NEW SOUTH WALES COURT OF CRIMINAL APPEAL

CITATION: REGINA v WHYTE [2002] NSWCCA 343

FILE NUMBER(S): 60056/02
HEARING DATE(S): 15 April 2002
JUDGMENT DATE: 20/08/2002
PARTIES:
Regina (Appellant)
Dale Shane Whyte (Respondent)

JUDGMENT OF: Spigelman CJ Mason P Barr J Bell J McClellan J
LOWER COURT JURISDICTION: District Court
LOWER COURT FILE NUMBER(S): 01/31/0157
LOWER COURT JUDICIAL OFFICER: Price DCJ

COUNSEL:
Crown: G E Smith / E Wilkins
Attorney General: R Cogswell SC /
M Buscombe / B Baker
Senior Public Defender: A Haesler
Respondent: F P Thraves
SOLICITORS:
Crown: S E O'Connor
Respondent: Halliday, Hook, Noonan & Co

CATCHWORDS:
CRIMINAL LAW - Sentencing - Guideline judgments - Dangerous driving occasioning death or grievous bodily harm - Crimes Act 1900, s52A.

LEGISLATION CITED:
Crimes (Sentencing Procedure) Act 1999
Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002
Crimes Act 1900
Crimes Act 1914 (Cth)
Criminal Appeal Act 1912
Criminal Legislation Amendment Act 2001
Criminal Procedure Act 1986
Criminal Procedure Amendment (Sentencing Guidelines) Act 1998
Customs Act 1901 (Cth)

DECISION:
Appeal dismissed.

JUDGMENT:

IN THE COURT OF

CRIMINAL APPEAL

60056/02

SPIGELMAN CJ

MASON P

BARR J

BELL J

McCLELLAN J

Tuesday 20 August 2002

REGINA v Dale Shane WHYTE

FACTS

Following his plea of guilty to one charge of aggravated dangerous driving occasioning grievous bodily harm Dale Shane Whyte was sentenced to imprisonment for two years and three months with a non-parole period of twelve months. The Crown appealed against the sentence imposed.

HELD

Per Spigelman CJ, Mason P, Barr, Bell and McClellan JJ agreeing (with additional observations by Mason P and McClellan J):

A *Wong v The Queen* (2001) 76 ALJR 79 does not require this Court to overrule the guideline judgments in *R v Jurisic* (1998) 45 NSWLR 209 and *R v Henry* (1999) 46 NSWLR 346.

B Since the High Court judgment in *Wong,* a new statutory power has been conferred on the Court.

C By force of ss21A(4), 42A and 37A of the *Crimes (Sentencing Procedure) Act* 1999, sentencing judges are obliged to "take into account" a guideline judgment given by this Court.

D Guideline judgments should be expressed so as not to impermissibly confine the exercise of the sentencing discretion. Guideline judgments are to be taken into account as a "check" or "sounding board" or "guide", but not as a "rule" or "presumption".

E There is no incompatibility between the Court issuing guideline judgments and its role as a repository of Commonwealth judicial power. *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 discussed.

F Numerical guidelines have a role to play in achieving equality of justice where, as a matter of practical reality, there is tension between the principle of individualised justice and the principle of consistency.

G It is appropriate to exercise the power under s37A and reformulate the *Jurisic* guideline. The numerical guideline has been significant in ensuring the adequacy and consistency of sentences.

A Typical Case

A frequently recurring case of an offence under s52A has the following characteristics.

(i) Young offender.

(ii) Of good character with no or limited prior convictions.

(i) Death or permanent injury to a single person.

(ii) The victim is a stranger.

(iii) No or limited injury to the driver or the driver's intimates.

(iv) Genuine remorse.

(vii) Plea of guilty of limited utilitarian value.

Guideline with respect to custodial sentences

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

(i) Extent and nature of the injuries inflicted.

(ii) Number of people put at risk.

(iii) Degree of speed.

(iv) Degree of intoxication or of substance abuse.

(v) Erratic or aggressive driving.

(vi) Competitive driving or showing off.

(vii) Length of the journey during which others were exposed to risk.

(viii) Ignoring of warnings.

(ix) Escaping police pursuit.

(x) Degree of sleep deprivation.

(xi) Failing to stop.

Items (iii) to (xi) relate to the moral culpability of an offender.

Guideline with respect to length of custodial sentences

For offences against ss52A(1) and (3) for the typical case:

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.

For the aggravated version of each offence under s52A an appropriate increment is required. Other factors, such as the number of victims, will also require an appropriate increment.

The guideline focuses attention on the objective circumstances of the offence. The subjective circumstances of the offender will also require consideration.

Circumstances of the Case

The sentence imposed was manifestly inadequate, however, the Court should exercise its discretion not to interfere.

ORDER

Appeal dismissed.

IN THE COURT OF

CRIMINAL APPEAL

60056/02

SPIGELMAN CJ

MASON P

BARR J

BELL J

McCLELLAN J

Tuesday 20 August 2002

REGINA v Dale Shane WHYTE

Judgment

1. **SPIGELMAN CJ:** This is a Crown appeal pursuant to s5D of the *Criminal Appeal Act* 1912. On 12 November 2001 the Respondent was arraigned upon an indictment containing one count of aggravated dangerous driving occasioning grievous bodily harm. He pleaded not guilty. On 13 November, after the close of the Crown case, the Respondent changed his plea to guilty. The trial judge sentenced the Respondent to imprisonment for a term of two years and three months commencing on 28 November 2001, expiring on 27 February 2004 with a non-parole period of twelve months expiring on 27 November 2002. The Respondent was disqualified from holding a driver's licence for a period of four years commencing on 8 April 2000.

The Effect of *Wong v The Queen*

2. These proceedings involve the offence considered in the first guideline judgment of this Court in *R v Jurisic* (1998) 45 NSWLR 209. In *Wong v The Queen* (2001) 76 ALJR 79, the High Court overturned this Court's subsequent guideline judgment in *R v Wong*

(1999) 48 NSWLR 340. (I will hereafter refer to the High Court decision as *"Wong"*.) The decision in *Wong* cast doubts on all guideline judgments including *Jurisic.*

3. This case was heard together with three other cases which raised similar issues. However, the Court was able to dispose of the other cases without considering the issue of principle. (See *R v Cook* [2002] NSWCCA 140, *R v Sharma* [2002] NSWCCA 142 and *R v Lee* [2002] NSWCCA 236.)

4. Mr G Smith appeared with Ms E Wilkins for the Crown in all cases. Different counsel appeared for the various offenders and made submissions on the issue of principle. Mr C Craigie SC appeared with Mr H Cox for Sharma, Mr T Game SC appeared with Mr H Dhanji for Lee, Mr P Kintominas appeared for Cook and Mr F Thraves appeared for Whyte. The Crown Advocate, Mr R Cogswell SC appeared with Mr M Buscombe and Ms B Baker for the Attorney General and Mr A Haesler appeared for the Senior Public Defender. The Senior Public Defender intervened pursuant to statutory provision, to which I will presently refer, giving that office a right to appear in circumstances where the Court may give a guideline judgment. Mr Thraves adopted the submissions of the Senior Public Defender on these issues.

5. It is necessary to identify the particular respects in which *Wong* is binding on this Court and which impinge upon the continuing authority of *Jurisic*. It is also desirable for this Court to reconsider *Jurisic*, including the way *Jurisic* was explained in *R v Henry* (1999) 46 NSWLR 346, in the light of the reasoning in *Wong*, even in those respects in which that reasoning may not be binding on this Court.

6. In *Wong*, four judgments were delivered. Gleeson CJ and Callinan J would have dismissed the appeal. Their Honours made observations with respect to the appropriateness of guideline judgments. In a joint judgment, Gaudron, Gummow and Hayne JJ made a number of observations critical of guideline judgments. If that judgment had represented a majority opinion of the High Court, then the impact of *Wong* upon *Jurisic* and *Henry* in terms of binding precedent, would have been much clearer than it in fact is. Kirby J agreed with the joint judgment that the appeal be allowed. However, Kirby J did not join in all of the reasoning of the joint judgment with respect to guideline judgments. In those respects in which Kirby J agreed with the joint judgment, this Court is bound to apply the principles reflected in that reasoning to other guideline judgments insofar as such principles impinge on them. (See e.g. *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 112-113.)

7. This Court's guideline in *Wong* (set out at 48 NSWLR 340 at [142]) comprised a table consisting of one column of weights of various ranges, and a second column setting out ranges of years, being terms of imprisonment, referable to each range of weights.

8. The High Court judgment in *Wong* establishes that the guideline set out in the form of that table was incompatible with the provisions of s16A of the *Crimes Act* 1914 (Cth). The joint judgment held that this was in error in that it identified weight as "the chief factor" to be taken into account on sentence (at [56], [67], [70], [73] and [87]).

Accordingly, their Honours held that the guideline was incompatible with s16A of the *Crimes Act* which required a wide range of factors to be taken into account (at [71]-[73]).

9. Kirby J also concluded that the guideline was incompatible with s16A (see [136]). That section required the exercise of an individual discretion that took into account all of the factors identified in it (see [132]-[135]). The guideline contemplated a result derived from the "single identified factor, namely the weight of the narcotic substance" ([135] and see [138]).

10. The two dissenting judges, Gleeson CJ and Callinan J both indicated an inclination to the view that there was an inconsistency with s16A, but did not need to decide that issue ([31] and [167]).

11. The incompatibility of the guideline considered in *Wong* with s16A of the *Crimes Act* is clearly part of the ratio of the High Court decision. This aspect has no direct applicability to any other guideline judgment of this Court, including *Jurisic*. *Wong* was the only guideline which the Court ever gave with respect to a Commonwealth offence.

12. The guidelines formulated in *Jurisic* and *Henry* differ from that formulated in *Wong*. In neither case was there a comprehensive table setting out sentencing ranges for the entire conspectus of possible offences. In each case the numerical guideline was more focused. Nevertheless, some aspects of the reasoning in the majority judgments in *Wong*, do impinge on the guidelines in these cases.

13. The joint judgment in *Wong* distinguished between the articulation of *principles* by an appellate court and the articulation of proposed *results* by such a court. (See [45], [56], [58], [65] and [83].) The identification of results that should be reached in future cases was distinguished from "considerations which a judge should take into account in arriving at those results" ([80]).

14. Furthermore, the joint judgment said at [78]:

> "Numerical guidelines either take account of only some of the relevant considerations or would have to be so complicated as to make their application difficult, if not impossible. Most importantly of all, numerical guidelines cannot address considerations of proportionality. Their application cannot avoid outcomes which fail to reflect the circumstances of the offence *and* the offender (with absurd and unforeseen results) if they do not articulate and reflect the principles which will lead to the just sentencing of offenders whose offending behaviour is every bit as diverse as is their personal history and circumstances."

15. Kirby J, the other member of the majority in *Wong,* did not adopt the same approach as the joint judgment in this regard. His Honour referred to "permissible" guidelines of referable principle ([139]). His Honour also said at [137]:

> "I also support the notion that publicly available guidelines, in the sense of relevant factors declared by an appellate court, are to be preferred to undisclosed or secret "tariffs" or rules of thumb that are not so readily susceptible to the debate in public, including in a court which has relevant sentencing responsibilities and powers."

16. It is not apparent that his Honour's references to "referable principle" or "relevant factors" is intended to exclude any reference to what the joint judgment called a "result". In other respects, Kirby J expressly adopted the terminology of the joint judgment. (See e.g. the last sentence of [137].) I do not understand Kirby J to conclude that a numerical guideline is, per se, impermissible in all circumstances. His Honour criticised "secret 'tariffs' or rules of thumb" ([137]). One of the virtues of a numerical guideline, is to overcome the lack of transparency by which sentencing judges acquire an understanding of the 'going rate'. His Honour also indicated an open mind on the utility of such "innovation" to promote consistency in sentencing (at [144]).

17. Gleeson CJ did not adopt the approach of the joint judgment. His Honour said at [9]:

> "… appellate courts, both for the purpose of making and explaining their own decisions, and for the guidance of primary judges, may find it useful to refer to information about sentences that have been imposed in comparable cases, and to indicate, subject to relevant discretionary considerations, the order of the sentence that might be expected to be attracted by a certain type of offender who commits a certain type of offence."

18. This reasoning supports the kind of guideline given in *Jurisic* and *Henry*.

19. Kirby J expressly confined his conclusion in *Wong* to the opinion that the guidelines "were incompatible with the terms of the federal legislation" ([149]). His Honour was referring to both s16A of the *Crimes Act* and s235 of the *Customs Act* 1901 (Cth).

20. Kirby J identified an incompatibility between the guideline adopted by this Court in *Wong* and the Commonwealth legislation creating the offence. His Honour referred to the distinction expressed in s235 of the *Customs Act* between a "trafficable quantity" and a "commercial quantity". This legislative scheme, his Honour held, excluded, (as described in submissions to the High Court) "the judicial creation of further sub-categories of offence" (at [125]). The table which this Court adopted in *Wong* identified five separate

categories of "low level trafficable quantity, mid level trafficable quantity, high range trafficable quantity, low range commercial quantity and substantial commercial quantity".

21. His Honour concluded at [129]-[131] that such "precise subclassifications" which were "determined by reference *only* to the quantity of the substance" were inconsistent with the legislation creating the offence.

22. Kirby J referred with approval to the consideration of such issues by the Supreme Court of Canada in *R v McDonnell* [1997] 1 SCR 948. In that case, the Court was concerned with a differentiation adopted for sentencing purposes between "major" and "minor" sexual assaults. The difficulty of distinguishing a permissible separate treatment of a relevant consideration from an impermissible judicially created category of offence, is emphasised by the fact that the Supreme Court of Canada split 5/4 on this issue of characterisation in that case.

23. The joint judgment also referred to *McDonnell*, albeit not in the same way as did Kirby J. Their Honours referred to the distinction between the judicial and legislative functions, rather than the provisions of s235 of the *Customs Act*, and, referring to the two judgments in *McDonnell,* said at [82]:

> "The majority held that it was not for the courts to create subsets of a legislatively identified offence. The point of difference between the members of the Court turned upon the degree to which the starting point given by the court below could or should be taken as prescriptive."

24. The joint judgment in *Wong* referred to the "subset" or "subcategory" issue in the context of determining the jurisdiction and power of the Court to give a guideline judgment.

25. The joint judgment in *Wong* concluded at pars [83]-[88] that this Court had neither jurisdiction nor power to issue the guideline in *Wong*. The joint judgment focused on the form of the guideline in terms of the table published by this Court, which it characterised as a "table of future punishments" ([84] and see [88]) and as the "expected or intended results of future cases" ([83] and see [84]).

26. The joint judgment identified the power in s5D(1) of the *Criminal Appeal Act* as being one to "vary the sentence and impose such sentence" on the *particular* offender and added at [84]:

> "It had no jurisdiction in respect of sentences passed or to be passed on others."

27. The joint judgment also said at [84]:

> "Nothing in section 12 of the *Criminal Appeal Act* gave the Court any relevant additional jurisdiction or power."

28. This last reference rejects as pertinent, the reliance which was placed on s12 in *Wong* in this Court (48 NSWLR 340 at [16]-[18]). Section 12 confers power on this Court to:

> "… exercise in relation to proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters …".

29. As stated in *Wong* at 48 NSWLR 340 at [16], I had set out in *Henry* at [13]-[21] a broad range of decisions where intermediate appellate courts had issued guidelines in the exercise of a civil jurisdiction.

30. This part of the reasons of the joint judgment is not binding on this Court. It was not adopted by the other three members of the High Court, including the other member of the majority, Kirby J. (See at [124] and [144].) Gleeson CJ did not believe a question of power arose ([30]).

31. In *Jurisic* and *Henry,* five judge benches of this Court decided to adopt a guideline judgment system of the general character that had long existed in England and Wales. Unless required by binding authority, or persuaded that it was wrong to do so, this Court should not overrule these prior decisions. *Wong* does not require this Court to overrule *Jurisic* and *Henry.* In any event, after *Wong,* the New South Wales Parliament has intervened.

Statutory Intervention

32. In late 2001, the New South Wales Parliament passed legislation conferring on this Court, with retrospective effect, a jurisdiction of the character which the joint judgment concluded the Court did not have. No submission was made to this Court that, on its proper construction, the legislation did not confer on the Court the power and jurisdiction which the joint judgment had said was absent.

33. The constitutional validity of this legislation was challenged and I will consider this submission below.

34. It was also submitted that the legislation did not have the effect of validating the guideline in *Jurisic,* because the procedures required by the new legislation to ensure that the Court receives submissions on the need for, and the contents of, a guideline, were not in fact followed when *Jurisic* was decided.

35. The Director of Public Prosecutions and the Attorney relied on cl 41 in Sch 2 of the *Crimes (Sentencing Procedure) Act* 1999. That section purports to validate guideline judgments given prior to the commencement of s37A. I will set out these sections below.

36. As counsel appearing for the offenders in the proceedings pointed out, cl 41 gives the "same force and effect" to a prior guideline as a guideline would have had if s37A had commenced before it was given, but only in circumstances that a guideline judgment "would have been validly given had s37A commenced before it was given". Counsel drew the attention of the Court to the provisions of s37A(2) stating that the Court "is to give" the Senior Public Defender, the Director of Public Prosecutions and the Attorney General an opportunity to appear "before giving a guideline judgment". This, it was pointed out, was not done prior to the judgment in *Jurisic*.

37. These submissions would deprive cl 41 of all effect. However, it is not necessary to decide the case on this basis. As indicated above, this Court should follow its previous decisions in *Jurisic* and *Henry.* Furthermore, all the relevant parties were heard in the present proceedings. As will appear, for other reasons, it is appropriate to reformulate the guideline originally given in *Jurisic*.

38. There are five relevant statutes to which it will be convenient to refer as follows:

· *Criminal Procedure Act* 1986 ("the 1986 Act").

· *Criminal Procedure Amendment (Sentencing Guidelines) Act* 1998 ("the 1998 Act").

· *Crimes (Sentencing Procedure) Act* 1999 ("the 1999 Act").

· *Criminal Legislation Amendment Act* 2001 ("the 2001 Act").

· *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act* 2002 ("the 2002 Act").

39. Shortly after this Court's judgment in *Jurisic,* the New South Wales Parliament gave statutory recognition to guideline judgments in the 1998 Act. This Act inserted a new Pt 8 into the *1986 Act*. These provisions, with subsequent amendments, are now to be found in Pt 3 Div 4 of the 1999 Act.

40. Section 26(1) of the 1998 Act empowered the Court to "give a guideline judgment" upon application by the Attorney General. Provision was made for the Senior Public Defender to appear in such proceedings and to make submissions. This provision recognised the proper contradictor issue referred to in *Wong* at [45] and [165].

41. The 1998 Act assumed that the Court had the jurisdiction and power which it had exercised in *Jurisic* to formulate a guideline. Section 26(4) inserted by the 1998 Act provided (now s37(4) of the 1999 Act, with an additional phrase):

> "The powers and jurisdiction of the court to give a guideline judgment in proceedings under this section are the same as the powers and jurisdiction that it has to give a guideline judgment in a pending proceeding apart from this section."

42. Similarly s28 inserted by the 1998 Act provided (now s40 of the 1999 Act):

> "Nothing in this Part:
>
> > (a) limits any power or jurisdiction of the court to give a guideline judgment that the court has apart from section 26".

43. The definition of a "guideline judgment" in the 1998 Act was:

> "**Guideline judgment** means a judgment containing guidelines to be taken into account by courts sentencing offenders."

44. The 1998 Act did not, however, expressly incorporate an obligation upon any court to take into account a guideline judgment. That, it appears, was presumed to flow from the terms of any such a judgment given by the court in the exercise of an inherent, implied or other statutory power.

45. As Gleeson CJ observed in *Wong* at [5]:

> "The expressions 'guidelines' and 'guideline judgments' have no precise connotation."

However, the sense in which the Parliament used these words in the 1998 Act is apparent from the circumstances in which it was enacted.

46. The timing of the 1998 Act, and the Second Reading Speech (see New South Wales, *Parliamentary Debates,* Legislative Assembly, 28 October 1998, 9190-9191) make it clear that the Parliament intended to refer to the kind of guideline judgment issued by this Court in *Jurisic.* There is, in my opinion, no proper basis on which the word "guideline" or "guidelines" in this statutory scheme can be read down to exclude guidelines which contain a quantitative element.

47. The 1999 Act was still directed to applications by the Attorney General (s37). The Act manifested no intention to alter the concept of "guideline" from the 1998 Act.

48. Section 36 of the 1999 Act amended the definition of guideline judgment to read:

> "Guideline judgment means a judgment containing 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)."

49. A definition of guideline proceeding was introduced:

> "**Guideline proceedings** mean proceedings under s37 on an application for a guideline judgment referred to in that section."

50. More detailed provision was made in the 1999 Act for participation in guideline proceedings by the Senior Public Defender and the Director of Public Prosecutions.

51. After the judgment of the High Court in *Wong,* the New South Wales Parliament passed the 2001 Act. The timing and content of the Act suggests that its purpose was to remove the doubt about this Court's jurisdiction and power identified in the joint judgment. This is confirmed by the Second Reading Speech (see New South Wales, *Parliamentary Debates,* Legislative Assembly, 30 November 2001, 19300). The 1999 Act was amended in a number of pertinent respects.

52. The s36 definition of a guideline judgment was amended by deleting the words "containing guidelines" and inserting in lieu thereof "that is expressed to contain guidelines".

53. Furthermore, the following additional sections were inserted into the 1999 Act:

> "37A(1) The court may give a guideline judgment on its own motion in any proceedings considered appropriate by the Court, and whether or not it is necessary for the purpose of determining the proceedings.
>
> (2) The Court is to give the Senior Public Defender, Director of Public Prosecutions and Attorney General an opportunity to appear as referred to in sections 38, 39 and 39A before giving a guideline judgment.
>
> 37B A guideline judgment given in proceedings under section 37 or 37A may be reviewed, varied, or revoked in a

subsequent guideline judgment of the Court, whether or not given under the same section."

54. The 2001 Act also amended the definition of guideline proceedings to read:

"**guideline proceedings** means

(a) proceedings under section 37 on an application for a guideline judgment referred to in that section, and

(b) that part of proceedings that relates to the giving of a guideline judgment under section 37A."

55. A new s42A was also inserted:

"42A A guideline that is expressed to be contained in a guideline judgment:

(a) is in addition to any other matter that is required to be taken into account under Division 1 of Part 3, and

(b) does not limit or derogate from any such requirement."

56. Schedule 2 of the 1999 Act contains savings and transitional provisions. The 2001 Act inserted a new Part into that Schedule which included the following clauses:

"41 Any guideline judgment given by the Court of Criminal Appeal before the commencement of section 37A that would have been validly given had section 37A commenced before it was given has, and is taken always to have had, the same force and effect as it would have had if section 37A had commenced before it was given.

42 Section 37B extends to any guideline judgment given before the commencement of that section (whether under Division 4 of Part 3 or apart from that Division)."

57. At the time that the 2001 Act was passed, Div 1 of Pt 3 of the 1999 Act contained a limited number of matters which were obliged to be taken into account on sentencing: guilty plea (s22) and time served (s24). The 2002 Act inserted s21A into that Division of that Part. Section 21A refers to a wide range of matters, broadly based on s16A of the Commonwealth *Crimes Act*.

58. On the proper construction of s42A of the 1999 Act, the reference to matters that are "required to be taken into account under Div 1 of Pt 3" encompasses that Division of that Part as amended from time to time. Relevantly, this extends to s21A. This conclusion is reinforced by the legislative history.

59. Section 21A was inserted by the 2002 Act. The legislative history of the 2002 Act indicates that at the time the Parliament passed the 2001 Act it was cognisant of the relationship between the general sentencing principles legislation and the guideline judgment legislation. The 2002 Act finds its origin in an Act introduced as a private members Bill into the Legislative Council on 26 September 2001 as the *Crimes (Sentencing Procedure) Amendment (Assaults on Aged Persons) Bill* 2001. On 15 November 2001 the Government moved an amendment to that Bill in the Council. The Bill's name was later changed to the *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Bill* but as amended on 15 November 2001 was otherwise in the form eventually enacted.

60. The *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Bill* was received in the Legislative Assembly from the Legislative Council on 30 November 2001. On that same day, i.e. 30 November 2001, the *Criminal Legislation Amendment Bill* i.e. the 2001 Act was introduced to the Assembly and immediately read for a second time.

61. Section 42A of the 1999 Act, as inserted by the 2001 Act, which refers to Div 1 of Pt 3 of the 1999 Act, must be understood to encompass not only the provisions of that Division as they existed at that time, but also future amendments, particularly the new s21A which was then envisaged and introduced but not yet passed.

62. The general sentencing principles set out in s21A are not exhaustive. Section 21A(4) provides:

> "The matters to be taken into account by a court under this section are in addition to any other matters that are required or permitted to be taken into account by the court under this Act or any other law."

63. Notwithstanding the fact that s21A is in part modelled on s16A of the Commonwealth Act, the conclusion reached in *Wong* as to the incompatibility of a guideline with the legislative scheme does not apply to s21A by reason of the combined effect of s21A(4) and s42A. The steps in this reasoning are as follows:

> (v) By s37A the court is empowered to "give a guideline judgment on its own motion".
>
> (vi) 'Guideline judgment' is defined in s36 to mean a judgment expressed to contain

guidelines "to be taken into account by courts sentencing offenders".

(iii) Accordingly, s37A empowers the court to give a judgment which contains guidelines to be taken into account by sentencing judges.

(iv) By force of s21A(4) a guideline given under s37A is a matter required or permitted to be taken into account "in addition to" the matters to be taken into account under s21A.

(v) By force of s42A(a) a guideline given under s37A is "in addition to" any matter required to be taken into account by s21A.

(vi) By force of s42A(b) a guideline given under s37A "does not limit or denigrate from" any requirement of s21A.

64. Nevertheless, the similarity between s21A and s16A of the Commonwealth Act considered in *Wong*, is of significance for the form of any guideline to be given by the Court. A guideline must not be stated in such terms as may impede the ability of a sentencing judge to take into account the other factors set out in that, and other, sections.

65. Of particular significance for present purposes is that the legislative scheme now makes express provision for the effect of a guideline judgment. By reason of the combined effect of s21A(4) and s42A, and in light of the definition of what s37A authorises this court to do, sentencing judges are obliged, by force of statute, to "take into account" a guideline judgment given by this Court. What was implicit in the 1998 Act is made explicit by the 2001 Act.

66. The fact that a guideline judgment is given this statutory force is of significance beyond overcoming the doubt cast on the existence of any such jurisdiction or power by the joint judgment in *Wong*. It specifies the effect which a guideline judgment ought have on sentencing judges by force of statute. It is not necessary to decide whether this effect is intended to be an exhaustive statement in this respect or whether this Court could give a guideline judgment with some different effect. No submissions were directed to this issue. If the Court sought to travel beyond the statutory terminology, no doubt issues of compatibility with the scheme in s21A could arise, in the same way as they arose with respect to s16A of the Commonwealth Act in *Wong*.

67. This Court should proceed on the basis that the statutory effect on sentencing judges of a guideline judgment - that such a judgment should be "taken into account" - is a complete statement of that effect. The reasoning of the majority in *Wong* concluded that

the effect of the guideline was greater than merely a matter to be taken into account. This conclusion played an important part in the reasons of the majority.

Prescription

68. Nothing in any of the judgments in *Wong* qualifies the general principle that it is appropriate for intermediate courts of appeal to lay down guidelines for the exercise of a discretion. As Mason and Deane JJ said in *Norbis v Norbis* (1986) 161 CLR 513 at 519:

> "… it does not follow that, because a discretion is expressed in general terms, Parliament intended that the court should refrain from developing rules or guidelines affecting its exercise."

69. Two issues arise. What, if any, is the effect of a failure to apply a guideline? What kinds of guidelines are permissible?

70. In *Norbis* Mason and Deane JJ contemplated the possibility that an appellate court could give a guideline with the effect of a binding rule and, accordingly, treat a failure to apply the guideline as itself a basis for finding that the exercise of a discretion had miscarried. Brennan J, whilst otherwise agreeing with Mason and Deane JJ, dissented in this respect in *Norbis*. For the reasons I identified in *Henry* at [22]-[28], authorities from a number of different areas of the law in which guidelines have been adopted in the context of a discretion, support the conclusion of Brennan J. In *Jurisic* I adopted the analysis in *R v De Havilland* (1983) 5 Cr App R (S) 109 at 114 and concluded at 220–221 that guidelines were not binding in this sense. (This was confirmed in *Henry* at [29]-[31].) *Wong* affirms this approach.

71. Nevertheless, the majority judgments in the High Court in *Wong* identified an impermissibly prescriptive quality in the guideline given by this Court in that case.

72. In *Jurisic*, I stated the effect of a guideline judgment on a sentencing judge in the following terms:

> "Such guidelines are intended to be indicative only. They are not intended to be applied to every case as if they were rules binding on sentencing judges." (220 C-D)
>
> "[Guidelines] represent a relevant indicator, much as trial judges have always regarded statutory maximum penalties as an indicator." (221A)

73. In *Henry*, I quoted that sentence and added at [31]:

> "Nevertheless, where a guideline is not to be applied by a trial judge, this Court would expect that the reasons for that

> decision be articulated, so that the public interest in the perception of consistency in sentencing decisions can be served and this Court can be properly informed in the exercise of its appellate jurisdiction."

74. In *Wong*, I made a number of further observations about the effect on sentencing judges of a guideline judgment of this Court which attracted comment in the majority judgments in the High Court.

75. First, I reiterated the observations in *Jurisic* and *Henry* that a guideline was "indicative only" and "non-binding". (See 48 NSWLR 340 at [32] and [142].) The joint judgment in *Wong* observed at [43] that such statements were not intended to convey "that the guideline may be ignored in determining sentences in future cases".

76. Secondly, I said at [125]:

> "… by providing guidance to trial judges it is less likely that sentences will be imposed which suggest a need for appellate review."

The joint judgment observed at [44] that:

> "… it is highly likely that the publication of a guideline judgment will affect what sentences trial judges impose. The … identified consequences may be accepted as not only likely to follow but also intended to follow … the Court's intention is clear. It intended that thereafter sentencing judges should take account of what was set out in the guidelines."

77. Thirdly, I said at [22] that the word "proper" in s5D of the *Criminal Appeal Act* involved the identification of "what is, or should be, the appropriate pattern of sentencing" for an offence. The joint judgment observed at [43] that the pattern:

> "… is a record of what is thereafter to be regarded as 'appropriate'. At least to that extent the judgment is intended, therefore, to be prescriptive."

78. Fourthly, at [141] I referred to sentences outside the ranges in the table as liable to "attract the close scrutiny of this Court:". The joint judgment at [80] referred to this observation as indicating the effect of a guideline to be that "Departure from it must be justified".

79. Finally, in this Court in *Wong,* Simpson J observed at [190] that:

> "… it is to be expected, and indeed is intended, that sentencing courts will, generally speaking, adhere to the range of sentences promulgated as appropriate."

80. Simpson J did not agree with the Court's decision to promulgate a guideline in *Wong*. In the High Court, both the joint judgment at [44] fn 38 and Kirby J at [130] and [137] fn 198 referred to her Honour's observations in support of their conclusion as to what the majority in this Court in *Wong* "intended". None of the majority judgments in *Jurisic, Henry* or *Wong* were so expressed.

81. On the basis of these five matters, the joint judgment concluded at [83]:

> "For the reasons that have already been given, the guideline stated in the present matters was intended to have prescriptive effect."

82. Kirby J expressly agreed with this conclusion at [137].

83. I readily accept that the intention of this Court, insofar as intention is material, was that "sentencing judges should take account of … guidelines", to use the formulation in the joint judgment at [44]. As I understand the joint judgment in *Wong*, even a guideline which was merely a matter "to be taken into account" would have an impermissibly "prescriptive character". On that basis, according to the joint judgment, a guideline which represents "a relevant indicator" for sentencing judges (which was the use to which I expressly referred in *Jurisic* at 221A and repeated in *Henry* at [30]) would be impermissibly prescriptive. Similarly, the further observation in *Henry* at [31] that this Court would expect a sentencing judge to articulate reasons for not applying a guideline would also be impermissibly prescriptive.

84. I do not understand Kirby J to have shared the joint judgment's reasoning in this regard. His Honour gave particular emphasis at [137] to the fourth and fifth matters identified above, i.e. the "close scrutiny" reference and the observations of Simpson J.

85. These parts of the reasoning in *Wong* are affected by the new statutory regime which empowers the Court to give a guideline judgment that sentencing judges must take into account.

86. The observations in this Court in *Wong* about "close scrutiny" went beyond what this Court said in *Jurisic* and *Henry*. It may also be that those observations are inconsistent with the new statute, by giving a guideline judgment greater effect than that for which the statute provides. It is not necessary to decide this issue. However, the statute does, it appears to me, validate the original approach in *Jurisic,* i.e. that a guideline judgment is a relevant indicator, in the sense that it must be taken into account.

87. In a judgment delivered in this Court prior to the argument in the High Court in *Wong*, I emphasised that guideline judgments were "intended to be indicative only" (*R v*

Karacic (2001) 121 A Crim R 7 at [52]). I also referred to some observations of Winneke P in *R v Ngui and Tiong* (2000) 1 VR 579 at [13] that:

> "… the utility of the relevant guidelines expressed in *Wong's case* will be as a 'sounding board' or 'a check' against the exercise of the sentencing judge's discretion."

88. In *Karacic* at [52], I adopted this formulation as equivalent to the use of guidelines as "appropriate indicators".

89. In *Wong* at [123], Kirby J referred to the observations of Winneke P in *Ngui and Tiong* to the use of guidelines for purposes of a "sounding board" or a "check" with approval. His Honour indicated that if the guidelines in *Wong* were used in this way, they would not have been incompatible with the legislative scheme there under consideration. (See also [144].) The joint judgment also referred to the relevant passage of the judgment of Winneke P in *Ngui and Tiong* with approval, albeit not with express reference to the terminology of "sounding board" or "check" (see at [85]).

90. To similar effect are the observations of Callinan J in *Wong* about State legislation making provision for guidelines. His Honour referred to such a guideline at [168] as:

> "… merely indicative starting points, not to be rigidly or mechanistically applied, and that the trial judge still has a real, judicial sentencing discretion to exercise of the kind discussed by this Court in *House v The King*".

91. There is discernible in the High Court judgments in *Wong* an apprehension, often stated in other cases about guidelines, that notwithstanding express statements about their limited role, guidelines may, in practice, have the effect of impermissibly confining the exercise of discretion.

92. Such an apprehension was expressed by Winneke P in *Ngui and Tiong* at [12]:

> "Experience in other areas of the law has shown that judicially expressed guidelines can have a tendency, with the passage of time, to fetter judicial discretion by assuming the status of rules of universal application which they were never intended to have. It would, in my opinion, be unfortunate if such a trend were to emerge in the sentencing process where the exercise of the judge's discretion, within established principles, to fix a just sentence according to the individual circumstances of the case before him or her is fundamental to our system of criminal justice."

93. This passage was quoted with approval in the joint judgment in *Wong* at [85]. Their Honours also said at [80]:

> "If a table that is published is intended to found arguments in future cases that the discretion exercised in that future case miscarried, whatever may be the caveats that might be entered at the time of promulgating the table, it becomes, in fact, a rule of binding effect."

94. Similarly, Kirby J referred to this Court's statement that guidelines were not "binding in any formal sense" as "mollifying words" which must be read together with the statement that sentences outside the range would "attract the close scrutiny" of the Court of Criminal Appeal (see [137]).

95. Callinan J also reflected apprehension about the practical effect of guidelines at [165] when his Honour said:

> "Despite the qualifications that their makers express, they also do have, and in practice will inevitably come to assume, in some circumstances, a prescriptive tone and operation."

96. The significance of the terminology and form of a guideline was also considered by the House of Lords in *White v White* [2001] 1 AC 596 in which their Lordships were concerned with a similar issue which the High Court considered in *Mallet v Mallet* (1984) 156 CLR 605. These cases involved the discretion to determine the division of marital property and the application of a guideline that an equality of division was an appropriate starting point.

97. The issue of terminology arose in *White*. Lord Nicholls of Birkenhead at 606 expressed disapproval of the language of "starting point" on the basis that:

> "… a starting point principle of general application would carry a risk that in practice it would be treated as a legal presumption …"

98. In *White* Lord Nicholls nevertheless concluded at 605:

> "Before reaching a firm conclusion … a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the means to ensure the absence of discrimination."

99. His Lordship went on to say that this approach does not "introduce a presumption of equal division" (at 605). Nor did the Court adopt a "presumption" of equality. His Lordship said at 606:

> "… it should be possible to use equality as a form of check for the valuable purpose already described without it being treated as a legal presumption of equal division."

100. Lord Cooke of Thorndon took at different view. He said at 615:

> "I doubt whether the labels 'yardstick' or 'check' will produce any result different from 'guidelines' or 'starting point'."

101. In *Mallet* the High Court considered the practice that had developed in the Family Court to adopt a general rule that property should be split 50/50 following dissolution of a marriage. (See at 609-610, 623-624 and 639-640.) The Full Court of the Family Court had rejected the proposition that there was a principle of equal division, but did adopt equality as a "convenient starting point". (See as quoted at 613.9.)

102. Gibbs CJ rejected the language of starting points. His Honour said at 610.3:

> "Even to say that in some circumstances equality should be the normal starting point is to require the courts to act on a presumption which is unauthorized by the legislation. The respective values of the contributions made by the parties must depend entirely on the facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power whose nature I have discussed, unfettered [by] the application of supposed rules for which the *Family Law Act* provides no warrant."

103. His Honour concluded at 613.9:

> "… it is not right for a judge to start with the assumption that the property should be divided between the parties in any pre-determined proportions."

104. Mason J also rejected the Family Court's approach of treating equality as "a convenient starting point". He concluded that it appeared to have been accorded the status of a "legal presumption" in the Family Court. (See at p623.2 and 625.8.) His Honour also concluded that the approach 'obscured' (625.8) the statutory scheme which required the Court to take into account the respective contributions of husband and wife. It did so "by arbitrarily equating the direct financial contribution of one to the indirect contribution of the other as homemaker and parent" (625.8).

105. Similarly, Dawson J stated that the statute "admits of no presumptions in the consideration of the relevant circumstances" (647.7) and concluded:

> "… it is misleading, in my view, to speak, as the cases do, of equality of contribution between husband and wife as the starting point in the consideration of their property interests. A starting point is, in reality, another name for a presumption and to prescribe a starting point is to invite a disregard for the requirements of the section." (647)

106. Deane J did not construe the references in the Family Court cases in this way. Specifically the reference in that case to a "convenient starting point" did not, his Honour concluded at 640.7:

> "… involve the mistaken proposition that there is, in the case of a long marriage, a rule of law that an equal division of assets must be treated as prima facie or presumptively appropriate. What that reference to 'equality' involves is the enunciation not of a legal principle or presumption but of a general counsel of experience on the subject of what constitutes, in some types of case, an appropriate starting point for the determination of the particular order which should be made in the particular circumstances of the individual case."

107. One aspect of the reasoning of Lord Nicholls in *White* differs from that of the majority in *Mallet*. The reasoning of the High Court would classify the proposition that "equality should be departed from only if, and to the extent that, there is good reason for doing so" as creating a "presumption" inconsistent with the statutory scheme. However, the majority of the High Court in *Mallet* shared his Lordship's reservations about the terminology of "starting points".

108. In contrast, in *R v McDonnell* the Supreme Court of Canada unanimously affirmed the idea of a guideline expressed in terms of a starting point. The difference between the five judge majority and the four judge minority in that case turned on the weight given by the intermediate court of appeal to the effect of deviation from the starting point. However, the idea of a starting point itself was accepted by all. (See e.g. at [43] in the majority judgment and the minority judgment at [58]-[86]. See also my summary of *McDonnell* in *Henry* at [26]-[28].)

109. In subsequent judgments, the Supreme Court of Canada has reaffirmed that the use of starting points, including the fixing of ranges for particular categories of offences, is compatible with the sentencing judge's duty to consider all relevant circumstances and the exercise of a general discretion. (See *R v Stone* [1999] 2 SCR 290 at [244]-[245]; *R v Proulx* [2000] 1 SCR 61 at [86]-[89]. See generally Bloos & Renke "Stopping Starting Points: *R v McDonnell*" (1997) 35 *Alberta Law Rev* 795 esp at 801-807.)

110. In *Jurisic* and *Henry,* I referred to the use of numerical guidelines by courts in many jurisdictions, particularly England and Wales. The general practice has not changed since that time. There has been a steady stream of new sentencing guideline judgments. (See e.g. *R v Mashaollahi* [2001] 1 Cr App R (S) 330 (importation of opium); *R v Kelly & Donnelly* [2001] 2 Cr App R (S) 341 ("racial aggravation"); *R v Webbe* [2002] 1 Cr App R (S) 82 (stolen goods); *R v Nelson* [2001] EWCA Crim 2264 (extended sentences).) The Court has also refused to adopt guidelines (*R v Milford Haven Port Authority* [2000] 2 Cr App R (S) 423 (environmental offences).

111. Furthermore, as I pointed out in *Henry* at [37]-[42] the Full Court of the Supreme Court of South Australia has identified what it has referred to as "sentencing standards" in the form of an "appropriate sentencing range". (See *R v King* (1988) 48 SASR 555 at 557-558; *Police v Cadd* (1997) 69 SASR 150 at 165-166, 172, 174, 175-177, 196-197 and 205.) The South Australian practice has continued since the High Court rejected the special leave application from one of four sentencing standard cases. (See *Bini v The Queen* (1994) 68 ALJR 859.) Some references in South Australian authority suggest that standards have application beyond a matter to be taken into account. (See *R v Mangelsdorf* (1995) 66 SASR 60 at 66.)

112. For those who are concerned that a guideline will, as a matter of practical reality, impermissibly confine the exercise of a discretion, no doubt the very concreteness of a numerical guideline is seen to be particularly objectionable. Differing views are held about the robustness of sentencing judges. In my opinion, a numerical indicator will not operate to confine the sentencing discretion.

113. However, the authorities referred to above suggest that this Court should take particular care when expressing a guideline judgment to ensure that it does not, as a matter of practical effect, impermissibly confine the exercise of discretion. This involves, in my opinion, ensuring that the observations in the original guideline judgment of *Jurisic* - that a guideline was only an "indicator" - must be emphasised, albeit reiterated in the language of the 2001 Act as a matter to be "taken into account". A guideline is to be taken into account only as a "check" or "sounding board" or "guide" but not as a "rule" or "presumption". I see this as a reaffirmation of the reasoning in *Jurisic*.

114. As mentioned above, in *Henry* at [31], after stating that guidelines are only an indicator, I added:

> "Nevertheless, where a guideline is not to be applied by a trial judge, this Court would expect that the reasons for that decision be articulated, so that the public interest in the perception of consistency in sentencing decisions can be served and this Court can be properly informed in the exercise of its appellate jurisdiction."

115. As Simpson J pointed out in *R v Khatter* [2000] NSWCCA 32 at [26], it did not follow that a failure to articulate reasons necessarily amounted to legal error. Under the

new s37A, the obligation on a sentencing judge is to take a guideline into account. The obligation to give reasons is now the same as that applicable in the case of any other matter required to be taken into account.

116. The element of prescriptiveness, if that be appropriate terminology, of a guideline judgment given under s37A, is now provided for in the statute. The majority judgments in *Wong* are not directly applicable to such a guideline.

Constitutional Validity

117. The Senior Public Defender submitted that the guidelines issued in both *Jurisic* and *Henry* were invalid under the Commonwealth Constitution. Section 37A could not validly authorise such a guideline. Mr Haesler relied on *Kable v Director of Public Prosecutions* (1996) 189 CLR 51. He submitted:

> "The promulgation of a prescriptive guideline is an act legislative in character and inconsistent with the exercise by a Court vested with the exercise of Federal judicial power."

And

> "If a guideline is to be prescriptive and binding on future sentencing decisions, it will have a legislative character. It will, in effect, either add circumstances of aggravation (and/or mitigation) to the existing statutory provisions, fix a maximum starting point or range or some other abstract, quantitative restraint on sentencing discretion.
>
> The exercise of this power is inconsistent with that exercised by a Court with the judicial power of the Commonwealth."

118. As I will set out below, I do not understand *Kable* to propound a test of consistency. The reasoning in *Kable* requires incompatibility or repugnancy between the disputed function and the exercise of Commonwealth judicial power.

119. In *Wong*, a number of references were made to the legislative quality of guidelines. In the joint judgment, their Honours referred to the table becoming, in effect, "a rule of binding effect" and noted at [80]:

> "The fixing of such a table begins to show signs of passing from being a decision settling a question which is raised by the matter, to a decision creating a new charter by reference to which further questions are to be decided. It at least

> begins to pass from the judicial to the legislative." [Citation omitted]

120. Their Honours referred to the English system of guideline judgments relied on in *Jurisic,* noting that England has no relevant constitutional limitation, and said at [81]-[82] that the issue had divided the Supreme Court of Canada in *R v McDonnell* in the context of the Canadian Charter of Rights and Freedoms. The joint judgment at [82] referred to the differences in *McDonnell* in the following terms:

> "… the immediate focus of that debate was on the distinction between the judicial and the legislative function. The majority held that it was not for the courts to create subsets of the legislatively identified offence. The point of difference between the members of the Court turned upon the degree to which the starting point given by the court below could or should be taken as prescriptive."

121. Kirby J referred to the constitutional arguments put to the Court, but did not find it necessary to decide the case on that basis. The submissions in *Wong* were directed to the limitations of the Federal jurisdiction (see at [147]). Under the subheading "A legislative function?" his Honour said at [144]:

> "… much will depend upon the way in which 'guidelines', so-called, are expressed. If they were merely a 'sounding board' or 'check' against the exercise of a sentencing discretion, so as to bring greater consistency to that exercise, they would not be incompatible with the performance of judicial functions …. If, for example, the Court of Criminal Appeal had cited statistical and historical material and decisional analysis to describe relevant ranges of punishment by reference to multiple factors and what had occurred in the past, no offence to the exercise of judicial power would have been committed."

122. Callinan J doubted, without deciding, that guidelines could be a proper exercise of the judicial power of the Commonwealth by reason of the fact that:

> "They appear to have about them a legislative quality, not only in form but also as they speak prospectively. Despite the qualifications that their makers express, they also do have, and in practice inevitably come to assume, in some circumstances, a prescriptive tone and operation." (at [165])

123. Callinan J distinguished between "guideline judgments and judgments setting forth sentencing principles" and said at [167]:

> "… guidelines do have a legislative flavour about them, … by their very nature, they may detract from a proper consideration and application of the principles which … s16A(2) … requires be considered and applied in each case."

Nevertheless, Callinan J indicated, albeit without deciding, that a State legislature could legislate for the promulgation of guidelines in relation to State offences, so long as they are "guidelines only … [i.e.] …indicative starting points" (see [168]).

124. For the reasons I have given above, the "prescriptive" quality of the guidelines in *Jurisic* and *Henry* differ from that identified in the majority judgments in *Wong.* The reasoning of this Court in *Wong* may have gone beyond the reasoning in *Jurisic* and *Henry.* In any event the form of the guideline in *Wong* was quite different. At least in the judgment of Kirby J, the use of guidelines as a "check" or "sounding board" is not impermissibly prescriptive. Kirby J said at [144]:

> "The fact that so many judges in different jurisdictions have sought to promote greater consistency in sentencing by the use of what have been called 'guidelines' is a reason for this Court to exercise caution before condemning the innovation as incompatible with judicial functions under the Australian Constitution."

125. The joint judgment in *Wong* referred to the Court's decision in *Re Attorney-General's Application (No 1): R v Ponfield* (1999) 48 NSWLR 327*,* in which a guideline was issued by the Court upon the Attorney's application under the legislation in the form in which it was before the 2001 Act. Far from casting any doubt on the validity of the legislation, the joint judgment said at [60]:

> "There was, therefore, a specific basis in State law for the application and no federal element."

126. I have set out my own understanding of the High Court decision in *Kable* in *John Fairfax Publications v Attorney General (NSW)* (2000) 158 FLR 81 esp at [10]-[51]. In my opinion *Kable* is authority for the proposition that a State legislature may not invest the Supreme Court of the State with a function which is incompatible with, or repugnant to, the exercise by that Court of the judicial power of the Commonwealth. However, the four judgments of the majority in *Kable* are not able to be distilled into a single principle. (See *R v Moffatt* [1998] 2 VR 229 at 237 per Winneke P and 249 and 251 per Hayne JA.)

127. In *Kable* Gaudron J identified the function under consideration as involving "the antithesis of the judicial process" (at 106), as making "a mockery of that process" (at 108) and as being contrary "to what is ordinarily involved in the judicial process" (at 107). The power, her Honour held, compromised the "integrity" of the Supreme Court and, by

reason of that Court's role under Ch III also, therefore, compromised the integrity of the judicial system under Ch III. Her Honour said that in part "… The integrity of the courts depends on their acting in accordance with the judicial process" (at 107).

128. McHugh J emphasised that the power was "far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person" (at 122). His Honour also held that the statutory procedures "compromise the institutional impartiality of the Supreme Court" (at 121).

129. Gummow J identified the power as "repugnant to the judicial process in a fundamental degree" (at 132, see also at 134). This was an aspect of "the character or quality of the State court system" (at 139), with which Ch III was concerned.

130. Each of the members of the majority in *Kable* referred to the significance of public confidence in the administration of justice and, particularly, the appearance of impartiality and independence of the judiciary from the legislature and the executive (per Toohey J (at 98), per Gaudron J (at 107), per McHugh J (at 117, 118-119, 121 and 124) and per Gummow J (at 133-134)).

131. In *John Fairfax Publications* at [21]-[26], I referred to other authorities, particularly the observations of Brennan CJ in *Nicholas v The Queen* (1998) 193 CLR 173, the joint judgment in *Grollo v Palmer* (1995) 184 CLR 348 at 365 and the joint judgment in *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 27 and 36-37.

132. As I have indicated, no single principle can be derived from the judgments in *Kable.* The common theme is a test of incompatibility. I suggested in *John Fairfax Publications* (at [43]) that it may be appropriate to adopt the term "repugnancy", to distinguish the *Kable* doctrine from the "incompatibility doctrine" applicable to federal courts.

133. State legislation must have a quite exceptional character to contravene the constitutional protection of the judicial process. This is manifest in the failure of intermediate courts of appeal to identify any such contravention in the subsequent authorities:

· *R v Moffatt* (the imposition and review of indefinite sentences).

· *Wynbyne v Marshall* (1997) 141 FLR 166, followed in *R v Fittock* (2001) 11 NTLR 52 (mandatory sentencing).

· *Lloyd v Snooks* (1999) 153 FLR 339 (mandatory sentencing).

· *Felman v Law Institute (Vic)* [1998] 4 VR 324 at 352-358 (supervisory jurisdiction over legal profession).

· *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588 at 595-596 (denial of legal professional privilege).

· *R v Nixon* (2000) 119 A Crim R 477 (the court's role in a statutory witness protection scheme).

· *Silbert v Director of Public Prosecutions (WA)* [2002] WASCA 12 (forfeiture order upon death of accused before trial – by majority).

· *R v Baker* [2002] NSWCCA 184 (redetermination of life sentence requirement of "special reasons").

134. In order to render a State Supreme Court an unfit repository of federal jurisdiction it is not enough to label a function as "legislative" or "quasi-legislative". It is necessary to look at the jurisdiction conferred by the statute and analyse the extent, nature and quality of the alleged incompatibility.

135. There is no doubt that some aspects of the jurisdiction conferred on this Court by the 2001 Act could not be conferred on a Ch III court. In particular that is so of the power in s37A(1) which authorises the Court to give a guideline judgment "on its own motion" and to do so in any proceedings in which the Court believes it appropriate to do so "whether or not it is necessary for the purpose of determining the proceeding". This power extends to the giving of a guideline which a sentencing court must "take into account". The identification of matters to be taken into account is not exclusively a legislative function.

136. The joint judgment in *Wong* refers to the function of an intermediate appellate court to formulate principles, as distinct from results. However, the formulation of principles – for example in the form of a list of aggravating and mitigating circumstances of the character in *Attorney-General's Application (No 1)* – also identifies matters which a sentencing court should take into account. The determination of matters required to be taken into account is not necessarily the exercise of legislative power.

137. At the time of the adoption of the Australian Constitution, the provision of numerical guidance by judges was not regarded as a function incompatible with judicial office. In 1901, before the establishment of a court of criminal appeal, Lord Alverstone CJ and all of the judges of the Kings Bench Division (except one who was ill) formulated a "Memorandum on normal punishments in certain kinds of crime". The issues that were addressed in this memorandum indicate that debates about leniency and consistency are not new. The memorandum said:

> "The extent of divergence in the assessment of punishment by Judges of the High Court, sitting in Courts of criminal jurisdiction, has been much exaggerated. In almost every class of crime, and pre-eminently in the case of manslaughter, the Judge, in fixing the punishment, has to

> discriminate between widely different degrees of moral culpability, and to weigh an infinite variety of circumstances and situations. The Legislature has wisely provided a large latitude in punishment. Justice demands, at times, that this latitude should be boldly used; and demands constantly the use of it in a slighter degree. Any attempt to mete out punishment to offenders in the same class of crime at a rigidly uniform rate could result only in the frequent perpetration of injustice. If due allowance is made for these essential considerations, there is nothing in the sentences of Judges of the High Court of Justice which are recorded in the criminal statistics (apart from the question of the advisability of flogging as a punishment) to indicate the existence of any established difference of principle or of general practice in the sentences of Judges of the High Court of Justice.
>
> At the same time, the Judges of the King's Bench Division are agreed that it would be convenient and of public advantage in regard to certain classes of crime to come to an agreement, or, at least, to an approximate agreement, as to what may be called a 'normal' standard of punishment: a standard of punishment, that is to say, which should be assumed to be properly applicable, unless the particular case under consideration presented some special features of aggravation or of extenuation."

(The Memorandum is reprinted in the Report of the Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties,* London: Home Office, 1978, Appendix E, 191; and in R M Jackson, *Enforcing the Law*, Penguin Books, 1972, Appendix V, 391. The Memorandum is considered in D A Thomas, *Constraints on Judgment: The Search for Structured Discretion in Sentencing 1860-1910,* University of Cambridge, Institute of Criminology, Occasional Series No. 4, 1979 esp at 73-74; Radzinowicz and Hood, *A History of English Criminal Law and its Administration from 1750: Vol. 5 The Emergence of Penal Policy*, London: Stevens & Sons, 1986 at 753-758. (Republished by the Clarendon Press in 1990, sub nom *The Emergence of Penal Policy in Victorian and Edwardian England*).)

138. The Memorandum set out specific sentence ranges for a variety of offences and made separate provision for first offences and subsequent convictions, juveniles and adults and aggravating circumstances likely to arise for specific offences. Differences of opinion amongst the judges is referred to. For Australian constitutional purposes, it is appropriate only to observe that this collective endeavour, although not itself performed in a judicial role, was not regarded as incompatible with the judicial function in 1901.

The public concern about disparity in sentences of that era, which is replicated in contemporary debate including conflict between the Home Office and the judiciary, culminated in the creation in 1907 of the first Court of Criminal Appeal. (See Radzinowicz and Hood at 753-770.)

139. The power in s37A is not tarnished by any suggestion of non-judicial pre-judgment, which the judicial arm of government is required to ratify, as was the case in *Kable.* Section 37A authorises this Court to formulate guidelines in an important area of judicial decision-making which are not prescriptive for the reasons I have given above but which, even on a more elastic understanding of the word "prescriptive", do not lead to any pre-determined result. The prescription, if any, is the addition of a particular matter to a list of considerations required to be taken into account.

140. Even if it is appropriate to attach the label "legislative" or "quasi-legislative" to a power of this character, it is not , in my opinion, a power the exercise of which detracts in any way from the reputation of the Court or from the actual or perceived independence and impartiality of the Court. The Court alone makes the relevant decision. The submission that the legislation is invalid should be rejected.

The Need for a Numerical Guideline

141. The Senior Public Defender submitted that the Court should not give any guideline which contained a quantitative element, in large measure because a guideline in that form was prescriptive and of a legislative character. Any guideline, it was submitted, should be restricted to a list of relevant considerations of the character which this Court gave in *Re Attorney-General's Application (No 1)*, i.e. a judgment which brings together sentencing principles discernible in the body of relevant appellate authority.

142. Prior to *Jurisic* there were a number of decisions of this Court which had identified such principles applicable to s52A of the *Crimes Act*, drawing from time to time on the case law of other jurisdictions for parallel offences. However, it was apparent to this Court in *Jurisic* that these principles had not been applied by sentencing judges. In particular the weight to be given to the need for public deterrence and the seriousness with which the community regarded the particular offences, manifest in a substantial increase in maximum penalties, had not been reflected in a substantial number of cases. As a result there was a flow of almost invariably successful Crown appeals against sentences imposed under s52A. (See *Jurisic* at 229.) The large proportion of cases that did not result in a term of actual imprisonment suggested a pattern of leniency and of inconsistency on the part of sentencing judges. The numerous statements in this Court about the need for a sharp upward movement in the sentencing pattern (e.g. *R v Slattery* (1996) 90 A Crim R 519) had been ignored by a significant number of sentencing judges. An approach limited to the identification of relevant sentencing principles had proved inadequate.

143. As Wood CJ at CL observed in *Jurisic* at 233:

> "The Court has, in the many instances identified and in several other areas, over the years endeavoured to lay down sentencing principles for particular classes of case where sentences reflecting a significant element of general deterrence are required, or where non-custodial options are inappropriate. It appears that sometimes these principles are lost or that their significance is overlooked, in the volume of appellate decisions handed down and in the pressure imposed on trial courts to dispose of increasingly busy criminal lists."

144. It appears that the *Jurisic* guideline did have the effect which this Court intended. (See Barnes, Poletti and Potas, *Sentencing Dangerous Drivers in New South Wales: Impact of the Jurisic Guidelines on Sentencing Practice,* Judicial Commission of New South Wales, July 2002.)

145. In my opinion, the numerical guideline contained in *Jurisic* has proven to be significant in ensuring both the adequacy of sentences and consistency in sentencing for this offence in New South Wales. If the numerical guideline were removed then the pattern of inadequacy and inconsistency would, in my opinion, quickly re-emerge. Section 52A is an offence particularly likely to be affected by personal sentencing philosophy resulting in a wide divergence of outcomes. Some sentencing judges find it very difficult to accept that a person of good character who is unlikely to re-offend should be sent to gaol. However, Parliament has made it quite clear that the injuries occasioned by driving dangerously and, no doubt, the prevalence of the offence, require condign punishment.

146. As I emphasised in Jurisic (e.g. at 216B-C, 220C) there is tension between maintaining the discretion essential for individualised justice, on the one hand, and guidance to ensure consistency in sentencing decisions, on the other hand. The basic principle is that of equality of justice. Like cases must be treated alike. Unlike cases must be treated differently. The first statement requires consistency. The second statement requires individualised justice. In my opinion, numerical guideline judgments have a role to play in achieving the ultimate goal of equality of justice in circumstances where, as a matter of practical reality, there is tension between the principle of individualised justice and the principle of consistency.

The Principle of Individualised Justice

147. The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individualised. The final balance of a wide variety of incommensurable and often incompatible factors does not, I accept, involve a mathematical exercise.

148. The joint judgment in *Wong* emphasised the range of considerations that are relevant to the exercise of the sentencing discretion. Their Honours stated at [76]:

> "So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform."

149. The joint judgment rejected the identification by this Court of weight of narcotic as the chief factor to be taken into account in fixing a sentence as a departure from "fundamental principle" ([70]). One of the bases on which the joint judgment reached this conclusion was that it adopted an impermissible "two-stage" approach to sentencing, rather than an "instinctive synthesis" approach. (See at [74]-[78].) At [176] their Honours referred to my analysis of the authorities in this respect in *R v Thomson* (2000) 49 NSWLR 383 at [54]-[113].

150. Their Honours were not intending to restrict their criticism of the two-stage approach to a table of the character involved in that case and its emphasis on the weight of narcotics. Their Honours said at [78]:

> "Numerical guidelines either take account of only some of the relevant considerations or would have to be so complicated as to make their application difficult, if not impossible. Most importantly of all, numerical guidelines cannot address considerations of proportionality. Their application cannot avoid outcomes which fail to reflect the circumstances of the offence *and* the offender (with absurd and unforeseen results) if they do not articulate and reflect the principles which will lead to the just sentencing of offenders whose offending behaviour is every bit as diverse as is their personal history and circumstances." [References omitted]

151. Kirby J, who had indicated his disagreement with the "instinctive synthesis" approach in *AB v The Queen* (1999) 198 CLR 111 at [99]-[100] (and see [102]), reiterated his position in *Wong* at [101]-[103]. His Honour said that that was not an appropriate occasion on which to resolve the differences that had emerged. Gleeson CJ referred with implicit approval to a two-stage approach which identifies comparable sentences and proceeds to distinguish facts and circumstances of the case (see at [11]-[12]).

152. The reference in the joint judgment at [78], quoted above, to inconsistency between numerical guidelines and the principle of proportionality, refers to this principle as encompassing *all* of the circumstances of the offence and the offender, considered

together. That this must be the ultimate outcome can be readily accepted. However, in this State the principle of proportionality identified in *Veen v The Queen* (1978-1979) 143 CLR 458 esp at 490; *Veen v The Queen [No 2]* (1987-1988) 164 CLR 465 esp at 472-3, 476 has long been held to permit, indeed to require, that a sentence should be proportionate to the *objective* gravity of the offence. This necessarily requires a sentencing judge to consider, at some stage in the reasoning process, the sentence that is appropriate for the particular circumstances of the crime without reference to the subjective case of the particular offender.

153. The role of objective circumstances in the test of proportionality was emphasised in the joint judgment of the High Court in *Hoare v The Queen* (1989) 167 CLR 348 at 354:

> "… a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances." [Emphasis in original]

154. The joint judgment in *Hoare* reiterated the reference at 356:

> "… the basic principle that a term of imprisonment cannot properly exceed that which is justified as appropriate or proportionate punishment for the objective offence."

(See Fox "The Meaning of Proportionality in Sentencing" (1994) 19 *MULR* 489 esp at 494-495.)

155. In *Bugmy v The Queen* (1990) 169 CLR 525 at 535-536 the High Court in a joint judgment of Dawson, Toohey and Gaudron JJ left open the question of whether the *Veen* cases approved a "two step approach".

156. The reasoning in *Hoare* appears to me to necessarily involve separate consideration of the sentence appropriate to the objective circumstances of the offence. Although expressed as an upper limit – a sentence cannot be greater than the objective circumstance suggest – it has been applied to create a lower limit – a sentence should not be less than the objective circumstances require.

157. In *R v Dodd* (1991) 57 A Crim R 349 in a joint judgment of Gleeson CJ, Lee CJ at CL and Hunt J, their Honours said at 354:

> "… there ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for

> without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place. Each crime, as *Veen (No 2)* (1988) 164 CLR 465 at 472 stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity …"

158. *Dodd* has been followed and applied in this Court on numerous occasions. (See e.g. *R v Moon* (2000) 117 A Crim R 497 at [70]; *R v BJW* (2000) 112 A Crim R 1 at [31]; *R v Ramos* (2000) 112 A Crim R 339 at [12]; *R v PG* (2001) 122 A Crim R 529 at [19]-[20]; *R v Sloane* [2001] NSWCCA 421 at [30]-[31]; *R v Edigarov* [2001] NSWCCA 436 at [54]; *R v Zamagias* [2002] NSWCCA 17 at [9]-[10].) (See also Gleeson "Individualised Justice – The Holy Grail" (1995) 69 *ALJ* 421 at 424; *R v Ireland* (1987) 29 A Crim R 353 at 366; *Punch v The Queen* (1993) 9 WAR 486 at 503 per Anderson J; *R v Raggett* (1990) 101 FLR 323 at 334; and *Khouzame v The Queen* [2001] FCA 354 at [23].)

159. If this represents a "two stage approach" inconsistent with the "instinctive synthesis" approach adopted by the Victorian Supreme Court (see *R v Williscroft* [1975] VR 292 esp at 300; *R v Young* [1990] VR 951 at 954-961), then this Court should leave it to the High Court to resolve the issue.

160. There is much to be said for the proposition that the sequence in which objective circumstances and subjective considerations are taken into account should not matter, as long as all relevant considerations are taken into account. (See e.g. *Punch v The Queen*; *R v Mulholland* (1995) 102 FLR 465 at 479-480 per Angel J.)

161. As Angel J put it in *R v Mulholland* at 480, a two stage approach only involves 'a pause along the way' and is likely to lead to the same or similar result. The difference may be, as Kirby J has said, "one of semantics rather than of substance". (*Cameron v The Queen* (2002) 76 ALJR 382 at [71].)

162. This approach may not differ in practice from that envisaged by McHugh J in *AB v The Queen* in which his Honour criticised the two stage approach to sentencing. McHugh J said at [18]:

> "The task of the sentencing judge or magistrate is not to add and subtract from an objectively determined sentence but to balance the various factors and make a value judgment as to what is the appropriate sentence in all the circumstances of the case … *No doubt at the conclusion of the process, the judge will check the sentence against other comparable sentences and may feel compelled to adjust the sentence up or down.* But that is quite different from beginning with an 'objectively' determined sentence." [Emphasis added]

163. On this basis, the use of a guideline judgment as a ‘check’ or ‘guide’ or ‘indicator’ is a "two stage" approach that is consistent with the ultimate application of an "instinctive synthesis" approach. Indeed, Crockett J one of the co-authors of the judgment in *Williscroft,* emphasised in another case the necessity to have regard to prior sentences as a "guide" or a "yardstick". (See *R v Zakaria* (1984) 12 A Crim R 386 at 388.)

164. I do not see any necessary inconsistency. The crucial sentence in *Williscroft* at 300 is:

> "Now, *ultimately* every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process." [Emphasis added]

165. In order to ensure that "*ultimately*" there is such an instinctive synthesis in the determination of the sentence actually imposed, it is not impermissible for a sentencing judge, as part of the reasoning, or as a final adjustment or check, to give a significant, severable part of the relevant considerations, separate numerical weight. As Gleeson said in *Wong* at [12]:

> "Judges are generally capable of entertaining two or more ideas at the one time."

166. Nor, in my opinion, is it impermissible for a sentencing judge to take into account, as a guide or check or indicator, what an appellate court has said would be an appropriate sentence in a typical case.

167. Individualised justice is not, in my opinion, incompatible with guidance of a numerical character from an appellate court, so long as two conditions are met. First, the guidance is not prescriptive in the sense that a guideline is a matter to be taken into account. Secondly, the sentencing judge must be able to determine the actual decision on the basis of a final balancing exercise, or "instinctive synthesis", which is not capable of precise articulation. In my opinion, numerical guideline judgments can satisfy these two conditions.

The Principle of Consistency

168. The significance of sentencing consistency has been frequently emphasised (sometimes in terms of "disparity" or "uniformity" or "discrepancy"). (See, for example, *Lowe v The Queen* (1984) 154 CLR 606 at 610; *Griffiths v The Queen* (1976-1977) 137 CLR 293 at 326-327; *Bugmy v The Queen* at 538; *Everett v The Queen* (1994) 181 CLR 295 at 306; *Dinsdale v The Queen* (2000) 202 CLR 321 at 340.)

169. As Gleeson CJ said in *Wong* at [6]:

> "One of the legitimate objectives of such guidance [described by the expression 'guidelines' and 'guidelines judgments'] is to reduce the incidence of unnecessary and inappropriate inconsistency. All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency."

170. As Jacobs J pointed out in *Griffiths v The Queen* at 327:

> "… where equal treatment (i.e. consistency in sentencing) is not the rule a potential offender is encouraged to play the odds, believing that he will be among those who escape serious sanctions. Certainty of punishment is more important than increasingly heavy punishment."

171. Priestley JA outlined the compatibility of a final instinctive synthesis with the recognition of the need for consistency in sentencing in *R v Holder* [1983] 3 NSWLR 245 at 270:

> "The various elements which a sentencing judge must take into account in arriving at his sentence are, in my respectful opinion, well described in *R v Williscroft* [1975] VR 292. A feature of the discussion in that case is its recognition that 'ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process' (at 300). The reported decisions show a constant effort by the courts to reduce the sentencing process to a reasonable degree of regularity and order and to eliminate so far as possible the idiosyncrasies of individual judges in arriving at the 'instinctive synthesis' spoken of in *R v Williscroft*. What is to me a very instructive example of this search for reasoned orderliness is the recent decision of this Court in *R v Visconti* [1982] 2 NSWLR 104. This decision discussed in detail the desirability of even-handedness in sentencing. To obtain a reasonable degree of even-handedness involves the sentencing court in being aware of the general pattern of

> sentencing in respect of particular types of crime. The pattern, once ascertained, will indicate to a court in a particular case a range within which the sentence should fall, bearing in mind the various factors which the court must consider."

172. The use of an existing sentencing pattern in this way is, in my opinion, compatible with the final decision, in a particular case, being characterised as an 'instinctive synthesis'. A guideline judgment is no different to a sentencing pattern in this regard.

173. In *Wong*, Gleeson CJ at [11] quoted McLachlin J from *McDonnell* at 989 where her Ladyship said:

> "The starting-point approach was developed as a way of incorporating into the sentencing process the dual perspectives of the seriousness of the offence and the need to consider the individual circumstances of the offender. It represents a restatement of the long-standing practice of sentencing judges of beginning by considering the range of sentence that has been posed for similar criminal acts followed by consideration of factors peculiar to the case and offender before them."

174. Gleeson CJ observed at [12]:

> "This does not have to be taken as referring to a strictly sequential process of reasoning."

175. I do not think it has ever been doubted that it is material for a sentencing judge to take into account an existing pattern of sentencing. In *Wong,* this Court purported to state an existing pattern of sentencing in a particular manner. Criticisms of this Court's judgment in the High Court were related to the manner in which that pattern was stated. No criticism was directed to the foundational assumption of this Court's reasoning in *Wong,* including this Court's considerations of prior decisions in which a dispute had arisen as to what that pattern of sentencing revealed, that such a pattern constituted a relevant consideration.

176. In *Wong* the joint judgment referred to the ground of manifest excess or manifest inadequacy, as a basis for appeal from a discretionary judgment, and said at [58]:

> "In this … kind of case appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases."

177. Their Honours referred to the well known reasoning in *House v The King* (1936) 55 CLR 499 at 505. It may be accepted that the mere fact of a 'marked difference' is not itself suggestive of legal error. However a failure to take into account a material consideration is identified as error in *House v The King*.

178. The obligation to take into account an existing pattern of sentencing reflects the principle of equality which requires consistency in outcomes, so that like cases are in fact treated alike and can be seen to have been so treated.

179. A pattern of sentencing emerges over a period of time by the conduct of sentencing judges and, of course, by courts of criminal appeal, which frequently are called upon to re-sentence. A pattern of sentencing emerges and changes over time from the ostensibly unrelated decisions of numerous sentencing judges. A pattern emerges, from the bottom up as it were, which is often supported as a manifestation of the collective wisdom of judges in an essentially uncoordinated process.

180. The end result may be that described by Lord Tennyson in *Aylmer's Field*:

> "… the lawless science of our law,
>
> That codeless myriad of precedent,
>
> That wilderness of single instances,..."

181. To some degree the "wilderness" is tamed by intermediate courts of appeal establishing principles. It is also generally accepted that an intermediate court of appeal may control the boundaries of acceptable results by determining what is manifestly inadequate and what is manifestly excessive. The issue is whether or not it is permissible for a court of criminal appeal to give guidance as to the appropriate level of sentences within these boundaries. Specifically, as was the case in *Jurisic*, whether it is permissible for a court of criminal appeal to determine that an existing pattern of sentences should move upwards, and to do so not only by asserting that objective in terms, as this Court has done with respect to this offence on a number of occasions without effect, but to identify appropriate sentences.

182. In my opinion, an intermediate court of appeal ought be able to give guidelines with respect to the exercise of a discretion, such as the sentencing discretion, that identify an appropriate level in a numerical way, at the least if such a guideline is not more prescriptive than establishing an obligation upon the judge exercising the discretion to take the guideline into account.

183. In this regard I believe courts of criminal appeal have certain advantages which do not exist for first instance judges. First, an appellate court has an overview of remarks on sentence by a range of judges. Such are theoretically available to trial judges, but such remarks are required to be read and assessed, and are in fact read and assessed, on a systematic basis by judges who sit on appeals. Secondly, perhaps more significantly, a

multi-judge bench must engage in a process of dialogue about the appropriate level of sentence that is more likely to lead to a result that takes a variety of considerations into account, and is unaffected by the idiosyncratic personal philosophy of an individual judge. The process of dialogue amongst members of an appellate court changes the quality of the decision-making process. Whilst sentencing judges at first instance may engage in discussions with colleagues, the requirement of dialogue imposed on a multi-member appellate bench before reaching a decision is of a different character.

184. As the experience of this Court with respect to sentencing for s52A prior to *Jurisic* shows, the mechanisms for ensuring consistency in the absence of guideline judgments may prove to be defective. This is, in part, a reflection of the restrictions applicable to Crown appeals which do not apply to severity appeals.

185. The normal appellate process is not always able to ensure consistency in results in the sense that similar cases are treated similarly. The words of the statutory provisions establishing a right of appeal by the Crown against inadequacy of sentence have been interpreted by the courts to be subject to a number of restrictions. These restrictions include observations that such appeals should be rare. Furthermore, the determination of Crown appeals are subject to what has been described, not particularly accurately, as "the principle of double jeopardy". No such restrictions are imposed on severity appeals. The result is sometimes an imbalance in the outcomes of the appellate process. Guidance by an appellate court of a numerical character is at least capable of minimising such inconsistency.

186. Inconsistency is also a function of the size of the criminal justice system. If the frequently stated assertion of the importance of consistency is to rise above the level of empty rhetoric, something more than the system of Crown appeals has been shown to be required.

187. The New South Wales Court of Criminal Appeal now deals with something in the order of 1,000 cases a year. Many sentencing appeals are dealt with by two judge benches in accordance with the provisions of s6AA of the *Criminal Appeal Act* 1912. Some forty separate judges sit in this Court in any one year. The maintenance of consistency becomes progressively more difficult.

188. Gleeson CJ identified the difficulties of scale associated with the criminal justice system in *Wong* at [10]:

> "The increasing size of the judiciary, and the legal profession, is a factor in the importance which is attached to the problem of inconsistency, and the need for appellate guidance. In the days when criminal justice was administered by a relatively small group of judges, it was easier to maintain consistency. The range of likely penalties for common offences was well known, and significant departures from that range were readily identified.

> Idiosyncratic decision-making was not difficult to recognise. Now, at least in New South Wales, a large number of judges (and acting judges) sentence offenders, and there is a growing need for the Court of Criminal Appeal to give practical guidance to primary judges. The form that such guidance might properly take is an important issue in the administration of criminal justice. If there is insufficient guidance, and resulting inconsistency, public confidence in the value of discretionary sentencing will suffer."

189. It is the very concreteness of a numerical guideline, which may create tension with the principle of individualised justice, that can, as a matter of practical reality, help to avoid impermissible inconsistency.

Public Confidence

190. Nothing is more corrosive of public confidence in the administration of justice than the belief that criminal sentencing is primarily determined by which judge happens to hear the case. Public confidence in the administration of justice, as Gummow J pointed out in *Mann v O'Neill* (1996-1997) 191 CLR 204 at 245, is today the meaning of the ancient phrase "the majesty of the law". Such confidence is to a very substantial extent determined by public understanding of sentencing by criminal courts. Whether described in terms of transparency or accountability, public understanding is enhanced by clarity in the identification of the factors taken into consideration in determining the sentence imposed in a particular case. Today the public is less prone than it may once have been to accept a judge's "instincts" – or indeed those of other authority figures – as determinative. Public confidence would be enhanced, in my opinion, if the specific weight given to particular factors is apparent from reasons for decision. A starting point or range derived from a guideline judgment, as a check or guide or indicator, will assist in clarifying the process of reasoning.

191. As Kirby J said in *Wong* at [102]:

> "Recent decisions of this Court have been interpreted, correctly in my opinion, as requiring greater disclosure by sentencing judges of the way in which they actually arrive at the sentence imposed on a person convicted of an offence. The final sentence will normally include elements of judgment and intuition. But in my view, it cannot be denied that adjustments are made to a prima facie level with which the sentencing judge begins the task. How can one even begin to think of 'discounts', for example, without at least conceiving the integer which is the subject of the discount? The ultimate product is no more scientifically demonstrable than a judgment for damages

> for personal injuries. But it would be a retrograde step to subsume the adjustments which the law requires to be taken into account in sentencing by a 'return to unexplained judicial intuition'. Greater transparency and honesty are the hallmarks of modern public administration and the administration of justice. In sentencing, we should not turn our backs on these advances." (Footnotes omitted.)

192. Kirby J returned to this theme in *Cameron* at [73]:

> "In the context of the higher duty of judges to state reasons that facilitate the judicial process, considerations important to judicial orders should … be revealed for the scrutiny of the litigants, the public and the appellate process. They should not be hidden in judicial formulae about 'instinct'." (Footnote omitted.)

193. As I said in *Jurisic* at 220:

> "At times, and with respect to particular offences, it will be appropriate for this Court to lay down guidelines so as to reinforce public confidence in the integrity of the process of sentencing. Guideline judgments, formally so labelled, may assist in diverting unjustifiable criticism of the sentences imposed in particular cases, or by particular judges.
>
> In my opinion, 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."

Review of the *Jurisic* Guideline

194. Section 37A of the *Crimes (Sentencing Procedure) Act* 1999, as inserted by the 2001 Act, empowers this Court to give a guideline judgment on its own motion "in any proceedings considered appropriate by the Court". In my opinion, for the reasons given above, it is "appropriate" to give a guideline judgment with respect to s52A of the *Crimes Act* 1900 in the present proceedings. It is not necessary to decide whether the guideline for this offence contained in *Jurisic* was valid, nor, if not originally valid, whether it was validated by the retrospective provisions of the 2001 Act.

195. The majority judgment in *Wong* cast doubt on the use to which sentencing judges could put the *Jurisic* guideline (and for similar reasons the *Henry* guideline) in respects not clarified by s37A. In particular, it is desirable to clarify the degree of 'prescription', or rather lack thereof, in that guideline. By invoking s37A to give a guideline to replace the *Jurisic* guideline, the force of the guideline will now be stated in statutory terms as a guide which must be taken into account.

196. Furthermore, this Court should, in my opinion, amend some of the terminology of the *Jurisic* guideline which may suggest a degree of prescription beyond its use as an "indicator", as originally stated in *Jurisic.*

197. Finally, it is desirable to state more fully the particular case to which the numerical guideline applies, in a form similar to the *Henry* guideline.

198. The joint judgment in *Wong* identified the limited bases upon which an appellate court may interfere with the exercise of a discretion and said at [58]:

> "… for a court to state what *should* be the range within which some or all future exercises of discretion should fall, must carry with it a set of implicit or explicit assumptions about what is, or should be regarded as, the kind of case which would justify a sentence within the specified range. It is those assumptions that may reflect or embody the relevant principle, not the result."

199. In this regard, the table in *Wong,* based only on quantity, differs from the form of guideline identified in both *Jurisic* and *Henry,* where the "assumptions about what is, or should be regarded as, the kind of case which would justify a sentence within the specified range" are stated by reference to a wide range of considerations of a frequently recurring kind.

200. The table in *Wong* provided numerical guidance for *all* relevant offenders. The numerical guidance in *Jurisic* and *Henry* related to cases with particular identified characteristics. The guideline in *Henry* is, however, more clearly of this character.

201. In my opinion, the Court of Criminal Appeal may give a numerical guideline where the judgment indicates with sufficient detail the kind of case for which that guideline is regarded as appropriate. It is that detail which, to adopt the words of the joint judgment quoted three paragraphs above, 'reflects or embodies' the relevant principles.

202. In *Mallet,* where the High Court rejected a presumption of equal division of property in matrimonial proceedings, their Honours did identify particular kinds of cases in which equality would be appropriate. (See e.g. Dawson J at 646-647.) With respect to certain identified cases, Deane J said at 640.9:

> "… the notion of equality is likely to offer an acceptable and useful starting point…"

203. In *McDonnell*, McLachlin J said that the starting point approach is based on identifying a "typical case". (See at [58], [59], [61], [85], [86].) The guideline in *Henry* was of this character (see at [162]). The guideline in *Jurisic* was also of this character, although less clearly so. Under the new statutory basis for guideline judgments, sentencing judges must take guidelines into account. It appears to me to be desirable to reformulate the *Jurisic* guideline in order to ensure that the guidance is stated in a form that is not impermissibly prescriptive.

204. A frequently recurring case of an offence under s52A has the following characteristics.

> (i) Young offender.
>
> (ii) Of good character with no or limited prior convictions.
>
> (vii) Death or permanent injury to a single person.
>
> (viii) The victim is a stranger.
>
> (ix) No or limited injury to the driver or the driver's intimates.
>
> (x) Genuine remorse.
>
> (vii) Plea of guilty of limited utilitarian value.

205. As the Parliament has made clear, in the maximum penalties for the offence, conduct which causes death or grievous bodily harm, even in the absence of any intention to cause such injury, is to be regarded as a serious crime. However, in determining the appropriateness of full time custody and the length thereof, the sentencing judge must give close attention to the degree of moral culpability involved. This is a critical component of the objective circumstances of the offence.

Custodial Sentence

206. The guideline set out in *Jurisic* consisted of two distinct propositions. The first limb of the guideline was in the following terms (at 231E):

> "A non-custodial sentence for an offence against s52A should be exceptional and almost invariably confined to cases involving momentary inattention or mis-judgment."

207. In *Jurisic* at 217-219, I referred to numerous prior decisions of this Court which contained guidelines of this general character. In the case of eight different offences, there were observations to the effect that a custodial sentence was required, save in exceptional circumstances. In the case of fourteen other offences, there were observations to the effect that a substantial period of imprisonment was ordinarily required.

208. The joint judgment in *Wong* at [61]-[62] expressly approved the form that "guidance" took in the decision of the Full Court of the Supreme Court of South Australia in *Police v Cadd*. That guidance was at 171:

> "…that the punishment should be imprisonment 'in the ordinary case of contumacious offending by a first offender, but the circumstances of the offending or the offender may dictate some less severe form of punishment…'"

209. The joint judgment in *Wong* at [62] paraphrased this passage in the formulation "the punishment should be imprisonment in the ordinary case of contumacious offending". Their Honours noted that the "real content of the guidance" was in the reasons, where meaning was given to the word "ordinary" in the expression "ordinary case of contumacious offending". In the Addendum in *Police v Cadd*, it was stated that the explanation of this phrase was to be found in the judgment of Mullighan J. Mullighan J explained his use of the word "contumacious" at 179:

> "It means something more than mere intention to drive disqualified which is an essential element of the charge. It is committing the offence with an attitude of total disregard of the disqualification in disobedience to the authority which imposed it."

210. The two other members of the majority would have gone further than Mullighan J. Doyle CJ contended that the offence there under consideration would "ordinarily" warrant imprisonment and that a suspension of such a sentence would be "unusual" (see at 166.5, 167.8 and 168.7). Bleby J formulated the guidance in terms of imprisonment as being "appropriate" for what Mullighan J described as a "contumacious offender … in most cases … unless quite extraordinary personal or other circumstances demand otherwise" (at 209.3).

211. The approval by the joint judgment in *Wong* of the common ground formulation of the majority in *Cadd*, and the reasons given therefore, do suggest an implicit disapproval of the further formulations of Doyle CJ and Bleby J. The latter are similar to the first limb of the *Jurisic* guideline. I do not understand Kirby J to have agreed with the joint judgment in this regard. As I have shown in *Jurisic,* guidance in this form has been given on numerous occasions by this Court. The position in New South Wales is, in any event, now affected by statute.

212. A guideline under s37A is a matter to be taken into account. The first limb of the *Jurisic* guideline, with the terminology "should be" and "almost invariably confined to", has a more prescriptive tone than that which is suggested by the statutory formulation. In view of the apprehension about the practical effect of a guideline, to which I have referred above, it is appropriate to reformulate the guideline.

213. Since the decision of this Court in *Jurisic* the Parliament has enacted s5 of the *Crimes (Sentencing Procedure) Act* 1999 which provides:

> "5(1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.
>
> (2) A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including its reasons for deciding that no penalty other than imprisonment is appropriate."

This statutory directive requires an amendment to the first limb of the *Jurisic* guideline.

214. The guideline this Court should give pursuant to s37A of the *Crimes (Sentencing Procedure) Act* 1999 with respect to the typical case identified above is:

> 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.

The Numerical Guideline

215. The second limb of the guideline in *Jurisic* at 231 was as follows:

> "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."

216. I had earlier set out a list of aggravating factors which had been established in the authorities as follows:

> "(i) Extent and nature of the injuries inflicted.

(ii) Number of people put at risk.

(iii) Degree of speed.

(iv) Degree of intoxication or of substance abuse.

(v) Erratic driving.

(vi) Competitive driving or showing off.

(vii) Length of the journey during which others were exposed to risk.

(viii) Ignoring of warnings.

(ix) Escaping police pursuit."

217. Further consideration of the authorities would cause me to amend this list by changing (v) to read "erratic or aggressive driving" and adding:

(x) Degree of sleep deprivation.

(xi) Failing to stop.

218. I went on to say at 231:

> "Paragraph (i) and par (ii) focus on the occurrence, whereas pars (iii)-(ix) refer to the conduct of the offender. The presence of these latter factors may indicate that the offender has abandoned responsibility for his or her own conduct. When the presence of such a factor can be so described, then it can be said to be present to a material degree for purposes of determining an appropriate sentence."

219. It was after this passage that the two limbs of the guideline in *Jurisic* were set out.

220. I said at 231 that the formulation of whether "the relevant aggravating factor manifest[s] in the circumstances of the case, that the offender has abandoned responsibility for his or her own conduct" involves an element of judgment on which sentencing judges could reasonably differ.

221. I also said at 231:

> "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."

222. As indicated above, Kirby J's reasoning in *Wong* turned in part on the impermissibility of judicial creation of a subcategory or subset of an offence defined by statute. Also as indicated above, the joint judgment made comments critical of such conduct, but its reasoning did not turn on this proposition. The statutory power to give guidelines now vested in the Court by s37A should not be exercised in such a way that the guideline can be categorised as a "subcategory" or "subset" of an offence defined by statute. It was submitted that the *Jurisic* guideline was of this character because of the reference to "abandonment of responsibility".

223. As set out above, the guideline in *Jurisic* was expressed in terms of an aggravating factor involving the offender's conduct being present "to a material degree". The factors identified all related to the moral culpability of the offender. The reference to 'abandonment of responsibility' was one formulation for describing a high degree of moral culpability. The case law subsequent to *Jurisic* does not suggest that it has been applied as if it were a statutory test.

224. The joint judgment in *Wong* referred with approval at [61]-[62] to the judgment in *Cadd* which identified a relevant differentiating factor for sentencing purposes to be "the ordinary case of contumacious offending", as explained in the judgment of Mullighan J. This appears to me to perform a similar function to the formulation "abandoned responsibility for his or her own conduct" in *Jurisic.*

225. I should note that no issue of quantum arose in *Cadd*. This is understandable as the maximum sentence for the offence with which the Court was there concerned was only six months imprisonment.

226. In *Wong,* the "subset" or "subcategory" point arose in the context of considering the Canadian case of *McDonnell,* in which the majority identified the references in prior Canadian intermediate appellate decisions to "major sexual assault" as such a category. It is desirable to reformulate the *Jurisic* guideline to ensure that it does not suffer from the same inadequacy and is more clearly of the character of "contumacious offending" referred to in *Cadd.*

227. Furthermore, the terminology of the second limb of the *Jurisic* guideline may be seen to have an undesirably prescriptive tone, notwithstanding the express observations that it was not to be prescriptive. Again a reformulation is suggested.

228. In the above list of aggravating factors, items (iii)-(xi) are frequently recurring elements which directly impinge on the moral culpability of the offender at the time of the offence. Individually, but more often in some combination, they may indicate that the moral culpability is high. One way of expressing such a conclusion is to ask whether the combination of circumstances are such that it can be said that the offender has abandoned

responsibility for his or her own conduct. That is not the only way of expressing such a conclusion.

229. The guideline for offences against s52A(1) and (3) for the typical case identified above should be:

> 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.

230. In the case of a low level of moral culpability, a lower sentence will, of course, be appropriate.

231. In the case of the aggravated version of each offence under s52A, an appropriate increment to reflect the higher maximum penalty, and what will generally be a higher level of moral culpability, is required. Other factors, such as the number of victims, will also require an appropriate increment.

232. The guideline is, to reiterate, a "guide" or a "check". The sentence imposed in a particular case will be determined by the exercise of a broad discretion taking into account all of the factors required to be taken into account by s21A of the *Crimes (Sentencing Procedure) Act*.

233. This guideline focuses attention on the objective circumstances of the offence. The subjective circumstances of the offender also require consideration. For the reasons I have given above, when discussing the proportionality cases, particularly *Dodd,* this approach reflects the principle of proportionality as discussed in those cases. No submission was made to this Court that the new s21A of the *Crimes (Sentencing Procedure) Act* inserted by the 2002 Act, affects this line of authority.

234. Insofar as this guideline involves a "two step" approach to sentencing it is, in my opinion, as a "check" for the reasons given above, consistent with an ultimate decision that involves the exercise of a broad discretion, sometimes referred to as an instinctive synthesis.

Circumstances of the Case

235. On the evening of 8 April 2000 the Respondent was driving a motor vehicle in a southerly direction through the township of Aberdeen, along a section of the New England Highway known as MacQueen Street. At about 6.10pm his vehicle crossed to the incorrect side of the road whilst negotiating a moderate right hand bend. The vehicle collided with two other vehicles, a Chrysler Galant sedan driven by Lindsay Keys and a mini-bus driven by Robert Lawford.

236. The breath analysis of the Respondent in Muswellbrook Police Station had a positive reading. The evidence before the Court was that the Respondent's blood alcohol at the time of impact would have been in the range of 0.204 grams to 0.257 grams of alcohol per 100 millilitres of blood, the most likely level being 0.241. The prescribed concentration of alcohol for purposes of constituting the aggravated version of the offence under s52A(4) of the *Crimes Act* 1900 was 0.15 grams per 100 millilitres of blood. The expert evidence before the Court was that even at the lowest level of the estimated range, the Respondent's driving would have been grossly impaired. Most persons would be in a comatose or stuporous condition with a blood alcohol reading of that level. The evidence was that only a very regular heavy drinker would be capable of walking and driving with such a high blood alcohol level, but that even such an individual would be very significantly impaired.

237. The Respondent had told police that he had commenced drinking at about 11.00am and consumed his last drink at about 5.00pm at a Murrurundi Hotel. The distance from Murrurundi to Aberdeen is approximately fifty kilometres.

238. In the record of interview the Respondent indicated that he had consumed probably about twenty schooners on the evening prior to the day of the collision and another dozen schooners on the day of the collision. The Respondent indicated that he had been feeling very tired. The Respondent was unable to recall the circumstances in which the accident occurred. Mr Keys gave evidence that he saw the Respondent's vehicle travelling in a straight line and drifting to the right. The trial judge concluded the Respondent had fallen asleep before the collision.

239. The result of the collision was that there was very serious injury to a Charles Hague, then aged sixty-three, a passenger in the mini-bus. He had a fracture dislocation to the left hip, multiple lacerations and abrasions to the lower leg and a fracture of the lateral tibial plateau. He needed a total hip replacement and suffers a permanent disability with respect to his left lower limb. The sentencing judge identified the extent of injuries as "substantial" and described the effect on the victim as a 'serious adverse impact'.

240. The sentencing judge recited the expert evidence about the Respondent's physical condition. One report indicated that the prisoner may have a sleep abnormality. Another report by a consultant physician referred to a history of excessive sleepiness and came to the conclusion that the Respondent does suffer from narcolepsy and possibly a mild sleep apnoea. The report noted that sleep disorder is severely aggravated by alcohol. The trial judge concluded:

> "I have no doubt that the large amount of alcohol the prisoner had consumed was the principal reason the prisoner fell asleep whilst driving his vehicle. The prisoner was, whilst driving his vehicle, intoxicated to a high degree. His ability to drive the vehicle was very significantly impaired.

> I accept, on the probabilities, that the prisoner was prone to narcolepsy prior to the offence. The fact that he was is not a matter of mitigation in the present circumstances.
>
> …
>
> The factors present: drowsiness, fatigue, history of excessive sleepiness, and the large amount of alcohol consumed, were a dangerous combination. The prisoner should not have driven his vehicle. However, he chose, for his own reasons to do so. In his own words he took a calculated risk."

241. The sentencing judge noted the prisoner's history. He had been convicted of a charge of common assault and a mid-range prescribed concentration alcohol offence which involved an accident. His Honour said:

> "The prisoner's record does not entitle him to leniency."

242. The sentencing judge also noted the guilty plea on the second day of the trial which, he said, arose:

> " … from a recognition of an inevitable adverse finding by the jury. The prisoner's plea of guilty however saved the cost of the trial proceeding further. The utilitarian benefit of the plea entitles the prisoner to a discount on sentence of 10 per cent."

243. The sentencing judge also noted and accepted as genuine the Respondent's expressions of remorse.

244. The sentencing judge took into account a range of subjective features including those set out in a psychologist's report. Although the seriousness of the Respondent's drinking problem was apparent, he acknowledged that he had not altered his drinking habits since the accident. His Honour specifically accepted the psychologist's conclusion that the Respondent remains at risk primarily because of the drinking culture of the country town in which he lives.

245. There was a significant body of evidence of good character from the Respondent's work and from social associates.

246. The sentencing judge referred to the list of considerations set out in *Jurisic* at 231, noting the serious nature of the injuries to Mr Hague, the number of people put at risk by the prisoner's driving, the high degree of intoxication, the fact that he had driven for some fifty kilometres on a major roadway upon which significant traffic could be expected. His Honour also made reference to the High Court judgment in *Wong*,

specifically to the three judge joint judgment at pars [76]-[78], and set out the effect of that judgment. His Honour added:

> "…in sentencing the prisoner I have taken into account all the circumstances of the offence and of the prisoner."

247. His Honour concluded:

> "Each case I am aware depends upon its own circumstances. The circumstances of the offence lead me to conclude, however, that in driving his motor vehicle, the prisoner abandoned the responsibility to drive safely which he owed to other road users and to himself. This is not a case of a momentary or casual lapse of attention. There is no alternative but to sentence the prisoner to a term of full-time imprisonment."

248. It is apparent from his Honour's reasons that he did not regard the guideline in *Jurisic* as prescriptive. He treated it as a guide or check.

249. As noted above, His Honour imposed a head sentence of two years and three months with a non-parole period of twelve months. The finding of special circumstances was based on the need for a lengthy period of supervision to assist with the Respondent's excessive consumption of alcohol. There was no challenge to this finding.

250. The Crown submitted that the sentence, especially the non-parole period, was manifestly inadequate. It noted that this case involved the aggravated version of the offence, by reason of the high blood alcohol concentration. It submitted that the sentencing judge failed to give appropriate weight to the objective seriousness of the offence.

251. The Crown referred to a number of allegedly comparable cases in which substantially higher sentences had been imposed: *R v McAskill* (2001) 31 MVR 508; *R v Khan* [2000] NSWCCA 454; *R v Kaliti* [2001] NSWCCA 268 and *R v Bicheno* [1999] NSWCCA 148. However, as Mr Thraves, who appeared for the Respondent, submitted, the cases relied on by the Crown involved significantly worse injuries to victims than that in the present case (e.g. multiple victims, amputation and blinding).

252. Mr Thraves submitted that the sentencing judge had taken into account all relevant considerations, including the objective gravity of the offence. He submitted that the long period on parole was required in order to provide assistance to overcome the Respondent's drinking problem.

253. The present case features two offsetting considerations. The injuries caused to the victim are serious but not of so high a degree as has often featured in such cases, e.g. amputation, blinding, multiple victims. On the other hand, the moral culpability of the

offender was of a very high order. A long period of binge drinking and significant sleep deprivation was not, as the trial judge found, mitigated by susceptibility to narcolepsy.

254. But for one circumstance, I would have found the sentence, particularly the non-parole period, to have been manifestly inadequate. The circumstance is the delay that has been occasioned by reason of this case becoming, in effect, a test case with respect to guideline judgments.

255. The sentence was imposed on 30 November 2001. The notice of appeal was not filed for two months. Listing for hearing was delayed to a time convenient for a number of different counsel in the cases to be listed together. The complexity of the issues has meant a significant delay in the delivery of judgment which would, in the ordinary course, have been delivered ex tempore. In the result, the Respondent has only a few months left of his non-parole period.

256. In all the circumstances, in my opinion, the Court should, in the exercise of its discretion, dismiss the appeal.

257. **MASON P**: I agree with the Chief Justice.

258. I also agree with the additional remarks of McClellan J, to which I would add reference to my own comments about the analogous difficulties experienced by inexperienced trial and appellate judges so long as *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 remains (see *Hunter Area Health Service v Marchlewski* (2000) 51 NSWLR 268 at 281, *Trustees of the Roman Catholic Church for the Diocese of Sydney v Hogan* (2001) 53 NSWLR 343 at 351-2).

259. **BARR J**: I agree with the Chief Justice.

260. **BELL J:** I agree with Spigelman CJ.

261. **McCLELLAN J**: I have had the benefit of reading the reasons for judgment prepared by Spigelman CJ, with which I agree. However, there are some remarks which I wish to add, not because of their novelty, but because of the significance of the issues to an understanding of the contribution which guideline judgments can make to the administration of criminal law.

262. It is often believed that controversy with respect to the appropriate sentence for a particular offence is a recent phenomenon, fuelled by exchanges in the electronic media and strident headlines in the popular press. Although the mechanisms for the expression of public dissatisfaction with individual sentences or sentencing patterns may have changed in recent years, the potential for controversy has, as the Chief Justice observes, existed for many years. The need perceived by the judges of the Kings Bench in 1901 to formulate a statement of "normal punishments" makes this plain. (see R M Jackson, *Enforcing the Law*, Penguin Books, 1972, Appendix V, 391).

263. Any judge who has been required to sentence a person for committing a crime, will be aware of the significant burdens which the making of the decision imposes. An experienced judge, particularly one with access to colleagues constantly involved in the sentencing process and the benefit of exchanges in an appellate court, may find the task less burdensome. However, many sentences must be imposed by judges with less experience and the majority of sentencing judges will never be involved in sentence appeals.

264. The structure of the modern legal profession, which demands specialisation by practitioners in particular areas of the law, will have the effect that a person who is, without doubt, appropriate for judicial appointment, may not have any, or significant experience, in the sentencing process. Even when a new judge has gained the necessary experience, the task of sentencing by the process often referred to as "instinctive synthesis", has in recent years become more difficult and prone to miscarry. It was, I apprehend, for this reason, amongst others, that guideline judgments were initiated. (see *R v Jurisic*).

265. The sentencing process involves a balancing of many factors derived from considerations of the circumstances of the crime, the victim and the offender. If the sentence imposed is to be accepted as just, it must be consistent with sentences imposed on other offenders where the relevant factors are similar. (see Gleeson CJ in *Wong* at para 6)**.**

266. The increasing number of sentences which are imposed and, as the Chief Justice has pointed out, the great many appeals in relation to sentences, has meant that the ideal of the individual sentencing judge being abreast of all of the sentences which are being imposed, is impossible. Even keeping abreast of the decisions of this Court is immensely difficult. The task is more difficult for the judge who has, as yet, limited experience in the sentencing process.

267. There are many areas in which the general community interacts with the judicial process and the judges who administer it. Public acceptance of the role of the judiciary in the making of decisions, which affect members of the community, emanates from a fundamental belief that the decisions which are made, provide a just outcome. This is the foundation for acceptance by the community of sentences imposed upon individuals by sentencing judges. But as Kirby J pointed out in *Wong* para 102, continued public confidence in the administration of justice requires effective transparency and honesty just as those attributes are required of other areas of public administration in contemporary society. The law must facilitate this objective.

268. Individual members of the community will usually be exposed to the criminal process only in a particular case. Victims, and relatives of victims, will very often, and understandably, have difficulty accepting a sentence which has been imposed where consideration of the objective criminality of the offence may have been balanced by the sentencing judge with the fact of a plea of guilty, the age of the offender, whether the offender has any previous convictions and other relevant considerations. Although

controversy in relation to an individual sentence may or may not be justified and, even though an error can be corrected on appeal, the fundamental objective of the process must be to ensure that sentencing judges have available to them all the assistance which the law can provide in determining the appropriate sentence in an individual case.

269. Guideline judgments utilised as a "check, guide or indicator" have the benefit of distilling the experience of this and other courts, so that guidance provided by those decisions in relation to other offenders may be readily available to the sentencing judge. They also assist the members of the public, with an interest in the individual case, to understand the reasoning process which resulted in the particular sentence and the relationship of that sentence to other sentences which have been imposed.

270. I agree with the reasons of Spigelman CJ and the order he proposes.

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