechanism. In *Police v Cadd (1997) 69 SASR 150* a minimalist approach was taken by setting out relevant and important factors and the type of punishment that should be imposed. This is a top-down approach of a prescriptive nature.

[3] *Cheshire* (unreported, WA CCA, 7 November 1989); *Podirsky* (1989) 43 A Crim R 404

CONCLUSION

Judicial responsiveness to community concerns by way of self-regulation is appropriate and unobjectionable. The NSW Court's regime of guideline judgments, notwithstanding its teething troubles and uncertain future, is acceptable in principle and workable in practice. It has been strengthened by the legislation passed during its currency.

However, we need to scrutinise very carefully any attempt by the executive to have the Court do its bidding in ways that may infringe its independence. We also need to be careful to ensure that measures taken do not result in unfairness to any of the parties involved or to future litigants.

FURTHER READING

(in alphabetical order by author/s or heading)

1 Anderson J L: "Leading steps aright: Judicial guideline judgments in New South Wales" – Current Issues in Criminal Justice Vol 16 No 2, p 140 (November 2004)

2 Barnes L A, Poletti P and Potas I: "Sentencing Dangerous Drivers in New South Wales: Impact of the *Jurisic* guidelines on sentencing practice" – Judicial Commission of NSW Monograph 21 (2002)

3 Barnes L A and Poletti P: "Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the guidelines in *R v Henry*" – Judicial Commission of NSW Monograph 26 (2003)

4 Cowdery QC, N R: "Guideline Sentencing: A prosecution perspective" – Judicial Officers' Bulletin Vol 11 No 8 (September 1999)

5 Craigie SC, C B: "Guideline Judgments Battered, then Patched Up – where does that leave your advice on pleas of guilty?" – Law Society Journal vol 40 No 1, p 53 (February 2002)

6 Latham DCJ: "Criminal Law Update" – The Judicial Review, Vol 6, p 55 (2002)

7 Lovegrove A: "Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments" – Current Issues in Criminal Justice, Vol 14 No 2, p 182 (November 2002)

8 Morgan N and Murray B: "What's in a Name? Guideline Judgments in Australia" – Criminal Law Journal, Vol 23 No 2, p 90 (April 1999)

9 Poletti P: "Impact of the High Range PCA Guideline Judgement on Sentencing Drink Drivers in NSW" – Sentencing Trends & Issues No 35 (September 2005)

10 Sentence: "Application of *R v Henry* to children" – Criminal Law News Vol 8 No 4, p 29 (2001)

11 Sentence: "Guideline for discount for plea of guilty" – Criminal Law News Vol 7, No 7, p 60 (2000)

12 Sentence: "Jurisdiction of the CCA to promulgate guideline judgments" – Criminal Law News, Vol 8, No 11, p 95 (2001)

13 "Sentencing – Guideline Judgments" – Judicial Officers' Bulletin, Vol 10, No 9, p 67 (October 1998)

14 Silverii J: “Concern over government sentencing reforms” – Law Institute Journal (Vic), Vol 77, No 5, p 20 (May 2003)

15 Spears D: “Structuring Discretion: Sentencing in the *Jurisic* Age” – University of New South Wales Law Journal, Vol 22, No 1, p 295 (1999)

16 Spigelman CJ: “Sentencing Guideline Judgments” – Australian Law Journal, Vol 73, No 12, p 876 (December 1999)

17 Sully J: “Trends in guideline judgments” – Australian Bar Review, Vol 20, No 3, p 250 (2001)

18 Warner K: Case and Comment: “Wong and Leung” – Criminal Law Journal, Vol 26, No 1, p 59 (February 2002)

19 Warner K: “Sentencing Review 1998” – Criminal Law Journal, Vol 23, No 6, p 364 (December 1999)

20 Warner K: “The role of guideline judgments in the law and order debate in Australia” – Criminal Law Journal, Vol 27, No 8, p 8 (2003)

21 Young J: “Guideline judgments in criminal appeals” – Australian Law Journal, Vol 73, No 1, p 13 (January 1999)

22 Young J: Recent Cases: “Guideline judgments: pleas of guilty” – Australian Law Journal, Vol 74, No 10, p 654 (October 2000)