

Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments

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This article examines the place of intuition and method in the sentencing judgment in Australia. In doing this, it analyses two attempts to structure discretion; namely, guideline judgments and the two-stage approach, focusing on the former, since they represent a highly developed application of the latter. More specifically, it is about how judges should digest the facts of a case as they exercise their discretionary judgment as to what is appropriate by way of sentence. Thus, there is here not a general evaluation of guideline judgments canvassing legal issues (e.g. constitutionality) and criminological matters (e.g. effectiveness).¹

Decision making in sentencing raises weighty and controversial matters. What apparently is not at issue are the prerequisites of good legal decision making; namely, judgments should be:

- individualised — numerous matters relating to the circumstances of the offence and the offender are of potential relevance to doing justice in the individual case (see the judgment in the High Court of Gaudron, Gummow & Hayne JJ in *Wong*);
- consistent — like cases are treated similarly and unlike cases differently (see the judgment in the High Court of Gleeson CJ in *Wong*);
- coherent — what is said is what is decided (e.g. when a factor or matter is said to be important it is in fact given substantial weight) (see the judgment in the High Court of Kirby J in *Ryan*);
- logical — judgments, if they could be analysed, would be found to conform to an underlying logic (the alternative is arbitrariness); this is implicit in the basis of the appellate process, as set out in the High Court judgment of Dixon, Evatt & McTiernan JJ in *House*; Kirby J's use of the phrase 'channels of logic' in *Wong* (at para 116) in respect of appeals is apposite here.

Yet what patently is at issue is how the best balance between these four prerequisites is to be achieved. In Australian legal circles, two options vie for prominence. One is judgment as an intuitive/instinctive synthesis, the other is judgment by way of a more or less conscious and explicit framework and process.²

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1 For this, see for example, Ashworth (1992), Hall (1991), Morgan & Murray (1999), and New South Wales Law Reform Commission (1996a).

2 Mandatory sentencing and sentencing grids impose non-intuitive thinking upon sentencers. However, they are not considered here, since they are not about better legal decision making; rather they are driven by law and order populism (see Zdenkowski 2000).

Until the late 1980s, in regard to this contention, academics and reform bodies tended to gather on one side and the judiciary on the other; the former attacking intuition, the latter defending it.³ Now, the contention is manifest, albeit muted, within the judiciary. Thus, although it is the judiciary who have been (and who largely continue to be) the defenders of the faith in the intuitive approach to the exercise of their sentencing discretion, two significant and different forms of what can be regarded as non-intuitive thinking are to be discerned in the decision making of sentencing judges. These are more recent developments. Perhaps the reformers have had an effect.

One form is described, *inter alia*, as the two-stage approach. It was the first breach in judicial ranks, appearing in the late 1980s (see the judgment of the Victorian Court of Criminal Appeal in *Young*), and examples conforming to this general approach are to be found across jurisdictions (see the review in Fox & Freiberg 1999, and in the judgment of the New South Wales Court of Criminal Appeal in *Thomson*). In this approach, the judge first determines, having regard to the facts of the offence, a proportionate sentence, and then adjusts this in the light of the circumstances of the offender so as to arrive at a sentence appropriate to the case.⁴ When state appellate judges have addressed or commented on this approach, as against that of intuition, their reactions have been various; for example: 'calculated to lead to error', in *Young* (at 961) (Victoria); 'unwise' and 'unnecessary', in *Lett* (at 9 per Hunt J) (New South Wales); 'matter of semantics', in *Punch* (at 494 per Murray J) (Western Australia); 'permissible', in *Nagy* (at 650 per McGarvie J, in respect of a discount for co-operation with authorities) (Victoria); and 'proper', in *Raggett* (at 52 per Kearney J) (Northern Territory). Nevertheless, in *Wong*, Gaudron, Gummow and Hayne JJ concluded in the High Court that intermediate appellate authority favours intuition over the two-stage approach. Yet the division may not be confined within and between the states. Although the High Court at this stage has not determined a case on the basis of the correctness or otherwise of the nature of the approach, at least two judges regard the two-stage approach as erroneous (see the separate judgments of McHugh J & Hayne J in *AB*) and another sees a return to unexplained intuition as a retrograde step (see the judgment of Kirby J in *AB*).

The second form of non-intuitive thinking is to be found in guideline judgments. In an elaborated and systematic form they first appeared in New South Wales in the latter 1990s. These judgments may go as far as identifying a pattern of case characteristics and indicating the sentence or range of sentence considered appropriate; there may also be an accompanying non-exhaustive list of potentially aggravating and mitigating factors which, if present, may justify a sentence outside the range (see generally, for example, Spigelman 1999; Ashworth 2000). The Victorian Court of Appeal would appear to have strong reservations about guideline judgments (see the judgment of Winneke P in *Ngui*); and the Western Australian Court of Criminal Appeal seems distinctly unenthusiastic about them (see Morgan & Murray 1999). In its recent judgment in *Wong*, the High Court provided an inkling of its feelings about numerical guidance by way of guideline judgments, considered generally as a means to justice: my interpretation of the judgment is that the judges' predispositions are various: accepting (Gleeson CJ); opposed (Gaudron, Gummow & Hayne JJ); cautionary (Kirby J); and open (Callinan J).

3 There are notable exceptions to this; for example, the New South Wales Law Reform Commission (1996b) favoured intuitive sentencing.

4 Judgments expressly deducting a quantum of sentence from what otherwise would have been appropriate, as a means of specifying the weight given to a factor, may be regarded as a sub-category of this general approach; in respect of a defendant's plea of guilty, see the judgment of the Victorian Court of Criminal Appeal in *O'Brien*.

How judges should digest the facts of a case as they exercise their sentencing discretion is manifestly contentious. Yet, if Justice Kirby as a member of the High Court be correct in his observation that it is too late to return to unexplained intuition (see *AB's* case), then it is no longer profitable to view the problem as a choice between intuition and non-intuition but rather it is necessary to frame the problem according to the following two questions:

- what should be the nature and form of the explicit sentencing framework and process?
- do the current two non-intuitive approaches satisfy the prerequisites of good legal decision making?

Moving from a set of case facts to a quantum of punishment represents an exercise in scaling. Yet judicial deliberations on this matter are not always easy to follow. Indeed, some avowedly contest the point. In the High Court Justice Hayne asserted that '[m]etaphorical references to "credit", "discount", or the like, must ... not be taken literally' (*Ryan's* case at para 144). Surely, this cannot be so. If the presence of a factor, such as a guilty plea, requires a quantum of sentence less than otherwise would be appropriate, then 'discount' has a literal meaning.⁵ This is the orientation of the present answer to these questions. It proceeds as follows.

1. Nature of and case for judicial intuition in sentencing.
2. Criteria for evaluating intuitive and non-intuitive thought in sentencing.
3. Nature and form of an elaborated sentencing framework and process.
4. Guideline judgments as an explicit sentencing framework.
5. The two-stage approach as an explicit sentencing framework and process.
6. Evaluation of the elaborated sentencing framework and process.
7. Evaluation of guideline judgments.
8. Conclusion.

Nature of and Case for Judicial Intuition in Sentencing

What is of concern here is how judges reach their decisions, not how they justify their sentences; it is about decision making (i.e. judgments in sentencing not sentencing judgments).

Judges have expressed clear views on this. According to them, decision making in sentencing cannot involve the mechanical application of quantitative and qualitative rules as a means to a precise determination of punishment (see the judgment of the Victoria Court of Criminal Appeal in *McCormack*, and the judgment of the High Court in *Ryan*). This is because of the number and complexity of the considerations arising in and across cases. Indeed, for this reason sentencing judgments cannot be but by way of an intuitive synthesis of all the elements involved in determining sentence (see the judgment in the Victorian Court of Criminal Appeal of Adam & Crockett JJ in *Williscroft*). Moreover, sentencing cannot but be intuitive because it involves a feeling for the application of the criminal law to the particular circumstances of the case (Phillips 1983); this can be thought of as instinctive justice. Observations of the Victorian Court of Criminal Appeal on the determination of appeals against the leniency (and severity) of sentences illustrate this. There it has been said that '... whether a sentence is manifestly, as distinct from arguably,

5 Let it be clear, this is not to imply that particular case facts can be deemed to have a constant percentage effect across cases; they cannot (see the later discussion).

inadequate does not ordinarily admit of a great deal of argument. Upon inspection of it and identification of the relevant circumstances, it either appears to be manifestly inadequate or it does not' (in *Scadden* at 7 per Phillips CJ; see also the judgment in the High Court of Gleeson CJ & Hayne J in *Dinsdale*).

Those who defend intuition would not argue that by this means the four prerequisites of good legal decision making — individualisation, consistency, coherence and logic — are perfectly met. Indeed, probably there is little disagreement with those who favour a non-intuitive approach as to what the limitations are. In respect of this, Victorian judges do not regard a sentence as in error if it falls within the range appropriate to the case (see *Young's* case), but admit that judges differ between themselves in the severity of their sentences (Supreme Court of Victoria 1988) (also, see the judgment in the High Court of Kirby J in *Postiglione*). But there is disagreement in two respects. First, the significance of the limitations attending intuitive thought; the former say justice is nonetheless well served (see Supreme Court of Victoria 1988; New South Wales Law Reform Commission 1996b), the latter group disagree (see Victorian Sentencing Committee 1988; Law Reform Commission Australia 1980, 1988). Secondly, the value of a framework of some sort for sentencing; the former say justice would be diminished (see *Young's* case; and Supreme Court of Victoria 1988; New South Wales Law Reform Commission 1996b), the latter that it would be enhanced (see Victorian Sentencing Committee 1988; Law Reform Commission Australia 1980, 1988).

Criteria for Evaluating Intuitive and Non-Intuitive Thought in Sentencing

What are the agreed limitations of intuitive thinking? and the perceived dangers of the non-intuitive approach? These are important questions, because the answers provide criteria for evaluating attempts to develop an explicit framework and process for sentencing, with respect to what improvements it must offer and drawbacks it must avoid.

The following limitations of intuition have been identified in the literature.

1. There is too much room for individual differences with respect to: preferred penal philosophies; levels of toughness (the severity of the sanction considered proportionate to a particular level of seriousness); and factors, as weighted, considered relevant to the various penal aims (this relates to the prerequisite of consistency) (see e.g. Ashworth et al 1984; Lovegrove 1984; Palys & Divorski 1984; and the judgment of the Victorian Court of Criminal Appeal in *Ramage*).
2. Decision making unaided could not be expected to cope with the inordinate demands placed on it by the requirements of individualised justice, requiring as it does the reconciliation of numerous and often conflicting matters to be considered singly and in combination (this relates to the prerequisite of coherence) (Ashworth 1983; Lovegrove 1989).
3. Legal discourse, characterised by and emphasising the expression of ideas and arguments in terms of words, does not lend itself to bringing a sound logic to sentencing, which requires careful distinctions to be drawn between qualitative and quantitative decisions, the latter involving complex scaling in terms of qualitative and quantitative variables and relationships (this relates to the prerequisite of logic) (Lovegrove 2001; and see Ranyard et al 1994, for an illustration of the problem).

Now consider judicial observations on the dangers inherent in the use of an explicit sentencing framework and process. (Some of the points raise overlapping matters but are sufficiently different to warrant separate consideration.) They are as follows.

1. Many critical factors and factor effects will be omitted from the framework because it is impossible to take full account of the complexity of the matters potentially bearing on sentence in any formal representation of the sentencing decision (see the judgment in the High Court of Hayne J in *AB*).
2. When adjusting a notional sentence (the adjustment being within type of sentence, e.g. a shorter term of imprisonment) there is a danger that the allowance for the additional matters will not reflect their true importance because the matters on which the notional sentence was based will dominate the process (see the judgment in the High Court of McHugh J in *AB*).
3. There will be a tendency, particularly over time, for judges to ignore matters not in the representation of the sentencing decision (see the judgment in the Victorian Court of Appeal of Winneke P in *Ngui*).

(The above three points relate to the prerequisite of individualisation.)

4. Factors cannot be considered properly in isolation because the one factor can relate to several aims; moreover, in each relationship its effect on what is the appropriate type and quantum of sentence may differ (see the judgments in the High Court of McHugh J in *AB* and of Kirby J in *Dinsdale*). Related to this is that case facts for their significance may depend on the presence or absence of other case facts (see the judgment in the New South Wales Court of Criminal Appeal of Gleeson CJ in *Gallagher*, and the judgment in the High Court of Hayne J in *AB*). Finally, a particular case fact, be it aggravating or mitigating, cannot be deemed to have a constant percentage effect on sentence across cases, even in the one category/sub-category of offence; how significant it is depends on the facts of the individual case (see the judgment in the High Court of McHugh J in *Ryan*).
5. The fixing of a notional sentence in regard to only a sub-set of case circumstances invites inevitable error because it is necessarily an artificial exercise (see the judgment of the Victorian Court of Criminal Appeal in *Young*). Moreover, in applying the standard, there is the risk of actual circumstances relating to the case being ignored and in their stead abstract matters underlying the notional sentence being considered (see the judgment in the High Court of McHugh J in *AB*).

(The above two points relate to the prerequisites of coherence and logic.)

6. In cases where the notional sentence is of one sanction type (e.g. imprisonment) and the appropriate sentence is of another type (e.g. suspended sentence), the process of adjustment for the additional circumstances lacks a logic (see the judgment in the High Court of McHugh J in *AB*).
7. The separate consideration of relevant matters multiplies the possibility of error, since there is the opportunity of error in relation to the consideration of each separate matter by itself and in relation to other matters, and the effects of these errors will tend to cumulate (see the judgment of the Victorian Court of Criminal Appeal in *Young*).

(The above two points relate to the prerequisite of logic.)

These judicial sentencing remarks are expressed here in my own terms so as to facilitate the present analysis in which, as stated above, sentencing is treated as an exercise in scaling. They were made largely in regard to the two-stage approach to sentencing. Nevertheless, they can be treated as applying to guideline judgments taking the form of a sentence appropriate to a limited set of case facts and acting as a standard against which allowance must be made for additional matters.

Nature and Form of an Elaborated Sentencing Framework and Process

The purpose of this section is to demonstrate by way of illustration that it is possible to construct a framework and state a process representing decision making in sentencing. The framework refers to an interrelated set of reference points providing a structure against which judgments are made, and the process describes how judgments are made in relation to the framework.⁶ It will be shown to satisfy the prerequisites of good legal decision making. Thus it is offered as a standard against which to judge the two-stage approach and guideline judgments. Such an elaborated sentencing framework and process will have the following five characteristics.

1. There will be three components relating to:
 - the selection and weighting of the aims of sentence;
 - the scaling of the relationship between case seriousness and sentence severity according to the principle of proportionality;
 - the aggregation of seriousness (sentence) across multiple counts according to the totality principle.⁷
2. The framework must be founded on case facts and the process be in terms of case facts, since case facts are the currency of justice.
3. The framework and process, while not mathematical, must provide a mechanism for numerical relationships and be numerically sound.
4. The appropriate level of detail is that the coverage incorporates the more common case facts and combinations of case facts but makes no attempt (or pretence) to be exhaustive.
5. Since the representation is founded on concrete, case-specific facts, the appropriate level of differentiation is the category or sub-category of offence (e.g. burglary or residential burglary).

Now to a consideration of each of the components.

6 In addition to a framework and a process, the representation requires content. This covers case facts to be considered, singly or jointly, as relevant to matters forming part of the sentencing decision; for example, indicators of an offender's rehabilitation prospects or circumstances not relevant to mitigation in cases of rape. Content is not pursued here, since it does not raise the problem of representing decision making in sentencing, thus falling outside the scope of the present analysis.

7 There are other decision elements of relevance to sentence, concerning both the immediate facts of the individual case (e.g. the sanction most appropriate to the rehabilitation of the offender when this is the main goal) and matters outside of the immediate case circumstances (e.g. parity of sentence between co-offenders). These, however, do not raise the problem of representing decision making in sentencing, thus again falling outside the scope of the present analysis.

The selection and weighting of the aims of sentence

This is a qualitative decision. It is founded on concrete, case-specific facts considered singly and in combination as indicators of the main penal aim — or the mix of aims — appropriate to the case. This decision represents the judge's interpretation, based on the facts, of the nature of the offence and the type of offender before the court. As an interpretation, it has a strong holistic and subjective character about it. The position can be illustrated thus. Consider the hypothetical case of a young man drinking in a hotel who, without provocation, threw a beer glass at another man, with the result that the victim's sight was seriously impaired; the offender, who showed some remorse, had a reputation for violence when drunk, but was without prior convictions and had steady employment. One possible view of the case is that before the court is a violent drunk who made an unprovoked attack on an innocent bystander and injured him permanently; there must be an attempt to deter the offender and, in view of the seriousness of the offence, imprisonment is appropriate. Another view of the case, by way of contrast, is that the offence represents the regrettable action of a generally solid young man who nevertheless requires help to moderate his drinking; thus the appropriate response is a programme of rehabilitation in the community.

Thus the representation of decision making requires the linking of case facts as indicators of what is appropriate by way of the one or more aims of sentencing. It will focus on those facts and combination of facts thought most likely to be a source of disparate interpretation. The indicators may relate to the offence (e.g. what makes, say, a burglary particularly serious so as to warrant deterrence or punishment of the offender), to the offender (e.g. circumstances favouring rehabilitation), or to both; they may take the form of single factors or a pattern of factors. The most appropriate form would be expected to vary across the categories or sub-categories of offence.

Giving weight to the aims of sentence other than just punishment can be thought of as a variation from what otherwise would be the proportionate sentence. In Victoria, for example, when the aim of rehabilitation is to be given weight, there will be a reduction in the proportionate term of imprisonment (the head sentence and/or non-parole period) or a non-custodial sanction when otherwise imprisonment would be appropriate. And in regard to incapacitation, by virtue of statute, it may require an increase in the proportionate term of imprisonment (see generally, Fox & Freiberg 1999). The question of how to deal with the relationship between this component and the second (next) component remains.⁸

In respect of this component, the representation of decision making is underdeveloped. Nevertheless, there is sufficient detail about its structure and content to evaluate its role in meeting the criteria of good legal decision making.

The relationship between case seriousness and sentence severity

This component covers the principle of proportionality. I have formulated a representation of the associated decision making, and what follows here is no more than a summary of that work (see Lovegrove 2001). This decision making represents a quantitative judgment. It comprises two parts. The first relates to an assessment of the seriousness of the case, as a combination of case facts, each fact constituting, as it were, a chunk of seriousness as aggravation or mitigation, which is to be added or subtracted on a scale of seriousness. Here the treatment of facts has more of an analytic and objective character to it.⁹ In the second part of the judgment, it is a matter of determining the quantum of sentence considered

8 It is a matter which, as a numerical problem, has exercised the judicial mind. See, in the High Court, the judgment of Kirby J in *Dinsdale*.

proportionate to the level of seriousness of the case. What form, then, is the representation of the relationship between case fact, seriousness and sentence to take? To illustrate this, the offence of (residential) burglary is used. There is good reason for this. This offence has been acknowledged as a stumbling block for narrative guidance. This is because for this offence it has not been possible to identify patterns of offending and typically no one case fact is of overwhelming importance in the determination of sentence (see the judgment in the New South Wales Court of Criminal Appeal of Grove J in *Ponfield*). Thus burglary is a rigorous test of the power of the present approach as a means of representing decision making in sentencing.

Now, consider the representation of the assessment of case seriousness. First, there are the criteria. For proportionality they will define victim harm and offender culpability, and relate to both the offence (say, violence experienced by the victim, loss suffered by the victim, and organisation of the offence) as well as the offender (e.g. reason for the offence, and prior criminal record).

Next, each criterion, treated as a dimension, has levels of seriousness, and each level is defined by the circumstances marking that degree of seriousness. (They will be defined in terms of concrete, case-specific circumstances.) Some of the dimensions will be quantitative (e.g. degree of loss suffered by the victim), others will be qualitative (e.g. degree of violence experienced by the victim). Readily understood is the numerical scaling of the former: the case facts for loss would be monetary values. How the latter can be scaled quantitatively is illustrated thus.

Case facts	Interpretation/ meaning	Levels of seriousness
O terrorises or injures V, or O assaults or ties up V and V is elderly or a child	Confrontation — terror without serious injury	5
O assaults V (attempt or minor injury) or ties up V, or O confronts V and V is elderly or a child	Confrontation — assault	4
O confronts V with or without actual threat to assault V	Confrontation — fear of injury	3
Burglary occurs at night and/or when V is at home	Confrontation — potential	2
Burglary occurs when V is not at home	No violence	1

It is important that the levels along a dimension mark approximately equal steps-up in seriousness; where this holds, there is no need formally to scale these gradations numerically. Only in this way can the framework be non-mathematical yet provide a mechanism for quantitative relationships and be numerically sound (thus satisfying the third of the five characteristics of the framework, listed above).

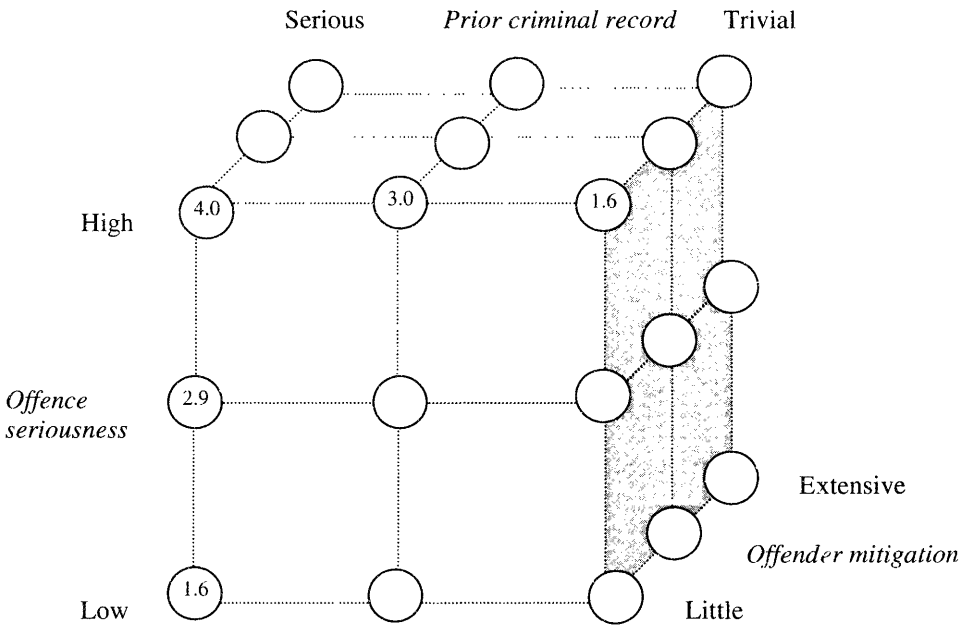
Thirdly, the several criteria relating to offence seriousness in combination determine the seriousness of the circumstances of the offence. A particular offence will be assessed in respect of each of the criteria, and then the individual assessments combined as a measure of (overall) offence seriousness. Thus the offence seriousness for burglary will be the aggregate of the seriousness on each of violence, loss and organisation. In this, allowance can readily be made for the relative importance (weight) of the criteria, but it is not necessary to explain that for present purposes.

9 For this purpose, a case fact may constitute the joint consideration of several case facts, each one relying on the other for its significance (e.g. a fact of mitigation may be that the offender was, say, drunk and provoked and a first offender).

In general, offender mitigation can be handled similarly to offence seriousness.

This sets the scene for the second part of the judgment: determining the quantum of sentence considered proportionate to the level of seriousness of the case. For the purpose of representing proportionate types and quanta of sentence in relation to seriousness, the appropriate level of differentiation for overall case seriousness may be in terms of three components: namely, offence seriousness and offender mitigation but with prior criminal record being considered separately from the latter as the third component (see Figure 1). The minimum number of distinctions on each of these components of seriousness is two, being the upper and lower levels. For offence seriousness, the offence being residential burglary, the lower level would be ‘no violence’, and perhaps ‘little more than spontaneous and opportunistic’ and ‘little loss’. In respect of prior criminal record, the lower level might be ‘no previous offending’. The offender tying up an elderly householder would mark the upper level on violence. And so on. However, a third distinction, midway between the upper and lower levels, would provide greater density in the representation. Three distinctions on each of the three components of case seriousness give rise to 27 variations for the offence category in question, and 27 corresponding proportionate sentences spanning the range of seriousness for this offence. The accompanying framework, at first blush perhaps off-puttingly complex, is actually a useful way of representing the relationship between the various combinations of case fact and sentence in the sentencing decision.

**Figure 1: Proportionate Framework —
Sentences for Combinations of the Components of Case Seriousness
(reproduced from Lovegrove 2001 with the permission of Sweet and Maxwell)**



Note: the figures in the cells are years and months of imprisonment.

The framework takes the form of a cube — the diagram shows three of its six sides. Each cell is formed by the intersection of one level of seriousness (upper, medium, lower) of each of the three components of case seriousness (offence seriousness, prior criminal record, offender mitigation), and represents one of the 27 variations for the offence category. The figure in the cell is the illustrative proportionate sentence for the cases falling in that cell. The cell at the bottom left-hand corner of the front of the cube represents low (lower level) offence seriousness, a serious (upper level) prior criminal record, and little (lower level) by way of mitigation, the proportionate sentence for this combination of levels being one year and six months' imprisonment. To understand the framework, it is helpful to deconstruct it in layers: in the top horizontal layer the nine cases are all of high offence seriousness, and in the bottom horizontal layer the cases are of low offence seriousness; similarly, all the cases in the left vertical layer are characterised by a serious criminal record, and so on; finally, the front vertical layer represents little by way of mitigation. Of course, a potentially large number of different combinations of factual circumstances (cases) may come within the scope of a particular cell. This is because the 27 variations relate to levels, and a variety of case facts may satisfy a particular level of seriousness on a component (e.g. the above definition of victim violence — one of the three criteria comprising offence seriousness — shows that its highest level of seriousness — 'confrontation — terror without serious injury' — would be satisfied by one of several case facts, each of which may be satisfied by a variety of actual circumstances); moreover, each of the 27 variations represents the intersection of three components.

For the purpose of the framework, there will be 27 sentences, one for each cell. All are properly judicial, intuitively determined as appropriate to cases representing the cells. Since these judgments are made for cases, they are necessarily holistic.¹⁰ In fact, the five illustrative sentences in Figure 1 were fixed by an English judge.

What is appropriate by way of sentence in a particular case would be determined by placing the case appropriately in relation to the framework and, where necessary, interpolating or extrapolating from the represented sentences. Consider a case, its particular circumstances representing high offence seriousness, little by way of mitigation, and falling between the upper and medium levels on prior criminal record; interpolating from the framework, the proportionate sentence for this case would be just over three years and six months (i.e. a little more than midway between the guideline sentences of four years and three years¹¹). The density of the sentences in the framework would appear to offer sufficient precision for sentencing.

The aggregation of seriousness (sentence) across multiple counts

This concerns the offender who is sentenced for more than one offence and the offences relate to separate incidents, say, two robberies and one burglary. This too is a quantitative decision. The author has developed a framework and process for this decision; however, it is not presented here since guideline judgments to date have not dealt with the multiple offender (see Lovegrove 2000, in press).

10 The procedures which should be followed to maximise the validity of this process have been discussed and set out in Lovegrove (1989, 1997).

11 'a little more than midway' because the guideline sentence of three years is a little more than midway between the sentence of four years and the one of one year and six months, indicating a tendency to non-linearity.

Guideline Judgments as an Explicit Sentencing Framework

For the purpose of this analysis, the guideline judgments of the New South Wales Court of Criminal Appeal will be the focus of attention. They represent the most established formal system of such guidance. Their purpose is to structure the decision making of sentencing judges as a means of guidance (see Spigelman 1999). There are now five of these judgments, and they take three general forms.

In one, a sentence or range of sentence considered appropriate to a particular or limited set of factual circumstances is provided as a standard together with a non-exhaustive list of case factors which may require (or do not justify) departure from the standard. The factual circumstances have been presented in one of three ways:

- a pattern of case circumstances involving multiple case factors (*Henry* — armed robbery);
- a threshold level of seriousness on a particular case factor (*Jurisc* — dangerous driving causing grievous bodily harm or death);
- several levels of seriousness across a range on a particular case factor (*Wong* — importation of heroin and cocaine).

In the second form, the guideline comprises a non-exhaustive list of potentially aggravating and mitigating factors (*Ponfield* — burglary).

In the third, the guideline specifies, for a particular case fact or a set of case facts, a percentage discount to be given on what otherwise would be the appropriate sentence (*Thomson* — plea of guilty).

Each guideline relates to only one category or sub-category of offence. A summary of the main elements of each guideline follows.

Henry

'*pattern*' defined by:

- young offender, little or no criminal history
- weapon like a knife, capable of killing or injury
- limited planning
- limited, if any, actual violence but a real threat
- victim vulnerable (e.g. shopkeeper)
- small amount taken
- plea of guilty, but strong Crown case.

other factors: 13 aggravating and mitigating factors (generally related to those in the 'pattern' but including the offender's rehabilitation prospects) and one, drug addiction, not of itself mitigating but of potential relevance to, for example, rehabilitation.

guideline sentence: 4–5 years' imprisonment appropriate to the 'pattern'; non-custodial sentences to be regarded as exceptional.

Jurisc

'*threshold level*' defined by:

- abandonment of responsibility (threshold level) marked by any one of seven indicative factors (e.g. degree of speed); this is to be taken in association with a guilty plea.

other factors: 6 other aggravating factors indicative of abandonment of responsibility and 2 aggravating factors related to risk of and actual injury.

guideline sentence: sentence of imprisonment of < 3 years (in cases of death) and < 2 years (in cases of grievous injury) should be exceptional; non-custodial sentence to be exceptional, almost invariably confined to a case involving momentary inattention or misjudgment.

Wong

levels across range defined by: *guideline sentences:*

low level trafficable quantity (2 grams–200 grams)	5 to 7 years
mid level trafficable quantity (200 grams–1 kilogram)	6 to 9 years
high range trafficable quantity (1 kilogram–1.5 kilograms) (heroin) (1 kilogram–2 kilograms) (cocaine)	7 to 10 years
low range commercial quantity (1.5 kilograms–3.5 kilograms) (heroin) (2 kilograms–3.5 kilograms) (cocaine)	8 to 12 years
substantial commercial quantity (3.5 kilograms–10 kilograms)	10 to 15 years

The above apply to couriers and those low in the hierarchy.

other factors: the offender being a principal (cf courier) or otherwise high (cf low) in the hierarchy as aggravating, and substantial degree of assistance and plea of guilty as mitigating.

(n.b. quantity is an exceptionally important factor, and many factors commonly taken into account are intended to be encompassed within the range, but departures may be justified.)

Ponfield

A list of 11 aggravating factors, two mitigating factors and one relevant but not mitigating factor.

Thomson

A guilty plea normally warrants a 10–25 per cent discount on sentence for its utilitarian value. The degree of the discount is primarily determined by two factors: the timing of the plea and the complexity of the case. In some cases the discount will be outside of the range; in fact, no discount may be appropriate in very serious cases, and in others it will produce a non-custodial sentence. In cases where the plea involves other matters such as contrition and victim vulnerability, a discount up to 35 per cent may be appropriate.

The Two-Stage Approach as an Explicit Sentencing Framework and Process

The two-stage approach has already been outlined and does not require elaboration. For the purpose of the present analysis, in fact, there is no need to distinguish it from numerical guideline judgments. What matters here is that both involve, in effect, fixing a notional sentence in the light of a consideration of only a part of the circumstances of potential relevance to the case and then requiring that allowance be made by way of an adjustment to this notional sentence for the remaining circumstances.

Evaluation of the Elaborated Sentencing Framework and Process

Does the elaborated framework overcome the acknowledged limitations of intuitive thought? And, in attempting this, are the perceived potential dangers of non-intuitive thought avoided? If the answer to these two questions is in the affirmative, then this sentencing framework can act as a standard of good legal decision making against which to judge guideline judgments as a means of structuring the decision making of sentencing judges.

Overcoming the limitations of intuitive thought

There are three matters for consideration.

First, disparity in the choice and weighting of penal aims arises because judges vary in their predilections on this and their understanding of the significance of particular factors. This is exacerbated because the decision involves a choice between multiple combinations of factors open to various interpretations. The provision of indicators of the appropriateness of the various aims can only serve to reduce the inherent subjectivity in the exercise. Disparity also arises from differences between judges in their preparedness to impose tough (or lenient) sentences; the sentences in the framework for proportionality serve uniformity in this respect; and, since the framework covers a wide range of factors and of case seriousness, there is not significant opportunity for idiosyncrasy to influence decision making. (Also relevant to this matter are the following two points.)

Secondly, coherence in the face of potentially numerous relevant case factors is facilitated by the framework; it promotes the orderly consideration of the relevant factors by: (1) showing a wide range of factors to be considered as potentially relevant; (2) allocating each one to its proper place (or places) in the sentencing decision; (3) demonstrating how each factor, considered as relevant, singly or in combination affects the sentence considered appropriate.

Thirdly, the representation of the sentencing decision in the framework is underpinned by a logic: proper distinctions are drawn between case facts as indicators of sentencing aims and as elements on a scale of seriousness. Moreover, although the component of the framework relating to proportionality is founded on case facts, it provides a mechanism for scaling quantitative and qualitative relationships which is numerically sound.

Avoiding the potential dangers of non-intuitive thought

There are seven matters for consideration.

1. The framework covers what approaches a comprehensive range of potentially relevant case factors and factor effects; this is achieved because: (1) the framework incorporates the three major components of the sentencing decision, namely, the selection of penal goals, the proportionate relationship between seriousness and sentence, and the cumula-

tion of seriousness (sentence) across counts; with respect to the second of these (2) case facts can be scaled on the criteria (dimensions) defining seriousness whether the character of these facts be quantitative or qualitative; and (3) each of these seriousness assessments can be combined, and given its due importance, on a scale for each of offence seriousness, prior criminal record, and offender mitigation; (4) cases comprising any combination of the more common circumstances relating to offence seriousness, prior criminal record, and offender mitigation can be placed within the framework showing the proportionate relationship between overall case seriousness and sentence.

2. The framework provides a sentence for a case. This sentence is proportionate to the extent that the circumstances of the case are covered by the framework. Thus the sentence is a notional one. The framework serves to minimise errors associated with the attempt to make due allowance for additional matters when adjusting the notional sentence, in two ways: (1) in any one case, adjustment will be required for few factors, and be comparatively small in magnitude, because of the framework's comprehensive coverage (the potential problem arises only when the facts of the instant case do not fully come within the scope of any one of the 27 sets of factual circumstances defining the cells in the framework); (2) since the relationship between case fact and sentence is specified for 27 combinations of offence seriousness, prior criminal record and offender mitigation and across the working range of overall case seriousness, the sentencer's proper course is well charted, thus facilitating ready and accurate extrapolation and interpolation from the framework.
3. Any tendency for judges to ignore matters not in the framework would be expected to be aggravated when it is not clear what the representation incorporates and how case factors relate to sentence, and the process of adjustment is obscure; with respect to these, however, the framework is transparent. Moreover, this point is less rather than more significant in view of the framework's comprehensive coverage of case factors.
4. The framework provides for the fact that case circumstances cannot be considered properly in isolation; it achieves this thus: (1) it distinguishes between the selection of penal aims (whether, for example, proportionate punishment or rehabilitation — or a balance between the two — is appropriate in a particular case) and the implementation of an aim (what, e.g., the proportionate punishment is for the case); (2) accordingly, the one case factor can play its proper part in the sentencing decision across aims (e.g. remorse may be relevant as an indicator of rehabilitation prospects and as an element of case seriousness by way of mitigation of what otherwise would be the proportionate sentence); (3) the framework incorporates a large number of factors and all factors in the framework are, by virtue of the framework, considered in combination with all other factors. Secondly, but related to this point, what are treated as case facts on a dimension can easily represent the joint consideration of multiple case facts (i.e. the actual case fact in the framework could be that the offender was, say, drunk and provoked and ...). Thirdly, (and because of the above two features) particular case facts do not have a constant percentage effect across cases.¹² Finally, the importance of a factor such as a guilty plea may be thought to vary (i.e. interact with) the seriousness of the case. This aspect has not been incorporated in the framework but it could be done simply.

12 It may appear that in the framework relating seriousness to proportionate sentence, particular case facts on dimensions have, the previous considerations aside, a specified constant effect on sentence across cases. This is true, but in respect only of the sentence proportionate to a case at the highest level of overall seriousness for the factors in the framework. In fact, the actual percentage effect on sentence of a particular case fact varies across cases with the level of overall case seriousness (and proportionate sentence).

5. The form of the framework obviates the need for the (notional) proportionate sentences provided there to be determined partly in regard to a sub-set of potentially relevant case circumstances and partly in the abstract; rather, each of the sentences in the framework is determined for a particular combination of offence seriousness, prior criminal record and offender mitigation considered jointly, this being based on a wide range of case facts. Moreover, in the application of the framework, the risk of actual circumstances and abstract matters being confounded is reduced in view of the framework's factual breadth.
6. The problem of sentencing decisions lacking a logic where the notional sentence is of one sanction type and the appropriate sentence is of another does not arise in respect of the framework; there are two reasons for this: (1) the sentences in the framework are based not only on factors related to the offence, but also (and jointly) on those related to the offender; (2) adjustment from a framework sentence of imprisonment to a non-custodial sentence can arise on two grounds: the additional factors either justify a different penal goal (e.g. rehabilitation) or reduce the (proportionate) seriousness of the case; the logic of the framework can accommodate both matters.
7. Multiplicity of error is a possibility in the individual and sequential consideration of case facts, particularly in regard to the determination of a proportionate sentence; in this, the problem is real where there is cumulation of error towards leniency or harshness. Three of the features of the framework act in concert to avert this problem: (1) the proportionate sentences in the framework are intuitively determined and in regard to a comprehensive set of case circumstances considered jointly; (2) the framework facilitates these sentences being seen in a systematic relationship, one to another, in respect to offence seriousness, prior criminal record, and offender mitigation and, accordingly, reveals whether these sentences are in due proportion; (3) the sentences are well distributed throughout the framework, thus confining possible effects of cumulative error.

In view of this, the elaborated sentencing framework and process would appear to moderate significantly the limitations of intuitive thought and not be subject to the perceived potential dangers of non-intuitive thought in sentencing. Because of this, it is suited to acting as a standard of good legal decision making against which to evaluate guideline judgments as attempts to overcome the acknowledged problems of intuitive thought.

Evaluation of Guideline Judgments

The questions for guideline judgments, as for the elaborated framework, are: do they overcome the acknowledged limitations of intuitive thought? and, in attempting this, are the perceived potential dangers of non-intuitive thought avoided?

Overcoming the limitations of intuitive thought

There are three matters for consideration. They relate to consistency, coherence and logic.

In view of the nature of these guideline judgments, the following questions can be framed conveniently to gauge their potential impact on *consistency*: (1) to what extent are the matters relevant to sentence covered in the factual set of circumstances acting as the standard? (consistency requires good coverage); (2) would variations, particularly significant variations, from the standard be expected to be common? (variation is inimical to consistency); (3) with respect to the circumstances not covered in the standard, what assumptions are to be made about them? and, what is their potential effect individually or

in combination on sentence? (silence does not favour consistency). The four guideline judgments vary in terms of the criteria favouring consistency; none would appear to serve consistency well.

Henry may cover the offence as a sub-category quite well but leaves significant matters relating to the offender open. In each of *Jurisc* and *Wong*, the standard is based on several factors only. *Ponfield* does not offer a standard. In regard to *Henry*, research shows that although cases of robbery demonstrate patterning, significant variation is not uncommon (see NSW Bureau of Crime Statistics and Research 1987). Only *Wong* provides any significant information on the effect of matters outside of the standard: they can normally be accommodated within the standard expressed as relatively narrow ranges of imprisonment. *Henry* and *Jurisc* acknowledge the additional factors as potentially aggravating or mitigating; in respect of this, mitigation is confined, non-custodial sentences being deemed exceptional, but much room is left to the sentencer.

Coherence requires: (1) information on what factors are to be taken into account; (2) direction on how these factors are to be taken into account, together with (3) indications of the effects of various combinations of factors on sentence as markers. Again, much is to be desired.

The four general guideline judgments give, to a greater or lesser extent, a reasonable coverage of relevant matters in respect of the offence, but fall short in regard to the offender.

All four implicitly treat case factors as representing bits of seriousness, to be added or subtracted in aggravation or mitigation. This is probably adequate for drug importation (*Wong*). But it is certainly not so for burglary (*Ponfield*) where the appropriate weighting of the penal goal of rehabilitation may be a prominent part of the sentencing decision, and requires factors to be treated as indicators as well. The significance of this omission for *Jurisc* and *Henry* probably lies between these two extremes.

Providing indications of the combined effects on sentence of relevant factors is something guideline judgments do badly; again, this would be expected to have least significance for *Wong* (since the one factor of quantity is deemed to be so important¹³) and most for *Ponfield* (since in burglary numerous individual factors together carry much weight but appear to exhibit little patterning), but should be regarded as significant for *Jurisc* and *Henry*.

Guideline judgments demonstrate no more than a crude and partial logic for the purpose of decision making in sentencing. Distinctions generally are not drawn between factors as indicators of sentencing aims and factors on a scale of seriousness, even when this is clearly critical to what is appropriate by way of sentence as in burglary (*Ponfield*). Moreover, it is taken for granted that qualitative factors (e.g. degree of violence) cannot be scaled quantitatively (see *Jurisc*). Finally, in *Ponfield*, the judgment no more than lists the factors of potential relevance to seriousness, the reason being the great diversity in the circumstances of the commission of this offence. In this the court is tacitly acknowledging that it does not know how to represent the relationship between case fact and sentence for all possible combinations of an extensive list of case facts. This limitation is critical for an offence like burglary. But it is problematic for an offence like robbery, as in *Henry*; although there are apparent patterns, they comprise few factors and, even to this extent, only approximate most factual circumstances.

13 But see the judgment of the High Court in this case.

Avoiding the potential dangers of non-intuitive thought

There are seven matters for consideration.

1. The guideline judgments omit from their representation of the sentencing decision many critical factors and factor effects; although this is probably of little practical import in regard to *Wong*, it certainly is for the three others.
2. There is a very real danger of the allowance for additional relevant matters as an adjustment to the notional guideline sentence not reflecting their true importance. This problem arises because guideline judgments aim at guidance for the purposes of control. To do this they generally offer a standard sentence or range of sentence as appropriate to a defined set of case circumstances, which sentences are to be treated as presumptive; the presumption may be strong and explicit or weak and implicit. The danger of inadequate individualisation is most likely to be realised when there is a standard together with a strong presumption; the problem will be exacerbated if the standard is narrow, relates to the effect on sentence of relatively few of the potential number of relevant factor variations, and the reference to other factors and their potential significance and effects is scant. The current guideline judgments demonstrate these features to a greater or lesser extent.

Jurisc, *Henry* and *Wong* each offers a relatively narrow standard (*Ponfield* does not propound a standard).

Jurisc carries a strong, explicit presumption against sentences below the level of imprisonment in the standard. *Wong* has a strong and explicit presumption against sentences outside of the standard ranges of imprisonment. In *Henry* the presumption is strong against non-custodial sentences; in view of one of the reasons for promulgating the guideline — to increase the level of custodial penalties — there must be taken to be an implicit but nevertheless moderate presumption against sentences below the standard. *Jurisc* and *Henry* carry a weak and implicit presumption against sentences above the standard in the sense that there may be a tendency for judges to treat matters relating to the standard as more important than matters mentioned but not in the standard as more important than matters not mentioned.

In *Henry*, but particularly in *Jurisc* and in *Wong*, the standard is based on relatively few factors and, with respect to other factors, little guidance is given to the sentencer, this point applying especially in respect of matters relating to the offender.

3. There is to be expected a tendency for judges to ignore matters not mentioned in the guideline judgments. One reason is that it is not clear whether the standard incorporates these other matters and, if it does, their assumed level of seriousness. Moreover, for the matters specified as potentially relevant but not incorporated in the standard, it is left open as to whether they relate to the appropriate penal aim or proportionate sentence (or both); and, if they are to be taken into account, there is the question of the weight to be given to them. Doubt about these things might be thought to favour neglect, especially to the extent that the sentencing standard carries a significant presumption. This will make for problematic sentencing especially for cases in which a significant number of factors outside of the guidance may singly or in combination carry substantial weight.

The danger for *Wong* is probably not of great practical significance, as long as the importance of quantity is accepted. But for *Henry* and *Jurisc*, the problem, especially in regard to the offender, may be significant. For *Ponfield*, there is reason for less concern, in view of the absence of a standard and, even though the list of relevant factors largely refers to the offence, this is unlikely to diminish awareness of what is well known to be mitigating by way of the offender.

4. In guideline judgments, case factors are left largely to be considered in isolation. There are three aspects to this: (1) the effects of factors are dealt with in relation only to the scaling of proportionate sentences, not to the selection of appropriate penal goals; (2) the number of factors defining each of the standard sets of circumstances — and for this purpose considered in combination — is based on relatively few factors, this applying more to the offence than the offender; (3) to the extent that other factors are mentioned in the guidelines, they are considered no more than by way of a list as individually aggravating or mitigating.

This applies to all three in which a standard is propounded (*Henry, Jurisic and Wong*). In *Ponfield*, the list of specified relevant factors necessarily leaves them to be considered individually.

And in *Thomson* the percentage discount on sentence for a particular factor could easily be read as generally fixed across seriousness within a category/sub-category of offence. But consider the following. In respect of the proportionate framework, the percentage effect on sentence of a factor having a constant weight across levels of case seriousness will be less with greater seriousness (the matter of a case fact as the joint consideration of multiple facts aside). Thus the effect of assigning a constant percentage value to a factor across seriousness is to have it interact with seriousness, such that it carries greater importance for greater seriousness. However, there is no evidence in the judgment that this was intended; rather, on the contrary, the judgment contemplates a minimal discount in certain very serious cases.

5. In guideline judgments standard sentences are set for specified sets of circumstances. Clearly, where the sets of circumstances are based on a limited number of specified factors, the exercise is necessarily artificial, and it is not clear what has been taken into account. In real-life sentencing, by way of contrast, numerous matters are there to be considered and there are no unrealistic circumstances.

But the former applies to all three guideline judgments in which a standard is set (*Henry, Jurisic and Wong*), since in each one the standard is based on fewer rather than more factors, the offence rather than the offender. The artificiality invites error in the setting of the standard. The lack of clarity in what has been taken into account hazards confounding the facts of the hypothetical guideline case and the actual case in the application of the guideline.

6. In two of the three guideline judgments providing a sentence for a standard set of circumstances, the sentence is one of imprisonment, yet the appropriateness of a non-custodial sentence is recognized in exceptional circumstances (*Jurisic and Henry*). In *Thomson*, too, a non-custodial sentence is contemplated as the effect of the discount for a plea.

Since guideline judgments implicitly treat case facts as representing bits of seriousness, to be added or subtracted in aggravation or mitigation, is it the case that non-custodial sentences are proportionate to low levels of case seriousness? If so, what defines the threshold? Or, as an alternative or in addition, is it that a non-custodial sentence is appropriate when the goal of rehabilitation is activated? If so, what are the relevant circumstances? Guideline judgments leave these waters largely uncharted.¹⁴

7. Guideline judgments attempt to guide in part by setting out factors relevant to sentence; this may be done by way of a standard limited set of circumstances together with a list of individual aggravating and mitigating factors (as in *Jurisic, Henry and Wong*), by a list of relevant factors (*Ponfield*), or by an assigned discount to a single factor (*Thomson*).

¹⁴ The factor of momentary inattention or misjudgment in *Jurisic* aside.

This must favour the individual consideration of relevant matters. As a consequence, when allowance is being made for these individual factors, there is the possibility of over- or under-estimating their combined effects. This is made all the more likely because the essence of the process is antithetical to considering the resultant sentence globally, and these judgments do not provide multiple and systematically related standards as touchstones for the process.

In summary, guideline judgments would not be expected to significantly moderate inconsistency, but to the extent that they do, they would be expected to inhibit individualisation and, in any case, are not without their problems in regard to the other prerequisites of good legal decision making, namely, those of coherence and logic.

Conclusions

The judicial intuitionists are right: the more recent judicial attempts at greater consistency — guideline judgments and the two-stage approach — hazard inadequate individualisation and error. These limitations arise from three interrelated sources. The first concerns what is required of a guideline sentence: a sentence as guidance must be expressed in terms of a relatively narrow range. The second and third concern the nature of case circumstances: cases falling in the same legal category or sub-category of offence vary widely in regard to the facts of the offence and the characteristics of the offender; and, while some factors of aggravation and mitigation in the scaling of seriousness have a quantitative character, most are qualitative. But guideline judgments in their current form do not incorporate the scaling of qualitative factors and cannot represent all combinations of these qualitative and quantitative factors. Thus, they necessarily give guidance on no more than a narrow aspect of this variation, and are based on or force upon the user a crude logic. This inevitably will hazard inconsistency, incoherence and inadequate individualisation.

The conclusions seem compelling. Unless the limitations of current judicial attempts to structure their sentencing discretion are overcome, the continued use of these measures will imperil justice. It is still wise to speak of 'good old' judicial intuition; 'old-fashioned' judicial intuition would be a premature epithet.

Yet this intuition as a means of decision making in sentencing leaves much to be desired. Indeed, disquiet about it is the motivation for the current less-intuitive approaches. These initiatives are to be commended and encouraged for what they seek to improve upon. But for what they achieve, they cannot be sanctioned. Simply, they are numerically too unsophisticated. Therefore, it is to be hoped that the higher judiciary will press on with this reform, yet accepting the development of more complex guidance as a challenge. In the High Court case of *Wong, Gaudron, Gummow and Hayne JJ* viewed the application of such complex guidance as difficult, perhaps impossible. The former is certainly true. Yet one hopes that this is not taken as a reason for not attempting to develop a framework appropriate to the numerical aspects of judicial thinking in sentencing. In judicial judgments, attempts to deal with legal problems lending themselves to a narrative discourse are Herculean; why should not the same endeavour be worth it for the numerical?

The elaborated sentencing framework and process summarised above demonstrate what is required for decision making. It addresses the numerical problems currently besetting guideline judgments. And, in doing this, it moves towards overcoming the limitations of judicial intuition, better satisfying the four prerequisites of good decision making in sentencing — individualisation, consistency, coherence and logic. Yet the proposed framework should not be thought of as involving mechanical calculation and entailing

precise determination. Rather, the fundamentals of the framework for proportionate sentencing compare with the traditional sentencing process, namely, sentence comparisons across cases in terms of multiple case facts, which sentences are holistically determined according to a judge's feeling for the application of the criminal law to the particular circumstances of the case. What alone distinguishes the framework from judicial intuition is that the framework, in addition, systematically interrelates cases — and the sentences for those cases — with respect to seriousness for all combinations of case facts in the scheme. This innovative element facilitates proper distinctions being drawn between cases.

The fixing of sentences in the framework clearly still involves traditional intuition in the sense of instinctive justice. But, in respect of the rest of the framework — the interrelationships between case facts, seriousness and sentence — the decision making required of the sentencer is not intuitive in the traditional judicial sense. What, then, is it? For the purpose of explanation, it may be profitable to use skilled performance as an analogy, drawing distinctions between the novice and the expert and considering the basis of skilled performance. The novice is one who brings little more than commonsense to the task: for (say) cricket, there is not a framework and rules interrelating body, bat and ball. By way of contrast, an expert is one who has this analytic knowledge base and has practised its application to the task in all its variations. Early on, decisions are made slowly and consciously, and the distinctions between the various courses of action are crude; in time, decisions are made readily and largely unconsciously, and actions reflect subtle distinctions, not lending themselves to explanation. Thus expert decision making as described here would appear akin to a form of intuition characterised as functional reasoning. This has been defined as apprehending, with little mental effort and in quantitative terms, how the assessment about a set of circumstances changes as a function of variation in one or more of the comprising factors¹⁵ (see Abernathy & Hamm 1995, and also von Winterfeldt & Edwards 1986). For the expert, intuitive thinking is based on an implicit understanding of the interrelationships between the factors relevant to the decision; it is born of a deep task involvement through practice and grows out of analysis. This is very different from traditional judicial intuition, its virtues being championed on the basis of there being no substantial analytic foundation (or framework) for the interrelationships between the factors relevant to sentence. In respect of this, there is an absence of thought, the intuition being for want of analysis, as for the novice. Indeed, there is empirical support for this. The author asked experienced judges to think aloud as they determined sentences according to the totality principle for a series of cases involving multiple offending. Most did not bring to the task even a general decision framework, and in the individual case showed faltering thought (see generally, Lovegrove 1997).

Intuition as functional reasoning would seem to be more appropriate to rational sentencing, where decision making involves reconciling cross-currents of aggravating and mitigating factors according to principle. The purpose of the proposed framework and its associated process is to facilitate this form of thinking as a means by which judges digest the facts of a case in exercising their discretionary sentencing judgment. Unfortunately, the framework has been well elaborated only in respect of proportionate sentencing for single offences. Work on the selection of penal goals remains to be undertaken, and the analysis of the sentencing of multiple offenders is yet to be completed.¹⁶ These are matters of urgency.

15 Nevertheless, in novel situations the functional reasoning will be more analytic than intuitive in character.

16 With respect to this third component, see Lovegrove (2000, in press).

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