

Sentencing the ‘Victimised Criminal’: Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment

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Abstract

This article analyses the way Australian courts have been sentencing a relatively unique category of convicted offenders — described oxymoronically here as ‘victimised criminals’ — who have already been punished or will be punished in one form or another, whether directly or indirectly, by an entity or entities other than the sentencing court proper. This situation can be called extra-curial punishment given the ‘extra-judicial’ nature of the sanction. Studies in this area are sorely needed because of the continuing complexity and ambiguity surrounding both the definitional parameters of extra-curial punishment, and the way courts have applied these rules in a flexible, and sometimes improvised, fashion. It is this fluidity that has been criticised as being the cause for the lack of certainty and precision in the relevant law. Consequently, the ensuing analysis will attempt to bring some clarity here by employing an analytical scheme that is premised on a morally intuitive common sense valve, the use of which results in judges arriving at fairer and more just decisions.

I Introduction

Sentencing in criminal cases requires the court to consider a range of factors and principles before rendering judgment. Given its complexity, this is necessarily a detailed process that is unfortunately further burdened by the utilitarian argument that punishment, according to Jeremy Bentham, is an inherently evil practice.¹ It matters little from where the source of such a consequence originates — whether judge or brigand — since the physical, psychological and/or financial effects of their actions on the recipient are the same: that is, some form of ‘pain’ is inflicted or some form of ‘pleasure’ is withdrawn.² The act of punishing is therefore a potentially controversial one, especially since it is usually administered by non-

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¹ J W Harris, *Legal Philosophies* (Oxford University Press, 2nd ed, 1997) 44.

² *Ibid* 40–4.

democratically elected judges, who are not answerable to the community in the way elected officials are.

Nevertheless, punishment remains an integral part of most, if not all, criminal justice systems.³ Because of its draconian effects, modern and enlightened societies have tried to ensure that the infliction of punishment is justified on grounds that are, by and large, politically acceptable to the community.⁴ These would include, for example, vindicating the use of punishments on the basis that they will ultimately deter; incapacitate; rehabilitate, reform or re-socialise; inflict retribution; denounce; and/or restore and reintegrate to the community, the offender.⁵

Although immensely topical, this article will not be analysing the general role sentencing courts play in punishing the run-of-the-mill type of convicted criminals: that is, those who have been found guilty and now await punishment by the courts for the crimes that they have committed. This study is instead concerned with a relatively unique category of convicted offenders — those who have already been ‘punished’ or will be ‘punished’ in one form or another, whether directly or indirectly, by an entity/entities other than the sentencing court proper — described oxymoronically here as ‘victimised criminals’. While the use of this term in no way suggests that the offender should be regarded or treated in the same way as an actual victim of a crime, it is nevertheless arguable that these criminals are in some material sense ‘victims’ themselves, albeit their ‘victimisation’ is often induced as a result of their initial offending behaviour. For example, a rapist is said to have suffered extra-curial punishment if he is brutally assaulted by the family members of his victim.

The proposition, however, that the suffering of such extra-curial punishment should somehow mitigate the eventual sentence — even though the said injury, detriment or loss originally stemmed from the offender’s *own* reprehensible conduct — is questionable indeed. There is clearly something counterintuitive in the contention that offenders should receive reduced sentences just because they experienced some calamity that, but for their wrongdoing, they would not have otherwise suffered. The adoption of this position by our courts therefore begs the question: ‘Should criminals not reap the full measure of what they sow?’ Mitigating the sentence in such potentially ‘undeserving’ circumstances could be construed as unfair to the *real* victim who had to suffer at the hands of the offender. And yet, as compelling as the preceding statement may sound, this is by no means an unassailable argument, for would it not be equally unjust for an offender to be punished inappropriately or excessively by the court? And what about safeguarding the victimised criminal from being punished twice for the same offence? Surely these are important issues as well. This latter point, in particular, was raised by Richards, who not only cited Queensland legislation and case law as

³ Terance D Miethe and Hong Lu, *Punishment: A Comparative Historical Perspective* (Cambridge University Press, 2005).

⁴ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 74–6.

⁵ *Ibid* 78–91; See also Peter Joyce, *Criminal Justice: An Introduction to Crime and the Criminal Justice System* (Willan Publishing, 2006) 320–6.

persuasive support, but also the views of the Australian Law Reform Commission.⁶ As recent cases like *Einfeld v The Queen*⁷ will illustrate, this dynamic tension between equally convincing arguments and counterarguments has led to significant definitional ambiguity and a resultant loss of precision in relation to the scope of what should or should not fall within mitigatory extra-curial punishment. This article will attempt to bring some clarity to this important area of the law by: first, defining the concept of extra-curial punishment; second, establishing its bases of admissibility; third, outlining the analytical scheme employed in this study; and fourth, delineating its conceptual parameters.

II Defining Extra-Curial Punishment

Punishment, in Hart's opinion, is a legal concept requiring the satisfaction of the following elements:⁸

- (1) it must involve pain or other consequences normally considered unpleasant;
- (2) it must be for an offence against legal rules;
- (3) it must be of an actual or supposed offender for his offence;
- (4) it must be intentionally administered by human beings other than the offender; and
- (5) it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Using this standard legal definition of punishment as a starting point, it is arguable that an extra-curial sanction would technically satisfy all of the above criteria with the exception of (5), since it is, after all, 'extra-curial': that which is administered outside of the judicial system.⁹ However, as case law will show, this notion is not without a significant level of embedded ambiguity. In the case of *Einfeld*, Basten JA opined that '[t]he phrase "extra-curial punishment" appears to have two limbs, neither of which can be described with precision'. His Honour was additionally of the view that '[t]he concept of "punishment" has been treated with less rigour, suggesting that the phrase has been used on occasion in a manner which extends beyond its proper reach'.¹⁰

⁶ Frank Richards, 'Extra-Curial Punishment and Mitigation of Sentence' (2009) 36 *Hearsay* <http://www.hearsay.org.au/index.php?option=com_magazine&func=show_edition&id=49&Itemid=48>. For a more recent treatment of this area of the law, see Kate Warner, 'Sentencing Review 2010–2011' (2011) 35 *Criminal Law Journal* 284.

⁷ (2010) 200 A Crim R 1 ('*Einfeld*').

⁸ H L A Hart, 'The Presidential Address; Prolegomenon to the Principles of Punishment' (1959–1960) 60 *Proceedings of the Aristotelian Society* 14.

⁹ Obviously for our purposes, extra-curial punishment must be meted out in response to a breach of a legal rule otherwise there will be nothing for the criminal *court* to adjudicate upon.

¹⁰ *Einfeld* (2010) 200 A Crim R 1, 24 [86].

Notwithstanding Basten JA's assessment, various courts have tried to pin down the definitional parameters of this notion, and to that end, James J in the case of *Silvano* defined extra-curial punishment as:

loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for his offence or at least by reason of the offender having committed the offence.¹¹

While the above ratio may seem to provide a fairly clear description of this concept, the actual application of this definition is far from simple, given the dynamic development of relevant law.¹² Although judges have been receptive to accepting extra-curial punishment as a mitigating factor (albeit in a piecemeal fashion), this has not stopped them from often imposing seemingly amorphous conditions¹³ to limit the use of this notion in circumstances that lead to counterintuitive or patently unfair outcomes. Predictably, this legal landscape is fraught with shifting lines drawn in the sand, where general rules are often marginalised by exceptions, and the exceptions in turn are framed in such generalised terms that their scope lacks adequate precision. A close examination of the relevant cases will reveal that judges have had to distinguish between various types of 'extra-curial punishment', even though the differences between them may be slight. For example, as Basten JA noted in *Einfeld*, extra-curial punishment:

would appear not, for example, to include consideration of the conditions of imprisonment and the impact of imprisonment on the particular offender. It is less clear whether it includes legal consequences of a kind which flow directly from the conviction or the sentence, such as disqualification from holding an office, remaining in an occupation or holding a licence.¹⁴

Unfortunately, this line dividing mitigatory and non-mitigatory extra-curial punishment is very fine indeed. Given Basten's JA caveat that '[t]he concept of "punishment" has been treated with less rigour by the judiciary',¹⁵ there is a real danger that the principles guiding the inclusion of extra-curial sanctions into the sentencing framework will remain unclear in its application. Before critically examining where these uncertainties lie, it would be proper at this point to outline the legal basis upon which judges are permitted to take into account extra-curial punishment as a mitigating factor.

A The Admissibility of Extra-Curial Punishment

The admissibility of extra-curial punishment is an important preliminary matter because there may be some confusion over the issue of admissibility, on the one hand, and the weight of evidence, on the other. For example, in *Jehad Jodeh v The*

¹¹ *Silvano v The Queen* (2008) 184 A Crim R 593, 598 [29].

¹² But see Basten JA in *Kenny v The Queen* [2010] NSWCCA 6 (12 February 2010) [23] ('Kenny') where he described the law in this area in less flattering terms.

¹³ It may well be that these conditions (for example, 'seriousness', 'exceptional/unusual circumstances', 'reasonable response', and 'unusual severity') were deliberately left vague so as to provide judges with the flexibility to distinguish between 'deserving' and 'less deserving' cases that come before them.

¹⁴ *Einfeld* (2010) 200 A Crim R 1, 24 [86].

¹⁵ *Ibid.*

Queen,¹⁶ the applicant's counsel argued that the principle that allows extra-curial punishment to be taken into account in mitigation of an otherwise appropriate sentence was explained in *R v Hannigan* as follows:

the theory which underlies the relevance of extra-curial punishment to sentence is that it deters an offender from re-offending by providing a reminder of the unhappy consequence of criminal misconduct, or it leaves the offender with a disability, some affliction, which is a consequence of criminal activity. In such cases one can see that a purpose of sentencing by the court, deterrence or retribution, has been partly achieved.¹⁷

To the extent that the applicant's learned counsel was referring to the issue of *admissibility* as opposed to *weight*, we would instead contend that the correct legal position is to be found in the ratio of *R v Daetz*.¹⁸ In this case, James J explained that:

[i]n sentencing the offender the court takes into account what extra-curial punishment the offender has suffered, because the court is required to take into account all material facts and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment.¹⁹

In addition to the common law position set out by James J above, Richards pointed out that while Australian sentencing legislation does not specifically refer to extra-curial punishment, there are nevertheless legislative bases which would likewise allow for its admission.²⁰ For example, in Queensland, according to the *Penalties and Sentences Act 1992* (Qld) s 9(2), when sentencing an offender, a court must have regard to:

- (g) the presence of any ... mitigating factor concerning the offender; ...[and]
- (r) any other relevant circumstance.

Generally speaking, other state and territory jurisdictions have similarly worded provisions.²¹

Sentencing judges may therefore admit extra-curial punishments into their deliberations because they are legally obliged to take into account *all* the material facts (which include mitigating factors) in order to ensure, not just the appropriateness of punishment, but also that their sanctions will not be excessive. Thus, any reference made by the court about how an extra-curial punishment may

¹⁶ [2011] NSWCCA 194 (29 August 2011) [49].

¹⁷ (2009) 193 A Crim R 399, 405 [25] (Chesterman JA) ('*Hannigan*').

¹⁸ (2003) 139 A Crim R 398 ('*Daetz*').

¹⁹ *Ibid* 410–11 [62].

²⁰ Richards, above n 6.

²¹ *Sentencing Act 1991* (Vic) s 5(2)(g); *Sentencing Act 1995* (NT); *Crimes (Sentencing Procedure Act 1999* (NSW) s 21A (this provides a more developed list of mitigating factors); *Sentencing Act 1997* (Tas) (this provision stipulates that state courts retain powers under, inter alia, the common law when it concerns the sentencing of offenders); *Crimes (Sentencing) Act 2005* (ACT) (although there is a long list of factors that the court can take into consideration when sentencing the offender, this provision makes it explicit that the court is not limited by the preceding subsections from considering other relevant circumstances); *Sentencing Act 1995* (WA) ss 6, 8; *Criminal Law (Sentencing) Act 1988* (SA).

satisfy the requirements of deterrence, retribution and so on, should be construed as irrelevant for the purpose of admissibility, since such objectives only justify the amount of weight, if any, judges may ascribe to such factors. The satisfaction of these principles cannot be used to explain why courts are permitted to consider such circumstances in the first place.

B *How to Make Sense of the Uncertainty between Mitigatory and Non-mitigatory Extra-Curial Punishments*

Before specifically analysing our domestic law, it is instructive to consider how other jurisdictions have addressed this legal conundrum. Good examples of alternative approaches include the Swedish and German penal codes (the *Brottsbalken* and *Strafgesetzbuch* respectively). Given their civil law traditions, both have established a statutory basis upon which extra-curial punishment may be expressly taken into account as a mitigating factor.²² Thus, s 60 of the *Strafgesetzbuch* requires the court totally to dispense with any punishment ‘if by the consequences of an offence the defendant himself was afflicted so severely that punishing him would obviously be inappropriate’.²³ Similarly, ch 29, para 5 of the *Brottsbalken* stipulates that:

in determining the punishment, the court shall to a reasonable extent, apart from the penal value, consider:

1. whether the accused as a consequence of the crime has suffered serious bodily harm; ...[or]
5. whether the accused as a consequence of the crime has experienced or is likely to experience discharge from employment or other disability or extraordinary difficulty in the performance of his work or trade;²⁴

Unfortunately the Australian position is less clear cut. As indicated, deciding where to draw the line in order to distinguish between the two apparent categories of extra-curial punishment — those that are considered by the courts to be mitigatory; and those that are not — is often a difficult task to perform. In order to achieve this objective however, our analytical scheme employs what we have termed a ‘common sense valve’. The approach taken here was foreshadowed in the case of *R v Hook* where Jerrard JA had to consider defence counsel’s submission that the offender’s self-inflicted injuries should mitigate an otherwise fitting punishment.²⁵ His Honour agreed, and was of the opinion that this submission appeared to be a ‘commonsense one’. This article will therefore attempt to develop this concept of ‘common sense’ in greater detail in the hope that it may then be

²² Ashworth, above n 4, 183; J Zekoll and M Reimann (eds), *Introduction to German Law* (Kluwer, 2nd ed, 2005) 413–14.

²³ *Ibid* 414.

²⁴ Ashworth, above n 4, 183.

²⁵ *R v Hook* [2006] QCA 458 (10 November 2006) [14]. For an alternative legal analysis however, consider the analytical framework employed by Professor Kate Warner to illustrate how the courts should be utilising a principled approach when *victimised criminals* come before them. In this latter regard, principles of proportionality, equal impact, individualised justice, and consistency (or equality) are incorporated into this sentencing rationale: see Warner, above n 6.

used conceptually to unify and reintegrate some of the more incongruent decisions involving extra-curial punishment into the applicable law.

Although not expressly articulated in their judgments, it is contended that the way judges have tried to distinguish between very similar forms of extra-curial punishment leads to the reasonable conclusion that our courts are genuinely uncomfortable with certain aspects of this sentencing practice.²⁶ This uneasiness, we believe, results from the court being pulled in two opposing directions at the same time. On the one hand, judges have to ensure that a victimised criminal is punished appropriately and not excessively. On the other, judges, in certain circumstances, are deeply conscious of how counterintuitive it would be to allow the offender to receive credit (in the form of a reduced sentence) for the extra-curial punishment received. In order to alleviate this perceived strain, judges may be taking an additional step of using a cognitive valve that would allow them to accept or reject instances of extra-curial punishment based on whether its inclusion would or would not offend the dictates of common sense. It is only when this question has been initially resolved in favour of the offender that the subsequent issue of weight can be considered.

'Using one's common sense' generally refers to a cognitive process of evaluating whether a particular state of affairs is desirable or not, and is often framed in factually descriptive terms rather than as what it truly is: a value judgment or 'morally intuitive' decision.²⁷ As Black explained, '[i]n common sense, law is, among other things, a way of achieving order and justice'.²⁸ This is precisely what we believe judges are trying to accomplish when victimised criminals come before them. Even though some may argue that the use of the common sense valve would result in courts making banal decisions that are predicated on 'ignorance, prejudice, and mistaken interpretation',²⁹ we would submit that their judgments have actually become even more rooted in justice and fairness, as well as displaying a greater appreciation of human frailty and suffering.

We would further maintain that employing common sense in this manner is by no means unique or extraordinary in legal analysis. Thomas Jefferson, a noted lawyer, and the principal drafter of the *United States Declaration of Independence*, once wrote in 1812 that '[c]ommon sense [is] the foundation of all authorities, of the laws themselves, and of their construction'.³⁰ He continued to expound upon this matter in 1823, explaining that:

[L]aws are made for men of ordinary understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be

²⁶ *R v Talia* [2009] VSCA 260 (16 November 2009) ('*Talia*') [28]; *Christodoulou v The Queen* [2008] NSWCCA 102 (15 May 2008) [5] ('*Christodoulou*').

²⁷ Donald Black, 'Common Sense in the Sociology of Law' (1979) 44 *American Sociological Review* 18.

²⁸ *Ibid* 18–19.

²⁹ Paul B Horton and Chester L Hunt, *Sociology* (McGraw-Hill, 6th ed, 1984) 4.

³⁰ John E Hall, 'The Proceedings of the Government of the United States' (1814) 5 *The American Law Journal* 65.

sought for in metaphysical subtleties which may make anything mean everything or nothing at pleasure.³¹

In *Peak v United States*, Douglas J (the longest serving Associate Justice in the history of the United States Supreme Court) held that ‘common sense often makes good law’.³² The explicit employment of common sense to resolve questions of law has likewise been embraced in a number of Australian High Court decisions.³³ There is therefore nothing scandalous about the use of common sense in the law. What is provocative here however is the fact that we are suggesting an unarticulated use of common sense by judges in order to distinguish between seemingly similar instances of extra-curial punishment.

But what does ‘common sense’ really mean in this context? We propose that the exercise of this moral intuition is partially grounded in a form of retributive justice called ‘*poena naturalis*’ (that is, where the vice punishes itself).³⁴ In this regard, Sadurski noted that:

judges and juries, as the case may be, do tend to take the wrongdoer’s suffering into account in sentencing ... Circumstances such as accidental injury during the crime, lengthy pretrial detention or brutal treatment by the police may convince the jury that the criminal has already ‘paid for his crime’ before he was even brought to trial ... This idea, referred to as ‘*poena naturalis*’, or ‘natural punishment’, seems to reflect something deeply embedded in our moral sense.³⁵

The German and Swedish penal provisions highlighted earlier have been explained and justified in exactly those terms.³⁶ Further, a number of socio-psychological studies have confirmed that respondents often regard an offender’s extra-curial suffering as a pertinent factor when determining an appropriate punishment.³⁷ One of these empirical studies also discovered that mock jurors:

gave more lenient sentences when the defendant had ‘paid’ for his crime — regardless of whether his suffering was ‘relevant’ [that is, where the defendant was moderately or excessively injured while trying to evade arrest] or ‘irrelevant’ [that is, where the defendant sustained moderate or excessive injuries as a result of falling down at home while out on bail].³⁸

These were morally intuitive decisions that attempted to ‘balance the burdens and benefits’ that had accrued to victimised criminals as result of being both advantaged (receiving or potentially reaping the ‘fruits’ of a crime) and

³¹ William Twinings and David Miers, *How To Do Things With Rules* (Cambridge University Press, 5th ed, 2010) 230.

³² *Peak v United States* 353 US 43, 46 (1957)

³³ *Ilich v The Queen* (1987) 162 CLR 110, 119 [14]; *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 515; [17]–[19]; *Chappel v Hart* (1998) 195 CLR 232.

³⁴ Michael H Tonry (ed), *Why Punish? How Much?: A Reader on Punishment* (Oxford University Press, 2011) 31.

³⁵ Wojciech Sadurski, *Giving Desert its Due: Social Justice and Legal Theory* (D Reidel, 1985) 231.

³⁶ Ashworth, above n 4, 183–4; Zekoll, above n 22, 414.

³⁷ Elaine Walster, G William Walster and Ellen Berscheid, *Equity: Theory and Research* (Allyn and Bacon, 1978) 79–81.

³⁸ *Ibid* 80 (emphasis added).

disadvantaged (suffering from some type of extra-curial punishment) by their offending behaviour.³⁹

Examining the relevant case law however will reveal a more nuanced legal landscape. While judges are indeed concerned with balancing this scale of 'burdens and benefits', they are equally mindful that any concession made in favour of the offender could inadvertently result in the victim (or for that matter, the community) being 'revictimised'. For example, where a person has succeeded in defending himself against a serious attack from an offender, albeit injuring the latter in the process, imagine how distraught and betrayed the victim will feel if the criminal is then entitled to a mitigated sentence because of those injuries. Our courts are acutely aware of these tensions, and have tried to avoid making such counterintuitive decisions⁴⁰ by employing a common sense valve — a moral calculus that incorporates an adapted form of *poena naturalis* — a cognitive 'weighing scale', which not only inquires whether the victimised criminal has effectively 'paid his dues', but is also sensitive enough to balance this against the reasonable expectations of the victim and those of the community-at-large. This, we believe, is the underlying analytical framework that judges employ when victimised criminals come before them.

Only if the court has resolved this additional question (whether the extra-curial punishment is mitigatory or not) in favour of the victimised criminal, will the case then proceed to the next stage when the issue of how much weight to ascribe to this factor will be addressed. As James J pointed out in *Daetz*:

[h]ow much weight a sentencing judge should give any extra-curial punishment will, of course, depend on all the circumstances of the case. Indeed, there may well be many cases where extra-judicial punishment attracts little or no significant weight.⁴¹

It is arguable that the attribution of weight would be heavily dependent upon the extent to which the extra-curial punishment has effectively deterred, reformed, rehabilitated, denounced and/or retributively punished the offender.⁴² By way of illustration, if the court was of the opinion that the extra-judicial sanction had specifically deterred the victimised criminal from committing more offences in the future, then it is likely that greater weight would be ascribed to this mitigating factor. Conversely, if none of these legitimate aims had been achieved or if the gravity of the offences was so serious that they eclipsed the significance of the extra-curial punishment, then that mitigating factor would probably attract little or no weight at all.⁴³

³⁹ Ibid 230–1.

⁴⁰ *R v Noble* [1996] 1 Qd R 329 ('Noble'); *R v Azar* [2004] NSWSC 797 (3 September 2004) ('Azar'); *Clinton v The Queen* [2009] NSWCCA 276 (19 November 2009) ('Clinton'); *Ludeman v The Queen*; *Thomas v The Queen*; *French v The Queen* (2010) 208 A Crim R 298.

⁴¹ (2003) 139 A Crim R 398, 410–11 [62].

⁴² *R v ONA* (2009) 196 A Crim R 255, 285 [136]; *R v Fidler* [2006] VSCA 17 (7 February 2006) [14]–[17].

⁴³ *R v Mohammad Rahman* [2011] NSWDC 101 (28 July 2011) [56].

C *Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment*

In the oft-cited case of *Daetz*, James J observed that:

while it is the function of the courts to punish persons who have committed crimes, a sentencing court, in determining what sentence it should impose on an offender, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence.⁴⁴

While these parameters appear fairly unambiguous, an in-depth analysis of the relevant court decisions nevertheless suggests that there remains a great deal of uncertainty in relation to the specific scope of this definition, particularly when it relates to the type and extent of the injury suffered by the victimised criminal, the identity of the party who inflicted the injury, and the reasonableness or otherwise of the latter's response to the offender's criminal conduct. This ambiguity will be explored in greater detail below:

1 *Personal injuries inflicted on the victimised criminal*

Bodily harm suffered by an offender as a result of being assaulted by the family members and/or friends of the victim appears to be a quintessential form of 'mitigatory' extra-curial punishment. In *Daetz*, James J opined that the courts would take into account of such injuries 'even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence'.⁴⁵ This ratio followed a line of previous decisions.⁴⁶ More recently in *R v Boehmke*, the victimised criminal was brutally assaulted by the rape victim's brother.⁴⁷ McMurdo P strenuously justified the classification of the offender's injuries as a mitigating factor because of the message it would convey — a message that:

our community does not tolerate vigilantism. The complainant's family must understand that the applicant's sentence would have been longer but for their anti-social retributive behaviour.⁴⁸

While it is arguable that, based on *Daetz*, personal injury is a type of detriment that would fall within this category of *mitigatory* extra-curial punishment, this is not an entirely accurate generalisation. The courts are sometimes confronted by certain factual scenarios which require a more fluid

⁴⁴ (2003) 139 A Crim R 398, 410–11 [62].

⁴⁵ *Ibid.*

⁴⁶ See, eg, *R v Allpass* (1993) 72 A Crim R 561 ('*Allpass*'); *R v Clampitt Wotton* [2002] NSWCCA 383 (30 October 2002); *R v Cooney* (Unreported, Queensland Court of Appeal, 6 March 1998).

⁴⁷ *R v Boehmke* [2011] QCA 174 (26 July 2011) ('*Boehmke*'). See also *O'Connor v The Queen* [2011] NSWCCA 161 (20 July 2011) (victim's fellow workers); and *R v Suresh Nair* [2011] NSWDC 124 (26 August 2011) [69] (the offender was brutally assaulted in prison in circumstances where there was a 'clear correlation between his being charged with offences relating to the facts of the charges which bring him before this Court and this brutal attack which was to punish him for these offences').

⁴⁸ *R v Boehmke* [2011] QCA 174 (26 July 2011) [27].

application of the relevant rules to ensure that there is not a slavish adherence to the black letter of the law at the expense of fairness and justice. It is in these circumstances that the courts are most likely to use a common sense valve in order to determine whether the personal injury (or for that matter, any other type of extra-curial harm) should or should not mitigate the eventual sentence. The ensuing analysis traverses four factual categories in closer detail.

1 *Personal injuries inflicted by a police or security officer*

In *R v Webb*,⁴⁹ the victimised criminal had been shot five times in the course of his arrest by the police because they feared he was armed with a submachine gun. Upon reviewing the judgment, the appellate court decided not to disturb the sentencing judge's decision to discount the punishment on account of the offender's serious injuries and continuing disabilities.⁵⁰ Unfortunately, apart from citing *Daetz* as support, little else was written to justify this result.⁵¹

This brevity is unfortunate as elaboration would have helped us to better understand why the court adopted this stance, particularly in light of the subsequent case of *Sharpe v The Queen*⁵² where the court was faced with a similar situation but took a radically different approach in resolving the issue of extra-curial punishment. In this case, another victimised criminal was shot in the leg, but this time by a security guard. The offender was in the process of committing an offence with two accomplices when he was injured by the security guard, and had to be hospitalised for a few days. In arriving at his decision, Johnson J explained that when the security officer shot the offender, his actions were not unreasonable in the circumstances,⁵³ and to that extent accepted the Crown Prosecutor's submission that the latter had been fired upon as a *natural and direct consequence of his offending*. Lamentably, Johnson J did not explicitly clarify how the reasonability or otherwise of the security guard's actions would affect the issue of extra-curial punishment. Nevertheless, it clearly played a significant role, along with a factual determination that the injuries suffered by the offender was not of a serious nature.⁵⁴

In an earlier case, *R v Barci and Asling*,⁵⁵ the prosecutor argued that any injuries suffered by the offender as a result of having taken part in a violent criminal enterprise should be regarded as self-inflicted, and hence irrelevant for the purpose of sentencing. In this case, the victimised criminal, a robber, had been shot by the police, and received as a result severe and permanent injuries. As in *Webb*,

⁴⁹ (2004) 149 A Crim R 167 ('*Webb*').

⁵⁰ *Ibid* 171 [24].

⁵¹ *Ibid* 171 [22]–[23].

⁵² [2006] NSWCCA 255 (23 August 2006) ('*Sharpe*').

⁵³ *Ibid* [66]. For example, the security guard was alone when he had to confront three armed burglars; he had only discharged his weapon twice because the first shot did not convince the burglars to surrender/retreat; and the victimised offender tried to resist arrest.

⁵⁴ According to the appellate court the *victimised criminal* had been hospitalised for a *mere* four days, and his injuries could only be described as being a passing physical injury. There was also insufficient evidence to support any credible assertion that there were ongoing physical or psychological disabilities.

⁵⁵ (1994) 76 A Crim R 103 ('*Barci*').

the appellate court here was equally concerned with the serious nature of the offender's wounds, and the lifelong impact they would have on his life. Given the severity of the inflicted harm, and that it would act as a constant reminder to the offender of his crime, the appellate court held that such extra-curial punishment was sufficient to be mitigatory.

The decisions in *Webb*, *Barci* and even *Sharpe* arguably make good common sense since they will ultimately reassure the victim and the community that only when the victimised criminal has suffered the most serious of harms will the court allow some concession to his or her sentence.⁵⁶ Thus, it would appear that 'serious harm' in this context represents extremely compelling evidence that the detriment suffered by the offender outweighs the apparent benefits of the crime (as seen *Webb* and *Barci*). James J made this amply evident when he held that merely suffering some form of extra-curial 'loss and detriment' was insufficient.⁵⁷ The victimised criminal had additionally to show that the inflicted harm was of a 'serious' nature. It should be noted that the courts do not generally concern themselves with trivial matters — *de minimis non curat lex* — and in *Daetz* this criterion was easily satisfied because the offender had been assaulted badly enough by the vigilantes to have suffered grievous head injuries requiring surgery and a considerable recuperation period.

Likewise, in *Hannigan*, Chesterman JA emphasised the need for the loss and detriment suffered by the victimised criminal to be 'serious' or to be an 'injury ... of consequence' before it can be taken into account as a mitigating factor.⁵⁸ Here, the court was not satisfied that the force used by the arresting police officer on the offender was sufficiently serious to warrant a reduced sentence. The victimised criminal merely suffered superficial facial injuries that did not appear grievous enough (no obvious bruising on his face) for the offender to seek medical attention or to even complain about it to his lawyers or the police. However, there was independent eyewitness testimony to suggest a police officer had savagely assaulted the offender. Nevertheless, his Honour held that:

[i]n these circumstances the principle explained in *Daetz* has no application. Assuming that the applicant was punched several times in the face by the arresting constable, causing the injuries photographed, the suffering inflicted was not such as to bring the case within the principle. The injuries were minor, not serious. Their effect went unnoticed and would in any event have been transient. More importantly the applicant did not know he had been hit [because he was intoxicated at the material time].⁵⁹

While the decisions taken in these cases may be partially justified on the basis of the seriousness (or lack thereof) of the offender's injuries (that is, whether the offender has 'paid his dues'), they do not clarify why it was still necessary to consider the reasonability or otherwise of the security guard's response to the

⁵⁶ See, eg, *Alameddine v The Queen* [2006] NSWCCA 317 (10 October 2006) ('*Alameddine*'); cf *Azar* [2004] NSWSC 797 (3 September 2004).

⁵⁷ *Daetz* (2003) 139 A Crim R 398, 410–11 [62].

⁵⁸ *Hannigan* (2009) 193 A Crim R 399, 405–6 [26].

⁵⁹ *Ibid* 405 [24].

offender's attempt at committing a crime (see *Sharpe* above).⁶⁰ What obscures this issue further is Chesterman's JA obiter in the case of *Hannigan*, where his Honour opined that any violent misconduct on the part of the police against the offender should be addressed using internal disciplinary action, a civil suit for damages, and a criminal prosecution, and *not* by mitigating an otherwise appropriate sentence that was designed to protect the community.⁶¹ His Honour continued to suggest that to allow for such a sentencing practice would only 'remove a deterrent against re-offending and hence increase the risk to the public that ... [the offender] might re-offend.'⁶² This stands in stark contrast with McMurdo P's assertion in *Boehmke* that taking into account mitigatory extra-curial punishment would actually reinforce the message that 'our community does not tolerate vigilantism'.⁶³

Hannigan is also difficult to understand in light of the subsequent case of *Fernando v Balchin*.⁶⁴ This involved an offender who had assaulted a police officer by spitting at him. He was later arrested, and treated in an aggressive and humiliating way while in police custody. Video footage from the CCTV camera showed how the victimised criminal was placed in neck and arm locks, forcibly shoved against the charge counter, had his hair pulled and his head violently pushed onto the countertop a number of times. When he protested that his arm was being broken, one of the officers responded by saying 'Good! You assaulted a police officer!' Even though there was no evidence to support the contention that the offender had been seriously injured, Blokland J nonetheless held that:

[t]he circumstances ... give rise to the conclusion that the Appellant was being punished [and hence] [a] later Court imposed punishment is additional ... [Consequently] the treatment of the Appellant at the charge counter should lead to mitigation of the penalty.⁶⁵

While these cases appear to be incongruent with each other, it may be possible to reconcile them through the use of our common sense valve. In *Hannigan*, for example, the superficial facial injuries suffered by the offender were clearly insignificant. The same cannot be said of the wounds inflicted in *Sharpe*. Although the court in this latter case was of the opinion that the victimised criminal's injuries were not of a serious nature, it should nevertheless be remembered that he was shot in the leg and hospitalised for four days.⁶⁶ It is therefore arguable that such harm could have easily been considered sufficient for him to have 'paid his dues', yet the learned judge took a contrary position in this regard.

⁶⁰ The cases of *Clinton* [2009] NSWCCA 276 (19 November 2009) and *Azar* [2004] NSWSC 797 (3 September 2004) (which will be discussed in greater detail in this article) appear to suggest that the reasonability of the victim's response should also be taken into account when determining the weight that is to be ascribed to the extra-curial punishment.

⁶¹ *Hannigan* (2009) 193 A Crim R 399, 406 [28].

⁶² *Ibid* 406 [29].

⁶³ *Boehmke* [2011] QCA 174 (26 July 2011) [27].

⁶⁴ [2011] NTSC 10 (10 February 2011).

⁶⁵ *Ibid* [24].

⁶⁶ Compare the wounds in this case with the much less 'serious' injuries suffered by the offender in *Fernando v Balchin* [2011] NTSC 10 (10 February 2011).

When evaluating whether the detriment suffered by the criminal has effectively balanced the scales, courts have tended to link the objective seriousness of the crime to the degree of severity of the extra-curial punishment: that is, the more objectively serious the offence, the more severe the extra-curial injuries have to be in order to mitigate the sentence, and vice versa.⁶⁷ Thus, Johnson J was entirely justified in holding that the injuries inflicted on the offender were insignificant given the objective seriousness of the offences that were committed and the aggravated use of an offensive weapon to prevent lawful apprehension. Consequently, when reviewing *Fernando v Balchin* in this light, it is equally arguable that the aggressive and humiliating treatment the offender endured in that case was justifiably held to be significant given the objectively less serious nature of the crime that he had actually perpetrated.

We further contend that in *Sharpe*, when Johnson J made explicit reference to the reasonability or otherwise of the security officer's behaviour in shooting the burglar, he was also implicitly attempting to balance the objective seriousness of the crime against the reasonability of the officer's response.⁶⁸ In other words, the more objectively serious the crime or threat, the greater the latitude afforded to the security officer when determining whether his actions were or were not reasonable, and vice versa.⁶⁹ In this case, the facts surrounding the security officer's decision to shoot the offender proved to be compelling enough to tip the balance against mitigating the sentence,⁷⁰ suggesting perhaps that the more reasonable the response, the less likely the extra-curial punishment will be considered mitigatory.⁷¹ Thus, even though the security officer in *Sharpe* was deemed to have acted reasonably in the circumstances, the same could not be said of the police officers in *Fernando v Balchin*, who had arguably acted in an unreasonable way when dealing with the criminal, especially given the relatively less serious crime that had been committed.

2 Personal injuries inflicted by the victim or victim's family

The court's reluctance to ascribe mitigatory status to injuries suffered by an offender as a result of being assaulted by the victim is more pronounced when the inflicted harm was not retributive or vengeful. In *Noble*,⁷² the appellate court considered a case involving two offenders who were trying to rob a shop. The proprietor of the establishment managed to successfully defend his property by significantly wounding one of the robbers with a firearm. The appellate court rejected the argument that 'any injury suffered in the course of committing an

⁶⁷ *FB v The Queen* [2011] NSWCCA 217 (30 September 2011), [156]; *Clinton* [2009] NSWCCA 276 (19 November 2009), [32]; *R v Davidson; Ex parte A-G (Qld)* [2009] QCA 283 (18 September 2009).

⁶⁸ [2006] NSWCCA 255 (23 August 2006) [66].

⁶⁹ This appeared to be the same commonsensical approach taken by the court when it had to deal with a victim (as opposed to a police or security officer) who had inflicted extra-curial punishment on an offender: see *Clinton* [2009] NSWCCA 276 (19 November 2009) [34].

⁷⁰ As mentioned earlier, the security guard was alone when he had to fend off three armed burglars; he initially tried to scare them off by firing a warning shot, and the *victimised offender* resisted arrest etc.

⁷¹ Once again, consider *Clinton* [2009] NSWCCA 276 (19 November 2009) [32].

⁷² [1996] 1 Qd R 329.

offence is necessarily a factor in sentencing'.⁷³ By way of obiter though, there was an allowance made where, for example, the court might accept as mitigatory the serious injuries inflicted on the victimised criminal as a result of a vigorous defence put up on the part of the victim, who suffered insignificant harm. In those circumstances, it would not even matter 'whether or not the retaliation was within lawful bounds'.⁷⁴

In the subsequent case of *Clinton*,⁷⁵ the court considered the offender's argument that the injuries he suffered as a result of being hit over the head with a stool by the victim should be considered mitigatory extra-curial punishment. The offender, who was armed with a knife, had been attacked by the victim when he was attempting to burgle the victim's home. Howie J stated that:

[w]hen the injuries are inflicted by the victim against whom the offence is being committed, the court is entitled to take into account whether the act that caused the injuries was an unreasonable reaction by the victim to the acts of the offender and the degree of the injury inflicted ... Another relevant factor may be the seriousness of the offending when compared with the punishment inflicted: see the discussion in *R v Davidson ex parte A-G (Qld)* [2009] QCA 283.⁷⁶

Unfortunately, there appears to be some uncertainty as to whether his Honour's judgment can be neatly compartmentalised into the two stages mentioned above: that is whether the extra-curial punishment is mitigatory in nature; and if so, how much weight the court should attribute to it. Here, the judge seems to have conflated what we believe should be two separate phases rather than simply one. Howie J noted that the applicant argued that he was:

entitled to have regard paid to [the extra-curial punishment] (given that he clearly suffered significant injuries which required surgery and bled very heavily from the wounds at the scene). I do not accept that submission. The applicant had no such entitlement and it was a matter for the [sentencing] judge to determine the weight to be given, if any, to the injuries the applicant suffered. On the material before the Judge they were relatively minor and the actions taken by the victim could not in any way be said to be disproportionate to the threat posed by the applicant to the victim's property or his person. In any event, I would have come to the same conclusion as ... [the sentencing judge].⁷⁷

Given Howie's J assessment that the offender's injuries were relatively minor, the appellate court, following *Daetz*, should have unequivocally rejected the applicant's argument that his sentence be mitigated. However, the statement that the trial judge nevertheless had a right to determine the weight of the extra-curial punishment, despite the fact that the inflicted extra-curial punishment was not of

⁷³ *Ibid* 330; In *Ludeman v The Queen; Thomas v The Queen; French v The Queen* (2010) 208 A Crim R 298, the court rejected the offender's injuries (facial cut and resulting scar, inflicted by the victim in an effort to pre-empt an attack by the offender and two accomplices) as insufficient to warrant mitigation of his punishment.

⁷⁴ *Noble* [1996] 1 Qd R 329, 330.

⁷⁵ [2009] NSWCCA 276 (19 November 2009).

⁷⁶ *Ibid* [32].

⁷⁷ *Ibid* [34].

sufficient gravity, makes this case somewhat difficult to understand in light of the preceding analysis.⁷⁸

The law is somewhat vague about the mitigatory status of non-retributive injuries inflicted by a victim's family member, perpetrated with the intention of preventing the offender from continuing with his or her criminal enterprise. In *Azar*,⁷⁹ the court considered a case where a victimised criminal had been assaulted by the victim's son after the offender had just shot the father. His Honour pointed out that there was no suggestion the son's actions were unreasonable when all the circumstances were taken into consideration (that is, the offender had just shot his father, and in the course of the son's attempt at wresting away the weapon from him, the offender was hit over the head a number of times with his own pistol).⁸⁰ However:

[u]nlike *Daetz* the consequences were short lived. There was no fracture to his skull. There was no permanent injury. Whilst it is a matter that should perhaps be taken into account, it should be given little weight.⁸¹

It is a pity the court did not go on to explain why it thought the extra-curial punishment 'should perhaps be taken in account', especially when it was explicitly acknowledged that the injuries suffered by the offender did not satisfy the requirements in *Daetz*.⁸²

Nonetheless, the attention paid to the reasonability or otherwise of the victim's response (or victim's son's response, as the case may be) in *Nobel*, *Clinton* and *Azar*,⁸³ suggests a resistance on the part of our courts to making decisions which, in the circumstances, would result in counterintuitive and unfair outcomes. Allowing the victimised criminal to receive a mitigated sentence because of injuries suffered when the victim defended himself or herself against an unwarranted attack clearly goes against the very tenets of reason and common decency. This may well be a further indication that the courts are using a common sense valve in order to resolve such questions: that by balancing the extra-curial punishment against the reasonability of the victim's response⁸⁴ a more morally justifiable result may be reached — one that satisfies not only the principle of *poena naturalis* for the offender, but is also sensitive enough to accommodate the legitimate expectations of the victim and the community.

⁷⁸ Note however the ratios in *R v Sharpe* and *Fernando v Balchin* concerning the seriousness of the harm suffered by the victimised criminal.

⁷⁹ [2004] NSWSC 797 (3 September 2004).

⁸⁰ *Ibid* [33]. The issue of the 'reasonableness of the response' has already been discussed in detail in the previous section.

⁸¹ *Ibid*.

⁸² (2003) 139 A Crim R 398.

⁸³ *Noble* [1996] 1 Qd R 329; *Clinton* [2009] NSWCCA 276 (19 November 2009); [2004] NSWSC 797 (3 September 2004).

⁸⁴ In deciding this matter, the court will have regard to, for example, the severity of the injuries suffered by offender and if any, by the victim as well; the objective seriousness of the offences committed; the nature of the resistance put up by the victim; the motivation behind the victim's response, for example, revenge, retribution, protection, etc.

3 *Personal injuries inflicted by an accomplice*

In *R v Brunelle*,⁸⁵ Mullins J unequivocally rejected the applicant's submission that the injuries he sustained in the course of a drug deal gone wrong be taken into account because he was accidentally shot, not by the victim or the victim's family or friends, but rather by his own accomplice. Although his Honour accepted that the victimised criminal's injuries were serious enough to require extended hospitalisation and possible future surgical intervention, the circumstances in which it happened (where the damage was not inflicted by the victim or another person seeking retribution or revenge) meant that the injuries 'could not be characterised ... as extra-curial punishment'⁸⁶ as they had in the cases of *Daetz*, *Hannigan* and *R v Davidson*; *Ex parte Attorney-General (Qld)*.⁸⁷ Here, the justification for overriding the 'seriousness of the injuries' argument outlined in *Daetz*, appears to be based on the requirement that the extra-curial punishment be retributive or vengeful. Prima facie, this decision does not sit easily with previously discussed cases where the victim, sought to defend himself against the offender, nor will it mesh well with cases involving self-inflicted personal injuries. However, it could be argued that injuries inflicted accidentally on the offender by his own accomplice should not be held to be mitigatory because this would be an affront to common sense, and unreasonably frustrate the legitimate expectations of the victim or of the community in seeking justice from the court.

4 *Self-inflicted personal injuries*

In *Alameddine*,⁸⁸ the prosecutor submitted that the injuries suffered by the offender (severe burns, as well as having to undergo an intensive treatment regime that lasted for more than two years) should not be considered by the court to be extra-curial punishment deserving of mitigatory effect. This was because the injuries, although serious, were self-inflicted when the chemicals used in the offender's methylamphetamine manufacturing laboratory exploded while he was still within the premises. He had apparently gone inside to use (or destroy) the drugs before his impending arrest and eventual return to prison. Consequently, allowing him a reduced sentence in such circumstances would, in the Crown's view, 'create an undesirable public policy'.⁸⁹ However, relying on *R v Haddara*,⁹⁰ among other cases, Grove J held that:

[t]o the extent that the Crown submitted that there was a boundary created by injury sustained by self-inflicted illegal activity beyond which no mitigation could be granted, I would reject it. That is not to say that the circumstances of infliction are irrelevant but to deny that, once injury is sustained by the action of the offender in the course of committing the

⁸⁵ (2010) 202 A Crim R 151 ('*Brunelle*').

⁸⁶ *Ibid* 255 [21].

⁸⁷ [2009] QCA 283 (18 September 2009).

⁸⁸ [2006] NSWCCA 317 (10 October 2006).

⁸⁹ *Ibid* [22].

⁹⁰ [1997] 95 A Crim R 108.

crime, the consequences are incapable of giving rise to a factor of mitigation.⁹¹

In *Whybrow v The Queen*,⁹² the offender suffered significant injuries as a result of his own reckless driving, and would continue to be affected by permanent physical impairment. Hislop J held that ‘the applicant’s injuries and resultant ongoing disability could have, and should have, been taken into account as extra-curial punishment in mitigation of the sentence’.⁹³ A similar outcome was produced in the later case of *R v Daniel Glover*,⁹⁴ where the district court took into account the severe personal injuries that the father suffered as a result of his dangerous driving (extra-curial punishment),⁹⁵ as well as the guilt he felt for causing such serious injuries to his son because of the crime (extra-curial suffering).⁹⁶ This latter form of mitigatory extra-curial punishment represents an extension to the initial limits set by the case of *Daetz*,⁹⁷ which was only concerned with the *physical* injuries inflicted upon the offender, and not the psychological/emotional trauma suffered by victimised criminals as a result of injuring or causing the death of someone to whom they were emotionally or relationally close. In a similar vein, *Chaplin v The Queen*⁹⁸ extended the boundaries by taking into account the suffering the offender felt when his mother was murdered by the father of his victim, who had died as a result of his negligent culpable driving — an extra-judicial sanction that had been inflicted on the offender in an indirect or oblique fashion.

While both *Daniel Glover* and *Chaplin* represent a logical extension of *Daetz*, and hence of *poena naturalis*, what is unclear is whether the courts should allow for *all* variations of self-inflicted injuries to be considered mitigatory. In *Christodoulou*, Campbell JA distinguished between two types of extra-curial punishment, the first being generally mitigatory in nature, and the second, not.⁹⁹ His Honour explained that mitigatory forms of extra-curial punishment were: either generally committed ‘in retribution for or as a consequence of ... [the offender] having committed the crime’; or ‘detriments unintentionally arising from the criminal conduct.’¹⁰⁰ The offender in this case had been charged with numerous assaults, malicious damage to property, intimidation, and aggravated breaking and entering. However, he had also attempted to commit suicide by injecting himself with battery acid which led to an unknown extent of necrosis to his arm muscles and tissue area. It was these injuries that he was now petitioning the court to take into account as mitigatory. Providing a second judgment to this

⁹¹ *Alameddine* [2006] NSWCCA 317 (10 October 2006) [27].

⁹² [2008] NSWCCA 270 (19 November 2008) (‘*Whybrow*’).

⁹³ *Ibid* [25].

⁹⁴ [2011] NSWDC 65 (12 April 2011) (‘*Daniel Glover*’).

⁹⁵ Although not referred to as “self-inflicted injuries”, the court in *Delzoppo v The Queen* [2011] VSCA 141 also had to consider what sort of impact the injuries suffered by the offender would have on his ability to undergo a period of imprisonment.

⁹⁶ See also *Woods v Akai* [2010] ACTSC 142 (while not referring to it as ‘extra-curial suffering’, the court took into account the ‘psychological and psychiatric consequences’ suffered by the offender because of his role in causing the death of his cousin, who was also his best friend).

⁹⁷ (2003) 139 A Crim R 398.

⁹⁸ [2010] VSCA 145.

⁹⁹ *Christodoulou* [2008] NSWCCA 102 (15 May 2008) [5].

¹⁰⁰ *Ibid*.

case, Grove J concurred with Campbell JA, in that he was also reluctant to extend mitigatory status to such self-inflicted extra-curial punishment. His Honour clarified that, as a matter of principle, it would be an unwarranted extension of *Alameddine* and *Haddara* to allow a deliberately self-inflicted injury that did not occur in the course of perpetrating a crime, or was an unintentional consequence of that offence.¹⁰¹ The case of *Christodoulou* is therefore an excellent illustration of how common sense has been employed by the courts to draw a moral fault line between acceptable and unacceptable types of self-inflicted extra-curial injuries.

D *Extra-curial Punishment not Involving the Infliction of Personal Injury*

It should be noted that *personal injury* is not the only kind of extra-curial loss and detriment that the courts have accepted as being mitigatory. Others include, for example: loss of career/profession; public humiliation/opprobrium; and being punished under a different regime of rules. However, as in the earlier analysis concerning bodily harm, the law in this area is also somewhat ambiguous.¹⁰²

1 *Loss of career/profession*

The appellate court in the case of *Whybrow* had to consider whether the loss of the offender's career in the army could be considered as a form of mitigatory extra-curial punishment.¹⁰³ Hislop J observed that there was nothing exceptional about the offender losing his career in the armed forces if it was simply based on the fact that he would be deprived of his liberty in prison.¹⁰⁴ This was because punishment 'necessarily precludes participation in many activities including participation in one's usual form of employment'.¹⁰⁵

This reference to 'exceptionality' or the lack thereof is extremely pertinent to our analysis.¹⁰⁶ It suggests that something additional is required for certain types

¹⁰¹ Ibid [41]–[42]. Campbell JA however preferred to leave the question as to whether this should be made a matter of principle undecided: at [2].

¹⁰² See also *Ismael Amado v The Queen* [2011] NSWCCA 197 (2 September 2011) (the court declined to consider whether the government's permanent residence application processes would be impacted by the offender's previous convictions); *Jehad Jodeh v The Queen* [2011] NSWCCA 194 (29 August 2011) (ability to recover damages in a civil action); *Arnold v The Queen* [2011] NSWCCA 150 (28 July 2011) (family dynamics).

¹⁰³ *Whybrow* [2008] NSWCCA 270 (19 November 2008) [31].

¹⁰⁴ Ibid [31]. See also *R v Dalzell* [2011] NSWSC 454 (20 May 2011) (although in this case, the loss of the offender's career was treated as part of his subjective circumstances for the purpose of sentencing. Nevertheless, the court still used an 'exceptional circumstances' test in order to determine the issue of mitigation).

¹⁰⁵ *Whybrow* [2008] NSWCCA 270 (19 November 2008) [31].

¹⁰⁶ Consider *R v Standen* [2011] NSWSC 1422 (8 December 2011) [203]; *R v Mohammad Rahman* [2011] NSWDC 101 (28 July 2011) [56], where the respective courts allowed the loss of the offender's career to be taken into account as mitigatory factors. Unfortunately, these decisions did not make any reference to the 'exceptionality' requirement, nor did they explain in any detail why the courts allowed such concessions in the first place. In contrast with these two cases, the court in *Sam v The Queen* (2011) 206 A Crim R 67, 101 [172] however held that the loss of career would *not* mitigate the punishment, although once again, no mention is made of the 'exceptionality' requirement nor was there any detailed explanation given as to why such a decision was taken.

of extra-curial punishment before they can be transformed into mitigating factors. Clearly, the loss of an offender's career falls within this category, and convicted criminals are therefore expected to accept that adverse consequences that flow directly or naturally from their criminal behaviour are both inevitable and deserved. For such extra-curial punishment still to warrant mitigation, some form of secondary or collateral harm must be evidenced that has adversely affected the victimised criminal to such an extent that any unmitigated sentence would be morally, if not, legally, questionable.¹⁰⁷ Unfortunately, what amount to 'exceptional' circumstances was left unresolved by the Court of Criminal Appeal.¹⁰⁸ That said, Hislop J did cite the case of *R v Bragias*, where Grove J noted that the loss of an offender's income due to his being imprisoned was not an uncommon consequence of his guilt for committing a crime, hence deserving of no special leniency in his sentence.¹⁰⁹ However, even if it were mitigatory, it should not lead to a high income earner claiming 'a lesser sentence for an identical offence, than someone of more modest earnings because the former would suffer a greater loss'.¹¹⁰ This potential risk of discriminating against lower-socioeconomic-status offenders was also echoed by Ashworth; he strongly argued against supporting 'a principle which institutionalised discrimination between employed and unemployed offenders'.¹¹¹

In *FB v The Queen*,¹¹² the appellate court had to consider whether the loss of the offender's career as a highly regarded professional educator and school administrator was mitigatory. Although Whealy JA agreed that the offender had indeed suffered a significant degree of extra-curial punishment (because he was convicted of an aggravated sexual assault committed against his underage student, he would not be able to continue to work as a school principal or to have any career that brought him into contact with young children), he was not however convinced that such an affliction should mitigate his sentence. His Honour explained that losing one's career was insufficient in these circumstances to outweigh or effectively undermine 'the level of objective seriousness involved in the offence. The ... [offender] must have known that his sexual pursuit of pupils in his care would sooner or later bring his professional career to an end.'¹¹³

In *Talia*, the offender had been convicted of obtaining property by deception. It was argued that pursuant to the *Estate Agents Act 1980* (Vic), this conviction would result in his being disqualified from working as an estate agent for a period of 10 years. In a combined judgment, Ashley and Weinberg JJA held that:

¹⁰⁷ See, eg, *R v Allpass* (1993) 72 A Crim R 561, 566 and *Kenny* [2010] NSWCCA 6 (12 February 2010) [49].

¹⁰⁸ Although not decisions that explicitly addressed extra-curial punishment, the appellate court in *Markovic v The Queen*; *Pantelic v The Queen* (2010) 200 A Crim R 510, 513–14 [6]–[11] explained that the 'exceptional circumstances' (in these cases, being the hardship suffered by the offender's family members) test was designed to be a fetter imposed on judges so as to limit their discretionary powers to exercise mercy/leniency on the offender.

¹⁰⁹ *R v Bragias* (1997) 92 A Crim R 330, 333.

¹¹⁰ *Ibid.*

¹¹¹ Ashworth, above n 4, 185.

¹¹² [2011] NSWCC 217 (30 September 2011).

¹¹³ *Ibid* [156].

the disqualification, although an extra-curial penalty, did not necessarily constitute a circumstance of mitigation; and to the extent that it might have been regarded as having that character, it was a circumstance of modest weight.¹¹⁴

Perhaps most illuminating, their Honours continued to explain how they arrived at that conclusion, opining that there was a:

distinct difference between a disqualification resulting from criminal conduct in the course of the employment from which the person is disqualified and criminal conduct remote from that employment but having that consequence.¹¹⁵

For example, a teacher who sexually molests a student or a lawyer who misuses trust monies should not be entitled to claim the loss of their profession as a mitigating factor. Where the crime committed was more remote or unconnected to the offender's job, there might be a considerably stronger argument in favour of the *incidental* loss of employment being treated as a mitigation circumstance. It makes a great deal of common sense to allow for the loss of the offender's career to be taken into account as mitigation if the offence had *not* been committed in the course of his/her employment, or that the crime was *not* somehow facilitated by him/her being in such employment (for example, an embezzling accountant having access to corporate bank accounts because of his/her occupation as the company's Chief Financial Officer).

The English position appears to support the approach taken by the Australian courts, and Ashworth noted that collateral consequences, such as the loss of one's career, are usually responded to by judges in one of two ways.¹¹⁶ Where the offence is not connected to the criminal's employment, the courts have been more inclined towards accepting the loss of career and consequential hardship as mitigatory. However, if the offence is related to the offender's job, particularly where an abuse of trust is involved, English courts have normally taken a hard line against allowing such extra-curial punishment to be considered mitigatory, unless they are the most exceptional of cases.¹¹⁷

2 *Public humiliation/opprobrium*

In *Allpass*,¹¹⁸ there was an acknowledgment that the extra-curial punishment suffered by an elderly offender who had sexually assaulted a young girl was significant enough to warrant mitigatory effect. According to the appellate court, the offender and his wife had suffered a great deal of abuse and harassment even to the extent of receiving violent threats to their lives and property.¹¹⁹ This distress continued to escalate, particularly after the trial court had announced its guilty verdict. This resulted in the offender needing psychiatric help, and an alternative

¹¹⁴ *Talia* [2009] VSCA 260 (16 November 2009) [28].

¹¹⁵ *Ibid.*

¹¹⁶ Ashworth, above n 4, 184.

¹¹⁷ *Ibid.*

¹¹⁸ (1993) 72 A Crim R 561.

¹¹⁹ *Ibid.* 566.

residence under assumed identities for both himself and his wife. As a consequence of his offence, they had lost everything that was of value to them.¹²⁰

It is interesting to note that although the victimised criminal did not suffer any actual physical injuries, the court nonetheless appeared to be especially impressed by the psychological impact the negative publicity (and the subsequent adverse response of the community against him and his wife) had on the offender's mental health, as well as the consequent need to relocate, and adopt new identities. In *Kenny*, Howie J considered this

an exceptional case where ... [the negative publicity and the subsequent opprobrium] reaches such proportion that it has had some physical or psychological effect on the person so that it could be taken into account as additional punishment.¹²¹

In *R v Wilhelm*,¹²² a case of some notoriety, the offender, who had been convicted of supplying a prohibited drug, had suffered a significant level of extra-curial punishment in the form of public derision, humiliation and death threats as a result of sensationalist media reporting. Relying on *Allpass*, Howie J was of the opinion that he was 'entitled to take into account not only issues of public humiliation of the offender but also the consequences of that upon him and his mental health'.¹²³ In arriving at this decision, the court appeared to be balancing the adverse effects of the media hype with the following facts: (1) that the victim was a consenting adult; (2) that the victim was the one who initiated the supply of the drug to her; (3) that the victim's death was a consequence which the offender could not have foreseen even if he had not been intoxicated at the material time; and (4) such an occurrence would not normally feature in a newspaper, and hence not be a worthy subject of any derision, interest or public concern.

¹²⁰ In *Ryan v The Queen* (2001) 206 CLR 267, Kirby J was also of the opinion that if the ensuing public opprobrium causes a 'significant element of shame and isolation to the prisoner and the prisoner's family', this could be considered to be a 'special burden' imposed on the victimised criminal, and if adequately supported by the evidence, justly deserves mitigatory effect: at 303 [123]. Likewise, Callinan J noted how unjust it would be for a court to marginalise the fact that when a prominent person commits a crime, he or she will tend to receive 'greater vilification, adverse publicity, public humiliation, and personal, social and family stress' as compared to an offender who was not as socially important: at 318 [177]. In stark contrast, McHugh J questioned the desirability and/or justification for favouring the 'powerful and well known over those who were lesser known': at 284 [53]. His Honour also refused to equate the suffering of such social stigma with that of losing one's job or of being inflicted with personal loss, as a result of being convicted of a crime: at 285 [54].

¹²¹ [2010] NSWCCA 6 (12 February 2010) [49]. See also *R v King* [2009] NSWCCA 117 (23 April 2009) [67] (intense media coverage led to the offender confining himself to his home because of his fear of being attacked by the public); *R v Lane* [2011] NSWSC 289 (15 April 2011) [87] ('exceptional circumstances of the media involvement' caused significant harm/distress to the offender, although in this case, there was insufficient evidence to prove this point). Cf *R v Standen* [2011] NSWSC 1422 (8 December 2011) [203], where the court considered the offender's loss of career as a law enforcement officer, and the consequent public disgrace and humiliation, as being extra-curial punishment deserving of mitigatory effect, even though no 'additional punishment' inflicted on the offender had been proven.

¹²² [2010] NSWSC 378 (29 April 2011).

¹²³ *Ibid* [24].

In *Kenny*, the district court sentenced an offender who had committed statutory rape to two years' imprisonment, with a one year and three month non-parole period imposed. The trial judge was asked to take into account the fact that the offender had suffered from more public humiliation and backlash than that which would naturally flow from the disclosure of a person's crimes to the community because of his status as a city councillor — a political position that demanded a higher standard of conduct. The trial judge however did not:

believe that such public humiliation is more than would naturally be expected given these offences and his public figure, such that the offender should be entitled to a finding that he has suffered extra curial punishment as a result. There is no evidence of any additional penalty being meted out to the offender. To the contrary he remained in public office years after the revelation of these offences, which he now admits.¹²⁴

After reviewing a range of cases, Basten JA, at the appellate stage, lamented that, '[n]one of these factors and considerations operate in a clear and constant way'.¹²⁵ Perhaps somewhat unfortunately also, his Honour was of the opinion that when deciding whether such extra-curial punishment should be taken into account as a mitigating factor, there was not only a need to 'ensure that the penalty fits the crime' but also that such a question should be 'assessed according to underlying principles of retribution, [and] deterrence'.¹²⁶ This position is, of course, at odds with our argument that such principles of retribution and deterrence are more appropriately considered when determining the issue of weight rather than that of whether such extra-curial punishment should be classified as mitigatory in the first instance. When providing the second judgment of the appellate court, Howie J similarly expressed disdain about the ambiguity plaguing this area of the law. His Honour nevertheless opined that something exceptional was required before public humiliation that arises from perpetrating a crime be considered mitigatory in nature.¹²⁷ Citing *Allpass* and *R v King*, Howie J explained that the said opprobrium should reach a level where some form of adverse physical or psychological impact is suffered by the offender before it may then be taken into account as additional punishment.¹²⁸

In the case of *Einfeld*, a former judge was convicted of perjury and perverting the course of justice.¹²⁹ As a result of the adverse media publicity surrounding his conviction, the offender experienced a devastating psychological effect on his mental wellbeing. Basten JA identified two factors that could affect a court's decision when deciding whether the public humiliation suffered by well-known or highly esteemed community figures are considered mitigatory for sentencing purposes. His Honour noted that the offender's status and former holding of office would give rise to a 'heightened seriousness of the offence', and consequently exposed him to a 'greater level of public opprobrium than otherwise

¹²⁴ *Kenny* [2010] NSWCCA 6 (12 February 2010) [42].

¹²⁵ *Ibid* [23].

¹²⁶ *Ibid*.

¹²⁷ *Ibid* [49].

¹²⁸ This should be contrasted with the difficulty in establishing sufficiently 'exceptional' collateral harm when the victimised criminal has lost his career or job.

¹²⁹ *Einfeld* (2010) 200 A Crim R 1.

might have occurred'.¹³⁰ However, this must be checked against whether 'the offence was one in the course of which the applicant appeared to use his former public office to further his unlawful purposes'.¹³¹

As the above analysis would suggest, courts are mindful of how morally counterintuitive it would be to mitigate a sentence simply because the offender has suffered public humiliation as a result of being prosecuted, convicted and sentenced. This reticence is more apparent in cases involving the loss of an offender's career or employment prospects. Thus, it may be possible to conclude that when the extra-curial punishment has taken the form of naturally occurring or inevitable deleterious consequences like these, mitigating an otherwise appropriate sentence would run contrary to the interests of the victim and the community in ensuring that the offender is justly and appropriately punished. *Poena naturalis* aside, such morally intuitive decisions require a balancing of the extra-curial punishment against the reasonable expectations of the victim, as well as that of the community-at-large — hence the need for some form of additional collateral harm that is exceptional enough to justify tipping the scales in favour of the victimised criminal.

3 *Punishment administered under different regimes*

Quite apart from the unsanctioned vigilantism and illegitimate retributivism usually associated with cases of extra-curial punishment, courts have also had to take into account instances when the offender has been punished or will be punished by other legitimate, although non-curial, regimes. In this regard, in *Einfeld* Basten JA acknowledged that 'a paradigm case of what might be described as extra-curial punishment may be found in the infliction of traditional or customary punishments by members of Aboriginal communities, including being speared in the leg'.¹³² Cases such as *Mamarika v The Queen*,¹³³ *Jadurin v The Queen*,¹³⁴ and *R v Minor* (1992) 79 NTR 1,¹³⁵ are illustrative of this point.

In *Mamarika v R*, the court attempted to expound upon the complex relationship between punishments meted out under customary Aboriginal law, and that of western judicial systems. This was no easy task, particularly because modern legal systems within liberal democracies, like Australia, no longer administer corporal punishment. And yet, to accept the *spearing* of an offender as a mitigating factor may give the impression that Australian courts tacitly support the imposition of anachronistic and harsh penal measures like these.

This point was specifically addressed in the case of *Jadurin*, where the full Federal Court held that:

¹³⁰ *Ibid* 27 [101].

¹³¹ *Ibid*. For an application of this approach, see *R v Nuttall; Ex parte Attorney-General (Qld)* (2011) 209 A Crim R 538.

¹³² *Einfeld* (2010) 200 A Crim R 1.

¹³³ (1982) 63 FLR 202.

¹³⁴ (1982) 7 A Crim R 182 ('*Jadurin*').

¹³⁵ (1992) 105 FLR 180 ('*Minor*').

[i]n the context of Aboriginal customary or tribal law questions will arise as to the likelihood of punishment by an offender's own community and the nature and extent of that punishment. It is sometimes said that a court should not be seen to be giving its sanction to forms of punishment, particularly the infliction of physical harm, which it does not recognise itself. But to acknowledge that some form of retribution may be exacted by an offender's own community is not to sanction that retribution; it is to recognise certain facts which exist only by reason of that offender's membership of a particular group. That is not to say that in a particular case questions will not arise as to the extent to which the court should have regard to such facts or as to the evidence that should be presented if it is to be asked to take those facts into account.¹³⁶

This position was reinforced by Mildren J in *Minor*, who made it clear 'the Northern Territory has had a long history of taking into account tribal law when sentencing a tribal Aboriginal'.¹³⁷ His Honour further explained that:

[t]he reason why payback punishment [as opposed to a vendetta], either past or prospective, is a relevant sentencing consideration is because considerations of fairness and justice require a sentencing court to have regard to, 'all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice' (per Brennan J in *Neal v The Queen* (1982) 149 CLR 395 at 326).¹³⁸

Perhaps more importantly, Mildren J justified the consideration of payback on the basis of the common law principle 'that a person should not be punished twice for the same offence'.¹³⁹ More controversially however, his Honour was of the opinion that payback spearing was not an unlawful action because the offender had consented to it.¹⁴⁰ Even if it were unlawful, it may still be possible to take such extra-curial punishment into account as a mitigating factor for the reasons cited earlier in this article.

Although the outcomes are similar, the rationale underlying these cases appears to be quite distinct from that adopted in *Boehmke*, where mitigatory extra-curial punishment was taken into account because of the desire to buttress the message that 'our community does not tolerate vigilantism'.¹⁴¹ *Mamarika*, *Jadurin* and *Minor*, however, seem to be concerned with two other issues: the first being the political need to be culturally sensitive to, and accepting of, parallel indigenous cultural justice systems; and the second, that because tribal punishments can be very harsh, the legal maxim *nemo debet bis punari, pro uno delicto* (no one should be punished twice for the same act) becomes especially pertinent. Douglas views this accommodation as being a 'weak form of legal pluralism', deemed necessary because of its inevitable application within certain Aboriginal enclaves, as well as for its dual role in disciplining the errant party and restoring some semblance of

¹³⁶ *Jadurin* (1982) 7 A Crim R 180, 187.

¹³⁷ (1992) 105 FLR 180, 190.

¹³⁸ *Ibid* 191.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* 192.

¹⁴¹ [2011] QCA 174 (26 July 2011) [27].

community peace within increasingly blighted Indigenous societies.¹⁴² This nevertheless flies in the face of the legal principle that the law should ‘apply equally to all people irrespective of their background’, and like Douglas, Zdenkowski was unimpressed with the court’s adoption of a ‘rather weak version of cultural relativism’, particularly since it raised a whole host of challenging questions surrounding issues of race, ethnicity, discrimination, illegitimacy, human rights violations, and breaches of the rule of law that our courts have been reluctant to address explicitly.¹⁴³

While judges have been reasonably accommodating when traditional Aboriginal sanctions are involved, the same cannot be said of other types of punishment under different enforcement regimes.¹⁴⁴ For example, in *R v Johnson*, Garling DCJ refused to accept that being a registrable person under the *Child Protection (Offenders Registration) Act 2000* (NSW) was a mitigatory form of extra-curial punishment.¹⁴⁵ This was because children would continue to be in danger if the offender’s movements were not closely monitored via such a register. Although the registration requirement was not termed as an extra-curial punishment,¹⁴⁶ the appellate court in *Director of Public Prosecutions v Ellis*¹⁴⁷ nevertheless had to decide whether such an obligation could be relied upon as a mitigating factor. The court held that ‘[a]s a general rule ... an offender’s reporting obligations under the *Sex Offenders Registration Act* are irrelevant’,¹⁴⁸ since Parliament saw fit to make such a requirement incidental to the actual sentence meted out against this particular class of felons (sexual offenders). The only way a sentence may be mitigated is if these ‘reporting obligations operate with unusual severity on a particular offender. In other words, they are relevant to sentencing only in exceptional circumstances’.¹⁴⁹

It is worth highlighting once more that these registration requirements for violent sexual offenders emanate from the legislative will of Parliament (to protect the community from an especially heinous class of criminals), as opposed to the retributive or vengeful animus of private citizens. Common sense would therefore dictate that such provisions be viewed as part of a suite of legitimate responses implemented by the state specifically to address this type of serious criminal

¹⁴² Heather Douglas, ‘Customary Law, Sentencing and the Limits of the State’ (2005) 20 *Canadian Journal of Law and Society* 155–6.

¹⁴³ George Zdenkowski, ‘Customary Punishment and Pragmatism: Some Unresolved Dilemmas: The Queen v Wilson Jagamara Walker’ (1994) 3 (68) *Aboriginal Law Bulletin* 26.

¹⁴⁴ See *R v Rivkin* (2003) 198 ALR 400 (at first instance) and *R v Rivkin* (2004) 59 NSWLR 284 (on appeal).

¹⁴⁵ *R v Johnson* [2011] NSWDC 32 (24 March 2011) [64].

¹⁴⁶ Note also *R v KNL* [2005] NSWCCA 260, where Latham J at paragraphs [49] to [50] doubted that ‘... in the circumstances of this case, the requirements as to registration under the *Offenders Registration Act* could be properly characterised as extra-curial punishment entitling the Respondent to any mitigation of penalty...’ although his Honour did make it clear that he did not ‘mean to suggest that there could never be a case where extra-curial punishment might arise from the requirements of the *Offenders Registration Act*, but this case fell far short of any penal consequence being visited upon the Respondent because of a conviction.’

¹⁴⁷ (2005) 153 A Crim R 340

¹⁴⁸ *Ibid* 347 [16].

¹⁴⁹ *Ibid*. Consider also *R v ONA* (2009) 24 VR 197, 226 [131] (‘registration will only be regarded as an extra-curial punishment in unusual circumstances’).

behaviour. It should not be perceived as being additional punishment deserving of mitigatory status, *unless* it results in unusual severity or is exceptional in its effects, on the offender.¹⁵⁰

III Conclusion

The rules regarding extra-curial punishment and the manner in which they are applied comprise an area that deserves greater study because of the continuing complexity and ambiguity surrounding both the definitional parameters of extra-judicial sanctions, and the way in which the courts have applied these rules in a flexible, and sometimes improvised, fashion. This fluidity has been criticised as being the cause of the lack of certainty and precision we see in the relevant law today.¹⁵¹ This is not to say, however, that such an approach is necessarily inappropriate in these circumstances. In general, it is arguable that judges are using their common sense or moral intuition to decide whether a particular type of extra-curial punishment should or should not be taken into account as a mitigating factor. This, we believe, is done so that their judgments will achieve a greater degree of justice and fairness for both the victimised criminals, as well as the actual victims coming before them. This is obviously a difficult task to perform given that these two parties often have conflicting interests. It is therefore not simply a question of whether offenders have 'paid their dues' by suffering the extra-curial punishment. Rather, the court's explicit inquiry into matters like the seriousness of the offender's injuries; the relative gravity of the crime vis-à-vis the extra-curial punishment; whether there are any exceptional/unusual circumstances to the case; the reasonability or otherwise of the victim's response, and so on — are in a sense a coded sequence of common sense factors that judges are specifically taking note of so as to avoid patently unfair or counterintuitive outcomes. This fine-grained treatment of the facts is also evidenced by the way the courts have adopted a piecemeal approach in extending mitigatory status to other forms of extra-curial sanctions: for example, indirect punishments and non-intentional self-inflicted injuries. Given that sentencing is a potentially controversial exercise of power (or authority) against the property, liberty and limb of a citizen, it makes good common sense for courts to employ an adapted form of *poena naturalis* that is also sensitive enough to detect these factual nuances, the victim's interests, and the community's moral fault lines in order to distinguish between worthy and less-worthy kinds of extra-curial punishment.

That said, it would be extremely useful if the courts were to make more explicit the reasons why a particular type of extra-curial punishment is or is not

¹⁵⁰ By contrast, in *R v Tim Yu Ng* [2009] VSCA 218 (25 September 2009) the appellate court did not disturb the trial judge's decision to allow the offender a reduction in his sentence because his assets (which were unrelated to his current criminal conduct) had been forfeited under the *Proceeds of Crime Act 2002* (Cth). Although there was no mention that the extra-curial punishment had an unusually severe impact on the offender nor that these were exceptional circumstances, it was nevertheless accepted by the court and all the concerned parties that the victimised criminal had indeed suffered 'significant added punishment' as a result of the forfeiture. Common sense in such a situation would demand that the offender be treated fairly, and due credit be given to him in the form of a mitigated sentence.

¹⁵¹ See *Einfeld* (2010) 200 A Crim R 1, 24 [86]; *Kenny* [2010] NSWCCA 6 (12 February 2010) [23].

mitigatory, particularly when there are multiple factors under consideration. The imposition of limiting conditions — for example, notions of ‘seriousness’, ‘exceptional/unusual circumstances’, ‘reasonable response’, and ‘unusual severity’ — should be accompanied by greater commentary as to their nature, as well as effect.

If any criticism is warranted, it should be directed at the lack of exactitude applied when differentiating between the two stages of, first, deciding whether a particular extra-curial punishment is mitigatory in nature; and second, the subsequent issue of weight. This is an important point to address because any conflation of these two phases will only make analysing this question unduly complicated and conceptually muddled. Even if there is an overlapping consideration of similar factors in both stages, this should not inevitably lead to the collapsing of these two separate processes, for the reasons cited earlier.

To sum up, it is hoped that the preceding analysis has brought some clarity to this extremely dynamic and fluid legal landscape. By conceptually reconciling some of the more incongruent decisions in this area, we have shown how our judges, despite criticisms of inconsistency and ambiguity, are, by and large, arriving at fairer and more morally intuitive decisions through the use of a common sense valve — an adapted form of *poena naturalis* that not only inquires whether the victimised criminal has effectively ‘paid his dues’, but is also sensitive enough to balance this against the reasonable expectations of the victim, and those of the community-at-large.