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Sentencing Drug Addicted Offenders

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Introduction

The issue of drug addiction and the criminal law has received considerable attention in recent months, particularly in New South Wales.

The creation of a Drug Court, modelled on similar courts in the United States, provides an opportunity to examine the effectiveness of diversionary schemes which emphasise intensive supervised treatment and rehabilitation models.

A recent Drug Summit in the NSW Parliament, attended by politicians, experts, and community groups, has proposed creation of a drug court specifically for children, relaxation of marijuana laws and trialing of heroin injecting rooms.

However, a decision of the Court of Criminal Appeal handed down on May 12 may also prove to be an important development in regard to the proper approach to be taken when sentencing drug addicted offenders.

In *R v Henry et al*¹, a five member bench formulated a guideline for sentencing armed robbers.² That topic, while important, is outside the scope of this paper. The decision in *Henry* is just as important for the discussion of drug addiction. In fact, the Court of Criminal Appeal sat a five judge bench in order to reconsider the proper approach to sentencing drug addicted offenders. This paper will summarise that decision and discuss its implications.

The Argument in *R v Henry et al*

In summary, the respondents in *R v Henry et al* submitted that the Court should reconsider the traditional view³ that drug addiction is "no excuse" for the

¹ *R v Henry, Barber, Tran, Silver, Tsoukatos, Kyroglou and Jenkins* [1999] NSWCCA 111 (unreported, 12.5.99).

² The Court listed a number of particular factors (for example, "young offender with no or little criminal history", "limited degree of planning", "weapon like a knife", "limited, if any, actual violence") and stated that sentences for an offence of that character "should generally fall between four and five years".

³ See, for example, *Valentini* (1989) 46 A Crim R 23 and *Ellis* (1993) 68 A Crim R 449. In other jurisdictions, see *Lawrence* (1988) 10 Cr App 464; *Johnas* (1982) 2 CCC (3d) 490, at 497; *Terizakis* (1986) 41 SASR 252; *Spiero* (1979) 22 SASR 543; *Halewyn* (1984) 12 A Crim R 202 (VCA).

commission of criminal offences and is not a mitigating factor for the purposes of sentencing (in the sense that it justifies a lesser sentence than would have been imposed but for the presence of that factor).

A large body of literature was tendered to the Court in support of this argument, along with affidavit evidence from experts in the field. It was pointed out that a large proportion of offences of armed robbery are committed because of an addiction to drugs. The New South Wales Bureau of Crime Statistics and Research reported in 1987 that:

drug (usually heroin) dependency appears to be an important ingredient in robbery offending, and in particular in the pattern of offending of those with multiple robbery convictions.⁴

All of the respondents to the Crown appeals against sentence in *R v Henry et al* were heroin addicted and motivated to commit armed robbery by reason of their habit.

It was argued in the Court of Criminal Appeal that there is a need to look for new solutions or creative responses for what has proved to be an intractable pattern. The establishment of the Drug Court was a manifestation of such a new approach, but it does not have jurisdiction in relation to offences "involving violent conduct".⁵ Three primary reasons were advanced as to why the factor of drug addiction should be recognised (or, at least, be capable of being recognised) as a significant "mitigating factor". Those reasons related to the potential impact of drug addiction on:

- (a) moral culpability/retribution;
- (b) deterrence; and
- (c) prospects of rehabilitation/reform.

It was argued that a stark choice was presented:

Follow an approach to sentencing which ignores medical and empirical evidence, emphasises retribution and punishment, maintains the myth of general deterrence, ignores the long term social consequences and requires more prisons to be built. Alternatively, introduce a health perspective, take into account the physiological, psychological and behavioural realities of drug

⁴ New South Wales Bureau of Crime Statistics and Research, *Robbery: Final Report (1987)* at 88. When the Bureau interviewed convicted armed robbers, it found that drug use was a motivating factor in 70% of robberies (*ibid* at 93).

⁵ *Drug Court Act 1998 (NSW)* s 5(2)(b).

addiction, recognise that treatment can and does work, and abandon (at least in this context) the idea of general deterrence. or at least acknowledge the limitations of general deterrence - and be careful about using heavy sentences to denounce particular conduct (which may make a court feel good but does not in fact provide any additional protection to society).

The Judgment of Spigelman CJ

On first analysis, the judgment is conservative, even "hard-line". The Chief Justice rejected the submission "that drug addiction should, of itself, be accepted as a mitigating factor". He also rejected the submission that "a crime induced by a need for funds to feed a drug addiction" was "lower in the scale of moral culpability than other perceived requirements for money". At one point in his judgment he emphasised:

the original decision to experiment with drugs which, in the usual case, is a completely free choice. The addictive quality of drugs, together with the anti-social behaviour which so commonly results from addiction, is so widely known that persons who choose a course of addiction must be treated as choosing its consequences.

Spigelman CJ also rejected an argument that the principle of general deterrence should be given less weight in the context of drug addicted offenders. Rather, he emphasised the dangers of the courts sending out a message that drug addiction could be a mitigating factor for the commission of crimes of violence like armed robbery.

However, at the end of the Chief Justice's judgment, he indicated that he agreed with the judgment of Wood CJ at CL on the proper approach to the sentencing of drug addicted offenders. The other members of the Court also agreed with the judgment of Wood CJ at CL in this regard. Accordingly, it is necessary to examine that judgment in some detail.

The Judgment of Wood CJ at CL

In his judgment, Justice Wood engaged in a comprehensive review of the issue. Like Spigelman CJ, he considered that the commission of an offence from a need to acquire funds "to support a drug habit, even a severe habit, is not an excuse to commit an armed robbery or any similar offence", and "of itself is not a matter of mitigation."

Wood CJ at CL also rejected the argument that sentencing courts should, as a general proposition, give less weight to consideration of general deterrence, particularly in relation to the sentencing of drug addicted offenders. The respondents had argued that there was little evidence that increasing prison sentences (as distinct from probability of detection and certainty of punishment) has any general deterrent effect, whether for offenders at large or drug dependent persons in particular. In fact, a number of studies have been interpreted as showing that the perceived severity of a sentence, as distinct from the certainty of detection and arrest, does not of itself provide a deterrent effect.⁶ Wood CJ at CL noted that, in the case of drug dependent persons contemplating the commission of an armed robbery, in particular, it was suggested that the prospect of imprisonment provides little deterrent, in that:

- their addiction causes them to give high priority to drug seeking behaviour, sometimes to the exclusion of all else;
- they are accustomed to engaging in high risk activity: Maher et al "Running the Risks: Heroin, Health and Harm in South West Sydney" National Drug and Alcohol Research Centre University of NSW NDARC Monograph no. 38 at 26, 120, 125; Hall Methadone Maintenance Treatment as a Crime Control Measure (1996) Bureau of Crime Statistics and Research, 2.
- the clearance rate for armed robbery is less than 1 in 5 (Chilvers: New South Wales Recorded Crime Statistics 1998 at 30-32;
- there is no realistic prospect of law enforcement activity reducing the size of the drug addicted population or of it reducing the street level price of drugs (thereby alleviating the financial pressure to resort to crime to support a habit) Maher supra at 126) and
- despite the steady increases in sentences, following the introduction of the Sentencing Act 1989, and also amendment of the Crimes Act 1900 to increase the maximum available penalty, in respect of many offences, the crime rate has not fallen.⁷

However, he pointed out that it "cannot necessarily be assumed from the fact that increases in sentences have not been accompanied by any noticeable drop in crime rates, that they lack deterrent effect". He was "not prepared to advocate

⁶ Anderson et al, "Formal and Informal Sanctions: A comparison of deterrent effects" (1997) *Social Problems* 25: 103-117; Paternoster et al, "Perceived Risk and Social Control: Do Sanctions really deter?" (1983) *Law and Society Review* 17: 467-479; Baron et al, "Deterrence and Homeless Street Youths" (1998) *Canadian Journal of Criminology* 27-60; James Austin et al, "Does Imprisonment Reduce Crime? A Critique of 'Voodoo' Criminology" (1993) *National Council on Crime and Delinquency* 10, 22.

⁷ Wood CJ at CL at para 261.

any departure from the long accepted wisdom that imprisonment does have a personal and general deterrent effect".

On the other hand, it appears that Wood CJ at CL was prepared to take into account considerations relevant to the deterrent impact of imprisonment on drug addicted offenders, and the availability of alternative treatment options, on a case by case basis. As the High Court stated in *Veen No.2*:⁸

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

Wood CJ appears to have accepted that sentencing judges should adopt a flexible approach to sentencing "those whose criminality is substantially linked to an addiction", sometimes giving greater weight to rehabilitation than retribution and deterrence.⁹ While drug addiction is not, in itself, an excuse or a mitigating factor, it would be "too rigid" to say that it can never be a mitigating factor. Justice Wood referred, without disapproval, to the observations of Mildren J in *Lewfatt*¹⁰ concerning the imprisonment of the typical offender with which the guideline judgment dealt:

The prisoner was young, and had undergone significant changes in her outlook. Her prior convictions were drug and alcohol related. She was now determined to stay off drugs and alcohol, and to pursue her ambitions for a career, and accept responsibility as a parent. Her history strongly suggested that she had gone through a difficult period of immaturity, and was now ready to rehabilitate herself. In those circumstances a period of actual imprisonment could well be counterproductive to this process. If one of the main purposes of punishment is to protect society, society's interests are best served by a sentencing disposition which promotes the rehabilitation of the prisoner, rather than a disposition which may have the opposite effect.

After discussing the various considerations of specific and general deterrence, retribution and rehabilitation, he proceeded:

It is more appropriate, in my view, to have regard to these considerations, upon an individual case basis, in which it is recognised that the offence of armed robbery remains a very serious crime, which, save in exceptional circumstances,

⁸ (1988) 164 CLR 465 at 476.

⁹ Cf the "individualised justice" to which Mahoney ACJ referred in *R v Lattouf* (unreported, NSWCCA, 12 December 1996).

¹⁰ (1993) 66 A Crim R 451.

calls for full time imprisonment. That is not to say that, in an individual case, the fact of drug dependency of the person standing for sentence may not remain a relevant fact reflecting on the objective circumstances of the offence, and/or the subjective circumstances of the offender, and particularly on the relativity of the minimum and additional terms.¹¹

In making the appropriate discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise, drug addiction can be a significant factor.

Justice Wood stated that, in his view, "the relevant principles are as follows":

(a) the need to acquire funds to support a drug habit, even a severe habit, is not an excuse to commit an armed robbery or any similar offence, and of itself is not a matter of mitigation;

(b) however the fact that an offence is motivated by such a need may be taken into account as a factor relevant to the objective criminality of the offence in so far as it may throw light on matters such as:

(i) the impulsivity of the offence and the extent of any planning for it; (cf Bouchard (1996) 84 A Crim R 499 at 501-2); and Nolan (1988) VSCA 135 (2 December 1998);

(ii) the existence or non existence of any alternative reason that may have operated in aggravation of the offence, eg that it was motivated to fund some other serious criminal venture or to support a campaign of terrorism;

(iii) the state of mind or capacity of the offender to exercise judgment, eg if he or she was in the grips of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes or to the act being other than a willed act;

(c) It may also be relevant as a subjective circumstance, in so far as the origin or extent of the addiction, and any attempts to overcome it, might:

(i) impact upon the prospects of recidivism/rehabilitation, in which respect it may on occasions prove to be a two-edged sword (eg Lewis Court of Criminal Appeal New South Wales 1 July 1992);

(ii) suggest that the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example where it arose as the result of the medical prescription of potentially addictive drugs following injury, illness, or surgery (cf Hodge Court of Criminal Appeal New South Wales 2

¹¹ Wood CJ at CL at para 270.

November 1993; and Talbot); or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete;

(iii) justify special consideration in the case of offenders judged to be at the "cross roads": Osenkowski(19882) 5 A Crim R 394.¹²

In what follows, these principles will be discussed in some detail. In order to do so, the various principles will be discussed in order.

(a) the need to acquire funds to support a drug habit, even a severe habit, is not an excuse to commit an armed robbery or any similar offence, and of itself is not a matter of mitigation;

The critical words in this passage are "of itself". Wood J endorses the view of Spigelman CJ that addiction is not automatically a mitigating factor on sentence. However, depending on the circumstances of the particular case, it may have just that effect.

(b) however the fact that an offence is motivated by such a need may be taken into account as a factor relevant to the objective criminality of the offence in so far as it may throw light on matters such as: ...

Wood CJ lists three matters which are aspects of the objective criminality of the offence and in respect of which the factor of addiction "may throw light". He does not suggest that this is an exclusive list. Accordingly, if the fact that an offence is motivated by a drug addiction affects the objective criminality of the offence in some other way, there is no reason why this cannot be taken into account. In respect of the three matters, a number of observations may be made:

(i) the impulsivity of the offence and the extent of any planning for it; (cf Bouchard (1996) 84 A Crim R 499 at 501-2); and Nolan (1998) VSCA 135 (2 December 1998);

In Bouchard, Callaway JA contrasted the applicants in that case with "a man crazed by a drug craving who committed an offence on the spur of the moment and later repented".¹³ In Nolan, the Victorian Court of Appeal accepted that the applicant was in a similar position to the hypothetical offender referred to by Callaway JA, so that the impulsiveness of the offence, rather than the mere fact of drug addiction, justified a lenient approach on sentence. Plainly enough, this circumstance would not constitute a mitigating factor where the offender committed a series of offences over a period of time in order to feed an addiction.

¹² Id at para 273.

¹³ (1996) 84 A Crim R 499 at 501-2.

Rather, it would operate in those cases where the offender commits a single offence (or, possibly, a series of offences within a short period of time) on an impulse to obtain the funds to satisfy an addiction and without any significant planning.

(ii) the existence or non existence of any alternative reason that may have operated in aggravation of the offence, eg that it was motivated to fund some other serious criminal venture or to support a campaign of terrorism;

In most cases it is likely that the need to obtain funds to feed a drug addiction will be the reason for the offence and, accordingly, no aggravating factor of the sort referred to here will be present.

(iii) the state of mind or capacity of the offender to exercise judgment, eg if he or she was in the grips of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes or to the act being other than a willed act;

It is significant that the example given of a reduced "capacity of the offender to exercise judgment" is just that, an example. The difficult question is assessing how less extreme circumstances, relating to the drug addiction and bearing on the state of mind of the offender, might impact on the objective criminality of the offence.

As noted above, it was argued in the Court of Criminal Appeal that there is a strong causal relationship between drug addiction and the commission of criminal offences, particularly property offences. It was argued that drug addiction results in the commission of criminal offences which, but for the addiction, would not have been committed. It was argued that drug addiction impairs the addict's decision-making capacity, so that the ability to exercise a free choice is reduced, thereby reducing the offender's culpability. It causes a young people to steal their parents possessions or prostitute their bodies to feed their habits. Addiction, in the sense of a craving for a drug, takes over and controls the addict's life, causing all other concerns, priorities, constraints (moral and legal) to diminish in importance, thereby impairing the capacity of the addict to choose between lawful and unlawful actions - the addict still chooses to commit crime but it is not a completely free choice.

Wood CJ at CL acknowledged the existence of studies which tend to show a causal relationship or progression from drug addiction to the commission of criminal offences, or to an incremental increase in the seriousness of these

offences.¹⁴ He was not persuaded that there is an inevitable causal relationship. He pointed out that many offenders commence their criminal careers before turning to drugs, and not all persons who become addicted to drugs commit armed robberies or even serious property offences. He noted that "there are many factors other than drug dependency, such as multiple social disadvantage or an attachment to a criminal sub culture, that contribute to criminal behaviour".¹⁵ However, he does not rule out an argument that the existence of a causal relationship between a drug habit and the commission of an offence may lead to a lesser sentence, only that it should not "automatically" do so.¹⁶

Wood CJ at CL also referred to an affidavit tendered by the respondents, sworn by Dr. Stephen Jurd, a psychiatrist specialising in the treatment of drug offenders. It is worth noting some of the contents of that affidavit:

2. Drug addiction has a well documented neurobiological or physiological basis. Repeated exposure to drugs decreases their impact, the body adjusting to their presence by a variety of countervailing mechanisms. The most obvious form of these countervailing mechanisms is the physical withdrawal syndrome - shaking and sweating in alcohol dependence; gooseflesh, running nose, etc in opiate dependents. However, the neurobiological alterations persist long after the physical manifestations of withdrawal have subsided. The persistence of these countervailing mechanisms beyond the effect of the drug itself provides the neurobiological basis of addiction. Thus, drug addiction is not simply a state of mind but has a physiological basis.

3. In addition, predisposition to addiction also has a substantial physiological (genetic) component. Thirty years of study of the neurobiological basis of alcoholism has revealed time and again that having a positive family history is among the most powerful predeterminants of alcoholism:

¹⁴ Dobinson et al, "Drugs and Crime: A Survey of New South Wales Property Offenders" (1984; New South Wales Bureau of Crime Statistics and Research) 56, 57, 62 and 64; Dobinson, "Making Sense of the Heroin-Crime Link" (1982) 22 ANZJ Crim 269; Maher et al, *Running the Risks: Heroin, Health and Harm in South West Sydney* National Drug & Alcohol Research Centre, University of New South Wales Monograph No 38, 51 and 62; Hall, "Methadone Maintenance Treatment as a Crime Control Measure" Bureau of Crime Statistics and Research (1996) 2; Hall, "The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems" (1997) 30 ANZJ Crim 105; Lipton, "The Effectiveness of Treatment for Drug Abusers under Criminal Justice Supervision" (1995) National Institute of Justice, 4. It may also be noted that the NSW Director of Public Prosecution, Nick Cowdery QC, has stated only recently that "much of the most visible and startling crime is drug related and that shows no sign of abating. Crime is one consequence of drug addiction".

¹⁵ Wood CJ at CL at para 251.

¹⁶ Id at para 259, noting a similar approach taken in respect of mental abnormality by Gleeson CJ in *Engert* (1995) 84 A Crim R 67.

- (a) identical twins are more likely than fraternal twins to both suffer from alcoholism.
- (b) Adopted away children of alcoholic parents, even if they have never lived with their parents, are more likely to themselves become alcoholic than other adoptees.
- (c) The risk of developing alcoholism increases depending on how many alcoholic relations one has, whether or not you live with them.
- (d) A series of molecular biological experiments have shown that at least one gene is overrepresented among alcohol dependent people.

There is every reason to extrapolate this information to other drugs. Similar studies have been done with drug dependents producing very similar results. It may be concluded that genetic makeup plays a substantial role in predisposing a person to drug addiction, although such predisposition is probably mediated by variable neurological sensitivity (thus individuals have substantially different drive to repeat drug usage following initial exposure).

...
5. Drug addiction affects the addict's behaviour in predictable ways. Values are altered. This process is referred to in the World Health Organisation definition of drug addiction as salience of drug seeking behaviour. I observe this on a daily basis in my practice. As drug addiction becomes more severe, so the priority of obtaining and using drugs, and recovering from their effects, overwhelms other considerations and priorities. Minor infractions of personal, moral and legal codes become more major. Addiction invades and controls the whole of the addict's life as craving escalates to the point where all other previously rewarding behaviours no longer satisfy that individual's reward system. Equally, personal, financial, moral and legal constraints are devalued proportionally to the severity of the addiction.

6. In summary, drug addiction has a well established neurobiological basis, confirmed by the success of anticraving drugs. There is also a well established genetic predisposition to drug addiction. Finally, drug addiction causes the addict to give high priority to drug seeking behaviour, sometimes to the exclusion of all else.

The respondents relied on this evidence to support an analogy between drug addiction and mental abnormality, in respect of which the element of general deterrence is often given less weight.¹⁷ Wood CJ at CL was not persuaded of this. He observed that the hypothesis that addiction has a genetic component or

¹⁷ See *Veen (No.2)* (1988) 164 CLR 465 at 476-477, *Scognamiglio* (1991) 56 A Crim R 81; *Tsiaris* [1996] 1 VR 398; *Letteri* (Court of Criminal Appeal, New South Wales, 18.3.93) and *Engert* (1995) 84 A Crim R 67. See also the paper presented at this conference by Justice Kirby, "The Future of Criminal Law - Some Big Issues", at pp19-24.

predisposition was not tested. Nor was the validity of the comparison with alcohol dependency. As noted, he was not persuaded that there is an inevitable causal relationship or progression from drug addiction to the commission of criminal offences, or to an incremental increase in the seriousness of these offences. He was not persuaded of the analogy to mental abnormality. In those cases,

the offender who suffers from a mental disorder or abnormality is less in control of his or her cognitive facilities or emotional restraints, and in some instances lacks the ability to make reasoned or ordered judgments. Almost invariably there is a limited appreciation of the wrongfulness of the act, or of its moral culpability, which although falling short of avoiding criminal responsibility does justify special consideration upon sentencing. Moreover, such a condition is inherent and its presence does not depend upon any element of choice.¹⁸

It may be argued that the evidence of Dr Jurd seemed to go some way towards meeting some of these criteria. He deposed to "drug addiction hav[ing] a well established neurobiological basis" and "control[ling] the whole of the addict's life". Further, addiction and its consequences is not simply a choice - there is a genetic predisposition to drug addiction. On the other hand, there is no reason to believe that the addict has a limited appreciation of the wrongfulness of the crimes committed to satisfy the craving¹⁹ and, as Wood CJ at CL observed, the initial decision to experiment with drugs is usually made in the exercise of free choice.²⁰ This latter point was the one emphasised by Spigelman CJ and discussed above - although it was also the subject of the criticism made by Simpson J.

The majority emphasis on the exercise of choice to use drugs carrying with it the consequences of that use may have the effect of largely negating any argument that the fact of addiction can result in a conclusion that the addict will often have a reduced "capacity of the offender to exercise judgment", even if the extreme situation of "an extreme state of [drug] withdrawal" is not present. However, there are suggestions in the judgment of Wood CJ at CL which may support the argument. Wood CJ at CL noted the following passage in the Queensland decision of *Hammond*²¹:

The true relevance of drug addiction as a factor contributing to the commission of crime and its effect in the sentencing process has never been adequately explained. In our view it is a factor that may help an offender to the extent of

¹⁸ Wood CJ at CL at para 254.

¹⁹ Although it was argued that unless the mentally disordered offender chooses to commit a crime, knowing it is wrong, an acquittal would be the appropriate response.

²⁰ Wood CJ at CL at para 257.

²¹ [1997] 2 Qd R 195 at 199-200.

showing that his or her descent into the crime in question was a secondary consequence of desperation produced by a human weakness rather than a primary choice. It may be inferred in many cases (and the present case is very much in point) that the offender would almost certainly never have become a thief but for loss of control of an ordered life through drug addiction. The proposition that the results of drug addiction are self inflicted is half true and therefore dangerous. The offender must of course be held responsible for his or her own actions. The drug addiction is not an excuse; but it is a factor that may tell the court that the real weakness of character is that of a drug addict rather than that of a robber. That may be by no means inconsequential.²²

Wood CJ at CL did not reject the proposition that the fact of drug addiction may, depending upon the circumstances of the particular case, show that the addict's "descent into the crime in question was a secondary consequence of desperation produced by a human weakness rather than a primary choice", and thus properly lead to the culpability of the offender being regarded as less deserving of condemnation than would otherwise be the case. Further, as observed above, Wood CJ at CL does not rule out an argument that the existence of a causal relationship between a drug habit and the commission of an offence may lead to a lesser sentence, only that it should not "automatically" do so.

Returning to Justice Wood's summary of relevant principles, he stated that the fact that an offence is motivated by a need to acquire funds to support a drug habit:

(c) ... may also be relevant as a subjective circumstance, in so far as the origin or extent of the addiction, and any attempts to overcome it, might:

(i) impact upon the prospects of recidivism/rehabilitation, in which respect it may on occasions prove to be a two-edged sword (eg Lewis Court of Criminal Appeal New South Wales 1 July 1992);

The respondents submitted that there is little, if any, evidence that long periods of imprisonment have a substantial rehabilitative consequence in respect of drug addicted offenders. Recidivism rates suggest the contrary. Indeed, long periods of incarceration may be counter-productive, initiating the offender into a criminal lifestyle, breaking social and familial bonds which militate against criminal behaviour and reducing the deterrent effect of imprisonment. Alternative sentencing options, it was submitted, were more likely to reduce drug dependency and the consequent incidence of criminality and of recidivism. A large body of literature was cited in support of this proposition.²³ In his

²² The Court added that "It is however a two edged factor; it may also tell the court that rehabilitation is going to be difficult". This point is discussed below.

²³ Hall, "Methadone Maintenance Treatment as a Crime Control Measure" (June 1996) Contemporary Issues in Crime and Justice, Bureau of Crime Statistics and Research 3,

affidavit, Dr Jurd referred to modes of treatment for drug addiction which have been developed based on the neurobiological model of drug addiction:

(a) Methadone is the best documented effective treatment for the management of opiate dependence. Numerous studies attest that it alters outcome in the long term.

(b) Naltrexone has been unequivocally shown to decrease relapse in alcoholism. The drug's capacity to diminish craving in both alcohol and opiate dependent people is widely accepted.

(c) Acamprosate (a drug not yet available in Australia but widely prescribed in Europe) has also been shown to decrease craving and relapse in alcohol dependents.

(d) Other anticraving drugs (like naltrexone and acamprosate) have been shown to diminish drinking in animal models.

Justice Wood accepted that "the rehabilitative aspect of sentencing is not an unimportant consideration".²⁴ He acknowledged that, particularly in the case of first offenders, the danger of the possible exposure of prison inmates to influences that may increase their prospects of recidivism, is a problem of common application. For such offenders, "the slamming prison door principle remains apposite"²⁵ (ie a short period of actual imprisonment may be an appropriate sentencing option). While considerations of retribution and deterrence may require a sentence of imprisonment, good prospects of rehabilitation may justify a shorter sentence than would otherwise be appropriate. Further, as he observed in a related comment, the fact of drug dependency may have a particular relevance for "the relativity of the minimum and additional terms".²⁶

It is true that Justice Wood pointed out that the origin or extent of the addiction, and any attempts to overcome it, might "on occasions prove to be a two-edged

and 6-7; Hall, "The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems" (1997) Vol 30 ANZJ Crim 113; Lipton: "The Effectiveness of Treatment for Drug Abusers Under Criminal Justice Supervision" (1995) National Institute of Justice 51-53; Murphy: "Drug Courts: An Effective Efficient Weapon in the War on Drugs" (1997) Illinois Bar Journal Vol 85 487; Tauber, "Drug Courts: a Judicial Manual California Centre for Judicial Education and Research" (1994) 1-2 and 9-10; and Belenko, "Research on Drug Courts: A Critical Review" (1998) National Drug Court Institute Review Vol 1 Issue 1, 21-23, 29 and 35.

²⁴ Wood CJ at CL at para 268, citing *Osenkowski* (1982) 30 SASR 21; *Douglas* (CCA NSW, 4.3.97); *Eastway* (CCA NSW, 19.5.92); *Fabian* (1993) 64 A Crim R 365; *Halewyn* (1984) 12 A Crim R 202.

²⁵ Wood CJ at CL at para 264.

²⁶ *Id* at para 270, citing *Bugmy* (1990) 169 CLR 525 at 537; and *B* (1993) 68 A Crim R 547.

sword", giving as an example the NSW case of *Lewis*²⁷. By this he meant that the factor of drug addiction may lead the sentencing court to conclude that, in the particular circumstances of the case, rehabilitation is going to be difficult. However, the success of various drug addiction treatments discussed in the literature suggests that rehabilitative prospects may compare favourably with the rehabilitative prospects of the mentally abnormal offender.²⁸

(c) [drug addiction] may also be relevant as a subjective circumstance, in so far as the origin or extent of the addiction, and any attempts to overcome it, might ...

(ii) suggest that the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example where it arose as the result of the medical prescription of potentially addictive drugs following injury, illness, or surgery (cf *Hodge* Court of Criminal Appeal New South Wales 2 November 1993; and *Talbot*); or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete;

In *Talbot*²⁹, the Full Federal Court noted the special circumstance where the addiction of the offender originated in the administration of a potentially addictive substance in the course of medical treatment, to which his or her consent was, at best, merely formal. The moral culpability of such an offender was said to be different from that of the offender whose addiction originated in the voluntary administering of a substance that he knew (or, Justice Wood would have added, should have known) to be addictive, and the use of which is proscribed by the criminal law. Justice Wood endorsed this approach. He also cited the Full Federal Court decision of *Douglas*³⁰ and accepted that

the moral and legal fault for the acquisition of the addiction can properly be considered, for example where the offender becomes addicted at an age when the 'degree of judgment' open to him or her is limited.³¹

This may prove to be a very significant passage. It leaves open the possibility that a sentencing court may regard drug addiction as a mitigating factor where the addiction was acquired when the offender was a young person. In *Douglas*, the facts were extreme. The offender's addiction commenced at age eight and was total by age thirteen. Spigelman CJ considered³² that the case "affirms that self induced addiction at an age of rational choice establishes moral culpability

²⁷ NSW CCA, 1.7.92.

²⁸ *Veen (No 2) v R* (1988) 164 CLR 465 at 477; *R v Tsiaris* [1996] 1 VR 398.

²⁹ (1992) 34 FCR 100.

³⁰ (1995) 56 FCR 465.

³¹ Wood CJ at CL at para 238.

³² Spigelman CJ at para 185.

for the predictable consequences of that choice." However, the language of Wood CJ at CL (and, indeed, the language of the Federal Court in *Douglas* itself) is less restrictive. Just because an adolescent, for example, can make "a rational choice" to experiment with drugs does not prevent a court from concluding that "the degree of judgment open to him or her is limited".

(c) [drug addiction] may also be relevant as a subjective circumstance, in so far as the origin or extent of the addiction, and any attempts to overcome it, might ...

(iii) justify special consideration in the case of offenders judged to be at the "cross roads": Osenkowski(1988) 5 A Crim R 394.

Osenkowski is often cited as authority for the proposition that a sentencing court may give particular importance to the rehabilitative aspect of sentencing where the court forms the view that "leniency at that particular stage of the offender's life might lead to reform".³³ Plainly enough, this reference gives a court sentencing a drug addicted offender considerable scope to accord greater weight to rehabilitation than retribution and deterrence in an appropriate case. As the Federal Court stated in *Molina*³⁴:

It must be remembered that the ultimate purpose of all punishment is the protection of society. It will often be in the best interests of society if emphasis is put on rehabilitation, particularly in cases where the offender can genuinely be said to be at the crossroads between a useless, drug-ridden and probably criminal existence and a relatively normal life in society, supported by a caring family.

The Judgment of Simpson J

Along with the other members of the Court, Justice Simpson agreed with the statement of principles contained in the judgment of Justice Wood. However, she added two qualifications.

Justice Simpson did not agree with the proposition articulated by the Chief Justice and endorsed by Justice Wood, that "persons who choose a course of addiction must be treated as choosing its consequences". She observed:

Drug addicts do not come to their addiction from a social or environmental vacuum. This court should not close its eyes to the multifarious circumstances of disadvantage and deprivation that frequently precede and precipitate a descent into illegal drug use. I do not suggest for a moment that all drug users fall into

³³ (1988) 5 A Crim R 394, King CJ at 394.

³⁴ (1984) 13 A Crim R 76 at 77.

this category. It is because some do and some do not that I believe rigid rules about the impact on sentencing of drug dependency on sentencing cannot be laid down. ... I cannot accept that the blameworthiness of one drug taker is (even excepting that small number of individuals who begin drug taking with medically prescribed drugs) always to be treated as being at the same level as the blameworthiness of the next. Nor can I accept that the exercise of free choice in the use of drugs is always of equal dimensions. It is not every decision to use drugs that can properly or fairly be characterised as a decision made in the exercise of free choice. The will of an individual can be overborne or undermined, not only by acts of another person, but also by the pressure of circumstances. I do not accept that most drug offenders are truly exercising free will when they choose the degradation, despair, criminality and cycle of imprisonment that can follow the initial use of illegal drugs. The circumstances that propel the offender to the use of drugs are often, if not usually, beyond his or her control. They may or may not be combined with a vulnerable personality or even a weakness of character. Many drug offenders have not had the life experiences or the normal developmental path that permit a conclusion that the decision to take drugs was a decision made in the exercise of a free choice in the sense in which that phrase is ordinarily understood.³⁵

She concluded that

A sentencing judge always has a delicate balancing task to perform, taking into account the demands of the community for retribution, deterrence both general and specific, and the interests of the same community in the rehabilitation of an offender. The exercise may call for an examination of the circumstances that led the offender to drug use, addiction and crime. All the circumstances that precipitate the use of drugs are relevant to the evaluation of moral culpability that is essential to the sentencing process. ... [N]ot all drug addicts are necessarily to be taken to have brought themselves to addiction and criminality with the same degree of foresight, determination, informed decision making, and consequent moral culpability. To impute those qualities to every decision to take drugs is to ignore the important starting point, the reasons underlying the initial drug use.³⁶

On the other hand, she considered that considerations of general deterrence should only "yield" to an emphasis on rehabilitation "where a combination of two circumstances exists":

(i) a background to the addiction that may explain the offender's decision to use drugs, and diminish his or her moral culpability for that decision; and

³⁵ Simpson J at para 336.

³⁶ Id at para 341, 348. Simpson J considered that "an analogy can legitimately and properly be drawn with the principles relating to the sentencing of aboriginal offenders, collected and stated by Wood J (as he then was) in *R v Fernando* (1992) 76 A Crim R 58 at 62 - 63".

(ii) demonstrated progress towards rehabilitation.

This narrow view was apparently premised on the proposition that "absent positive evidence of real rehabilitation" ("as distinct from theoretical rehabilitative prospects"), "the diminution in moral culpability which results from drug addiction originating in the kind of social or familial deprivation to which I have referred cannot result in a corresponding diminution in sentence". It was not a view endorsed by any other member of the Court. This is perhaps not surprising. It reflects the overly rigid approach to sentencing which Justice Wood, and Justice Simpson herself, criticised. It does not make sense to say that general deterrence can never yield to rehabilitation simply because the offender's addiction did not arise from social or familial deprivation or because there has not been "demonstrated progress towards rehabilitation" at the time of sentencing.

Conclusion

The issue of how best to deal with drug addicted offenders, like the issue of drug policy in general, generates heated debate and violently different views. At one extreme, there is the view that addiction can never be regarded as a factor in mitigation. Primary emphasis is given to retribution and general deterrence, rather than rehabilitation.³⁷ At the other extreme, it would always be a mitigating factor and the focus would be on treatment and rehabilitation.³⁸

It is apparent from a careful analysis of the various judgments of the Court of Criminal Appeal in *R v Henry et al*, and particularly that of Justice Wood, that it is not as hard-line as it might first appear. While the members of the Court are clearly unwilling, perhaps understandably, to send out an explicit message that drug-addicted armed robbers can expect to be treated more leniently than non-drug-addicted armed robbers³⁹, the decision does permit sentencing judges to adopt a flexible approach to sentencing "those whose criminality is substantially linked to an addiction".

It was argued in the Court of Criminal Appeal that there is a need to look for new solutions or creative responses for what has proved to be an intractable

³⁷ Cf the current English position: *R v Brewster* [1998] 1 Cr App R

³⁸ Cf the Drug Court program, developed in parts of the United States and on trial in NSW.

³⁹ In this regard, both Spigelman CJ (para 187) and Wood CJ at CL (at para 256) quoted O'Loughlin J in *Terizakis* (1986) 41 SASR 252 at 256: "To give way, out of sympathy and concern, by imposing lesser terms of imprisonment than would otherwise be imposed, might appear to be an act of humanity, but it will do nothing to stamp out the drug trade and, worse, it might even give some indirect encouragement to would-be offenders."

pattern. Without expressly endorsing that view, there are clear signs in this judgment that the Court is prepared to move some way down the path towards a sentencing process which, at least in some circumstances, gives greater weight to rehabilitation than retribution and deterrence.

Interestingly, one of the most significant voices at the Drug Summit in NSW, held only a week after this judgment was handed down, was Justice Wood. He observed that "the offender cannot be dismissed simply on the basis of their personal choice to play with drugs". He called for new solutions to the problems of drug addiction, stating that "we can continue on that path of destruction of individuals and families and waste of economic resources or we can seriously consider the options" of comprehensive rehabilitation and detoxification services, constructive diversion programs, heroin trials, safe injecting rooms, and new forms of chemical therapy. In large part, the Summit adopted this approach.

As the NSW Director of Public Prosecutions, Nick Cowdery QC, has said on many occasions, the traditional law enforcement model and emphasis on punishment has been ineffective in reducing drug related crime: "seeking to prevent crime by turning attention to criminal penalties is about as useful as dealing with the road toll by addressing the crash repair industry ... locking people away does not reduce crime".⁴⁰ Whatever the truth of these observations, the scourge of drug addiction linked crime plainly requires consideration of new, even unpalatable, solutions by politicians, judges and the community at large.

⁴⁰ N Cowdery QC, Paper presented to NSW Young Lawyers, 23.2.99, at p3.