



RELEVANCE of MENTAL ILLNESS in SENTENCING

By Greg Barns

One of the most significant developments in the criminal law in Australia in recent years has been the cataloguing by the Victorian Court of Appeal in a 2007 case of the ways in which the mental illness of an offender is relevant when sentencing in criminal cases.

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In *R v Verdins*,¹ the Victorian Court of Appeal set out six ways in which ‘mental impairment’, either temporary or permanent, may be relevant in cases where mental illness falls short of providing an excuse for the commission of a crime. The importance of the decision has been neatly described as: ‘both a synthesis of the evolving law in Australia on the relevance to sentencing of impaired mental functioning and a restatement of important issues of principle. It liberalises the circumstances in which such information can impact upon sentencing to the advantage of the offender and clarifies when psychiatric symptomatology,

amounting to a “mental disorder” within the terms of a DSM or ICD definition, or falling short of a frank diagnosis, can be used in the sentencing process. It constitutes Australia’s most sophisticated and subtle analysis of the relationship between impaired mental functioning and sentencing.’²

In *Verdins*, the Court of Appeal took the opportunity to revisit a previous decision by that Court in *Tsiaris*.³ There, the Court set out the ways in which mental illness might be relevant in examining moral culpability, deterrence and the impact of imprisonment.

Tsiaris articulated five principles:

1. First, it may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances, and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective.
2. Second, the prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Third, a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time.
4. Fourth, specific deterrence may be more difficult to achieve and is often not worth pursuing as such.
5. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health.

What *Verdins* does is to restate and expand on the *Tsiaris* principles. The Court of Appeal says in *Verdins* that impaired mental functioning, whether temporary or permanent, is relevant to sentencing in at least the following six ways:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending, or at the date of sentence, or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending, or at the date of the sentence, or both.
5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.⁴

Verdins has been applied and approved in a number of other jurisdictions. In *Leach v The Queen*,⁵ the Court of Criminal Appeal set out the *Verdins* principles and Basten JA noted that:

'They should in any event be applied, absent a specific

statutory basis for departing from them, by this Court to the extent that they reflect the general law of Australia as understood by an Intermediate Court of Appeal.'⁶

In *Krijestorac v The State of Western Australia*,⁷ the Western Australian Court of Appeal considered the *Verdins* principles as did the Queensland Court of Appeal in *R v Goodger*,⁸ the South Australian Court of Criminal Appeal in *R v Yost*,⁹ and the Court of Criminal Appeal in Tasmania in *Startup v State of Tasmania*.¹⁰

Verdins is now relevant in sentencing in cases involving mental illness in all Australian courts. So what does this mean from a practical perspective?

The experience in Victoria in the post-*Verdins* era is an instructive one in this regard. It is common now for psychological and psychiatric reports on clients to directly address the *Verdins* principles and for counsel to take the court through how each of the *Verdins* principles is supported by this expert evidence.

It is important to note, however, that judges and magistrates in Victoria, having been swamped by entreaties to apply *Verdins* to cases, have tended more recently to examine very closely the connection between the crime and the mental illness. The simple assertion that a person is living with a mental illness and that therefore their moral culpability is reduced will not suffice to attract *Verdins*.

Justice Lex Lasry of the Victorian Court of Appeal has set out how a trial judge should apply the *Verdins* principles. In *DPP v Moore* (2009) VSCA 264, he observed:¹¹

'In my opinion, the application of the *Verdins* principles does require an analysis by a sentencing judge based on evidence of the variety of issues and consequences of impaired mental functioning. It may be that the effect of a particular impaired mental state is relatively minimal, either as to the circumstances of the commission of an offence and the moral culpability of the offender or its likely effect on the offender when serving his or her sentence. On the other hand, it may be able to be identified as lying at the root cause of the conduct. In addition, as the court said in *Verdins*, if either general or specific deterrence is to be moderated then the nature and severity of the symptoms and their effect on the mental capacity of the person being sentenced must be evaluated.' ■

Notes: 1 *R v Verdins* (2007) 16 VR 295. 2 I Freckelton (2007), 'Sentencing Offenders with Impaired Mental Functioning', *R v Verdins*, Buckley and Vo [2007] VSCA 102; (2007) 169 A Crim R 581 Maxwell P, Vincent and Buchanan JJ (2007) 14 *Psychiatry, Psychology and Law*, pp359-63. 3 *Tsiaris* (1996)1 VR 398. 4 *R v Verdins* (2007) 16 VR 95, para 32. 5 *Leach v The Queen* (2008) NSWCCA 73. 6 *Ibid*, para 10-11. 7 *Krijestorac v The State of Western Australia* (2010) WASCA 35. 8 *R v Goodger* (2009) QCA377. 9 *R v Yost* (2010) SASFC 4. 10 *Startup v State of Tasmania* (2010) TASSCCA 5. 11 *DPP v Moore* (2009) VSCA 264, at para 51.

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