STRUCTURING DISCRETION: SENTENCING IN THE *JURISIC* AGE

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On 12 October 1998, the Court of Criminal Appeal headed by new Chief Justice Spigelman ushered in a new phase in the history of sentencing in New South Wales. In *R v Jurisic*,[1] the Court announced that from now on it will, in appropriate cases, issue guideline judgments. On 13 October 1998, the Chief Justice in an article written for and published in the *Daily Telegraph* labelled this approach as "innovative and different". These guideline judgments represent a departure from the traditional system of sentencing principles developed through appellate review and involve the adoption of a more structured approach. However, the introduction of such guidelines may also be seen by some as an unacceptable engagement by the judiciary with populist views and as an institutional acknowledgment of a law and order crisis. A wider question is whether the judiciary is the appropriate body to implement community concern, and whether such judicial activism creates an unacceptable tension between the role of parliament and the proper functioning of the judiciary.

I. THE DECISION IN *R v JURISIC*

Mr Jurisic (the respondent) pleaded guilty in the Local Court to three counts of dangerous driving occasioning grievous bodily harm in contravention of s 52A(3)(a) of the *Crimes Act* 1900 (NSW). Each of the three counts related to a separate victim. He was committed for sentencing to the District Court where the following sentences were imposed:

Count 1: sentenced to minimum term of nine months with an additional term of nine months, both terms to be served by way of home detention. A licence disqualification period of 12 months was also imposed.

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1 *R v Jurisic* [1998] NSWSC 597 (12 October 1998).

Counts 2 and 3: on each count, pursuant to s 558 of the *Crimes Act*, sentence deferred upon respondent entering into a recognisance himself in the sum of $1,000 to be of good behaviour for a period of two years and to accept supervision of the Probation and Parole service.

The Crown appealed on the grounds that the sentences imposed were inadequate. The Court of Criminal Appeal allowed the appeal, quashed the sentence imposed below on the first count, and sentenced the respondent to imprisonment for two years comprising a minimum term of one year and an additional term of one year. A licence disqualification period of two years was also ordered.

In passing judgment, the Full Bench of the Court of Criminal Appeal issued the first guideline for New South Wales, which read 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.
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> (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.[2]

A list of aggravating factors, including, inter alia, speed and degree of intoxication, was provided by Chief Justice Spigelman.

II. INTRODUCING GUIDELINES

Spigelman CJ, in his leading judgment, indicated clearly 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.[3]

This notion of guideline judgments is derived from the pre-1998 guideline judgments issued by the English Court of Appeal.[4] After referring with approval to Dunn LJ in *R v De Havilland*,[5] Spigelman CJ said:

> The existence of multiple objectives in sentencing – rehabilitation, denunciation and deterrence – permits individual judges to reflect quite different penal philosophies.

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2 *Ibid* at 37, per Spigelman CJ.

3 *Ibid* at 14-15.

4 H Donnelly, "Guideline judgments: from tariffs to starting points" (1998) 5 *Criminal Law News* 93.

5 (1983) 5 Cr App R (S) 109 at 114.

> This is not a bad thing in a field in which "the only golden rule is that there is no golden rule": [see *R v Geddes* (1936) 36 SR (NSW) 554 at 554-5, per Jordan CJ]. Indeed, judges reflect the wide range of differing views on such matters that exists in the community. However, there are limits to the permissible range of variation. The courts must show that they are responsive to public criticism of the outcome of sentencing processes. Guideline judgments are a mechanism for structuring discretion, rather than restricting discretion.[6]

III. ASSESSING THE NEED FOR GUIDELINE JUDGMENTS

The Chief Justice observed that "[s]ignificant disparity between public opinion and judicial sentencing will eventually lead to a reduction in the perceived legitimacy of the legal system".[7] He also suggested that "[p]ublic criticism of particular sentences for inconsistency or excessive leniency is sometimes justified".[8] The recognition of this situation is the justification for the introduction of a corrective measure: the guideline judgment.

This explicit acknowledgement by a court that some public criticism of sentencing disparity is warranted is remarkable. Traditionally, the courts have taken the view that they should not be swayed by public opinion from their duty to administer justice fairly and impartially, nor be influenced by the tide of public opinion generally. However, it is clear that the courts should not stand aloof from the community that they serve. As Justice Michael Kirby has observed:

> Judges are there to give dispassionate decisions, uninfluenced by the strong forces that can rise and swell and then retreat again in popular opinion. It is a feature of our time that our political institutions tend to live from day to day. It will be, I think, an unhappy development if the courts were equally prone to respond in that way to passing political fancies. By the same token, the courts serve the community of citizens of whom they are members and it is important for them to be aware of changing moral, social, technological values in the community and, in a general sense, keep up with the times.[9]

The proposed use of guideline judgments is consonant with this balancing exercise.

The other interesting feature of the judgment in *Jurisic* is that the Court is responding to public opinion as manifested in the media. Although some academic authors have doubted the existence of a discrete and discernible body of sentiment known as public opinion regarding policy related issues in crime

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6 Note 1 *supra* at 17, per Spigelman.

7 *Ibid* at 20.

8 *Ibid* at 17.

9 Quoted in an interview in G Sturgess and P Chubb, *Judging the World: Law and Politics in the World's Leading Courts*, Butterworths (1988) p 370.

and justice,[10] it is clear that the Court is concerned to explain and justify its decision-making process.

Adams J in his judgment notes a need for caution in courts addressing public perceptions:

> [W]hilst the Courts must do everything in their power so to act that public confidence is maintained, and whilst the importance of public perceptions must be accepted (and without resentment or patronising) we must treat with care assertions about what might be the public perception about this or that issue. Nor can publicity about a particular case or cases deflect a Court ever from doing justice according to law. To do so would be, amongst other things, to betray the trust that the overwhelming majority of citizens place in the Courts to stand as a bulwark against prejudice and unreason.[11]

IV. ERODING JUDICIAL INDEPENDENCE?

Spigelman CJ notes that in Victoria guideline judgments were not implemented because, it is reported, of resistance by judges of the Supreme Court. A significant question to be addressed is: does structuring sentencing discretion amount to restricting judicial discretion? This is a corollary to the larger question as to whether restricting discretion in sentencing undermines judicial independence and accountability.

As to this latter question, Tonry has referred with approval to Ashworth's[12] argument that:

> it is a confusion to conflate protection of the judge's power, within applicable law, to decide the facts of individual disputes and apply the law to them – a process at the core of judicial independence – with protection of the judge's preferences to set sentences free from standards that might constrain [the] exercise of discretion.[13]

The restriction of discretion in sentencing does not automatically undermine judicial independence.

In downplaying the impact of guidelines on judicial discretion, the Court emphasised the continuity between statements of sentencing principle and guideline judgments:

> This court, like other courts of criminal appeal, has frequently stated principles of general application with respect to appropriate sentences for particular offences. Such statements have, in part, the characteristics of a guideline judgment. The

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10 See, for example, AM Durham III, "Public Opinion Regarding Sentences for Crime: Does it Exist?" (1993) 21 *Journal of Criminal Justice* 1.

11 Note 1 *supra* at 3-4, per Adams J.

12 AJ Ashworth, "Sentencing Reform Structures" in M Tonry (ed), *Crime and Justice: A Review of Research*, University of Chicago Press (volume 16, 1992) 181.

13 M Tonry, "Sentencing Reform Across National Boundaries" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform*, Clarendon Press (1995) 267 at 273.

> formal step of recognising that the Court does issue such guidelines is a logical development of what the Court has long done.[14]

This claim that guideline judgments already form part of the practice of the Court of Criminal Appeal is a way for the Court to take ownership of the otherwise English concept of the guideline judgment. It is also an answer to the criticism that the creation of guideline judgments involves the judiciary in a non-judicial function that is properly the role of parliament. As Wood J observed:

> By tagging selected decisions as guideline judgments, the Court is not to be taken as usurping the function of the legislature, or as inappropriately intruding into the exercise of the sentencing discretion reserved to trial judges. Rather, what is intended is for the Court of Criminal Appeal to highlight the sentencing principles which fall for it to determine, in a way that might assist trial judges, the DPP and trial counsel, and reduce the occasion for that degree of inconsistency or departure from principle that is an indicator of injustice.[15]

V. DANGERS IN GUIDELINES THEMSELVES

One problematic aspect of the *Jurisic* decision is the presumption by the Court that the creation of guidelines will be usually prompted by Crown appeals. The purpose of Crown appeals is to correct manifestly inadequate sentences.[16] Therefore, guideline judgments developed in such a context will be used to set higher sentencing benchmarks. It is troubling that Spigelman CJ observed:

> A guideline judgment is more likely to arise in the context of a Crown appeal than in the context of an appeal against severity by an offender. In the usual case it will be the Director of Public Prosecutions who draws the attention of the Court of Criminal Appeal to the background circumstances, in terms of inconsistency of judgments and other matters, which may make it desirable to promulgate a guideline judgment with respect to a particular offence.[17]

If the stated purpose of the introduction of guideline judgments is to maintain public confidence by reducing public criticism of disparate sentences, then it is not axiomatic that such guidelines can only arise from Crown appeals. Logically, unduly harsh sentences in individual cases may equally threaten the integrity of the legal system, by showing that the system is harsh and capricious. It is troubling that the mindset of the Court is already geared towards Crown appeals as providing the building blocks of guideline judgments.

Perhaps it is for this reason that the Attorney-General has announced legislative reform[18] that will enable to the Court of Criminal Appeal, on the

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14 Note 1 *supra* at 9, per Spigelman CJ.

15 *Ibid* at 2, per Wood J.

16 *Everett v The Queen; Phillips v The Queen* (1994) 181 CLR 295.

17 Note 1 *supra* at 19, per Spigelman CJ.

18 *Criminal Procedure Amendment (Sentencing Guidelines) Act* 1998 (NSW) see especially the new s 26 inserted into the *Criminal Procedure Act* 1986 (NSW).

application of the Attorney-General, to issue guidelines as free standing documents; that is, guidelines that are not related to particular appeal cases. However, this legislation is inherently dangerous, both because it blurs the distinction between the executive and the judiciary and because it may prove to be unworkable.[19]

It is also interesting that the first guideline judgment involved dangerous driving occasioning death or grievous bodily harm. The original s 52A, which was inserted into the *Crimes Act* and operative from 6 November 1951, was introduced because of the reluctance of the courts to convict drivers of manslaughter in the factual circumstances envisaged by the section.[20] It would be ironic if the effect of the *Jurisic* guideline was to reduce the number of convictions. This could occur in two ways; first by jurors becoming aware of the new sentencing guideline and declining to convict, or secondly by accused persons declining to plead guilty to such a charge on the basis of the perceived limited discretion to impose other than a custodial sentence.

VI. SETTING A NEW DIRECTION FOR SENTENCING

The adoption of guidelines by the Court in *Jurisic* is a move tailored to meet modern concerns about perceived disparity and undue leniency in sentencing. These concerns are by no means new to New South Wales or indeed to common law jurisdictions. One international commentator, Michael Tonry, has observed that sentencing reformers whatever their jurisdiction must all confront the "antipodean twins" of discretion and disparity.[21] Guideline judgments appear to be an acceptable way of structuring sentencing discretion without unduly intruding on judicial discretion.

But perhaps the true significance of the decision in *Jurisic* is that it is an example of a modern court challenging the unspoken conformity principle of the common law. Judges have traditionally eschewed controversy or media attention. Through the co-ordinated release of the judgment and the publication of an article by the Chief Justice in a major daily newspaper, the Court is actively seeking to capture the public interest and take ownership of and responsibility for sentencing policy, which has so long been the bastard child of public policy. This engagement with the media represents an interesting development in the history of the New South Wales judiciary. For:

> When judges begin talking to the media ... they are trying to create more informed public discussion, they are searching for understanding, they are making themselves in some sense more accountable.[22]

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19 For more detail as to these cogent criticisms by commentators including the Director of Public Prosecutions and the Senior Public Defender see E McWilliams, "Sentencing guidelines: who should be the arbiter, the judiciary or parliament?" (1998) 36(11) *Law Society Journal* 48.

20 *Attorney-General v Bindoff* (1953) 53 SR (NSW) 489 at 490, per Owen J.

21 Tonry, note 13 *supra* at 268.

22 Sturgess and Chubb, note 9 *supra* at 180.

Such moves towards institutional accountability and openness by courts are to be applauded. The move to guideline judgments is, as Adams J in *Jurisic* observes, an example of a modern court bringing "to notice a basic conception that underlies the recognition of the fundamental importance of the rule of law in a liberal democracy and our attempts to maintain it".[23]

23 Note 1 *supra* at 4, per Adams J.