JAMES COOK UNIVERSITY – INTER ALIA BALL

Keynote Address - 12 October 2013 Cairns

By The Honourable Justice Henry

Good evening ladies and gentlemen. May I at the outset congratulate the committee on organising this wonderful evening. I also thank the organising committee for conferring the honour upon me of being your guest speaker.

The last time I addressed a student ball was in 1983, 30 years ago. The reason I addressed that ball will be apparent from Roxy's introduction and her reference to the media article about the ICC Ball of 1983. That ball was shut down early and it fell to me as the student president to ascend, the stage, interrupt the band and address the masses to tell them of their great night's premature demise. I thought it took a certain courage to be the harbinger of such unwelcome news. I said, as best I recollect, "I'm sorry but we've been shut down, the ball is over you, will have to leave now" and with that 16 words I left the stage.

As speeches go it was not particularly persuasive in prompting the 1200 students then present to put down their drinks and depart. It was however an appropriately brief speech for a ball. While tonight I will utter more than 16 words to you I cite my ball speech pedigree to reassure you from the jump that I appreciate student balls are not the place for very long speeches.

I cite it for another reason and that is as an example of the reality that the true story is rarely captured accurately or in full in news media. I remember being astonished when I read that 1983 article about the ball at the misquoting of some of what I had said. It was a lesson well learned early for I was about to embark upon a career in the law in which many of the cases I litigated were reported on in a way which did not present an entirely accurate account of events in court.

I soon learnt that phenomenon is not always because of misreporting of the facts. Often it is because all the facts cannot be included—there just is not the news space. Events which take hours to unfold in court are necessarily summarised in one or two hundred words. Media reporting must be selective. Inevitably some facts, generally the facts which make the story less interesting or less controversial, are left out. Sometimes that is a decision of a sub-editor, not the reporting journalist. Sometimes facts must be left out by operation of law because to publish them would be an offence. For example there may be a case in which an offender has turned informant and therefore gets an unusually generous sentence discount but the fact that the offender has turned informant cannot be published in order to explain what otherwise seems an inexplicably lenient penalty. Sometimes when facts are left out the reported court outcome seems strange and for that reason seems all the more news worthy.

In the media reporting of court proceedings by far the most commonly reported cases are sentences, that is, the sentencing or punishment of those who plead guilty or are found guilty of criminal offences. Much of that reporting focuses on the extreme cases, the ones involving notorious offending or involving exceptional court outcomes or where the victim's family are publically complaining the sentence is not harsh enough.

The ubiquity of media reporting on sentencing and the public's interest in this area of the law is something no lawyer can entirely escape. When an estate lawyer goes to a friend's barbeque do you think she gets asked about the most exciting will she has drafted in the last week? No, she is asked why the defendant on the front page of the local paper was only given probation for breaking into the local Girl Guide hut. When a commercial lawyer goes to a dinner party do you think he is asked about the thousands of dollars GST he has saved a client this week on a business deal? No, he is asked about the defendant on tv news last night who was given a suspended jail term for killing a crocodile.

Future lawyers, pay heed, whether you end up practising in the criminal jurisdiction or not, you will become flag bearers for your profession in disabusing the broader public of the distortions of selective media reporting of sentencing. It is you, at the soccer club break up, the fete, the street Christmas party, who will be expected by your lay acquaintances to explain how the processes of sentencing in our civilised society can give rise to the diverse and sometimes seemingly disproportionate sentences reported in the mass media.

I assure you your lay acquaintances will have a view. It will not matter to them that the sentence was imposed by a Judge who is an expert learned in the law. Indeed many of them will tell you that they could do a better job. It is a curiosity that the same people would not presume to tell an engineer how to build a dam or a surgeon how to do an operation. Inexplicably many people presume there is no similar learning barrier preventing them from knowing best about what sentence should be imposed on an offender.

So are you up to the task? Can you honour your future role as a member of the profession in educating the broader public about sentencing in a way the media rarely attempts. To do so you will need to understand the two main theories of punishment.

Firstly there is the theory of punishment sometimes called utilitarianism. At first blush this theory involves apparently civilised and enlightened thinking. It involves the Benthamite view that punishment is inherently bad because of the pain it causes the offender but deems that pain to be justified because it is exceeded by the good consequences stemming from it. Its focus is essentially forward thinking, driven by the notion the sentence will have some beneficial purpose in the future.

Those purposes generally fall into three main categories:

1. Incapacitation or quarantine—imprisoning offenders to protect society from them.
2. Deterrence—discouraging the offender personally as well as discouraging the general public from engaging in such behaviour in the future by showing it will be punished (Deterrence at those levels is commonly referred to as personal deterrence and general deterrence respectively).
3. Rehabilitation—reforming the offender, inducing a change of attitude so that the offender will be law abiding in the future.

Sounds sensible does it not? How does it work in practice? Well, bearing this theory in mind, lets us take a case that really happened and see what you consider the sentence should have been.

On the night of 10 October 2009 Damien Ford went out on the Gold Coast and his life and that of another man was changed. Damien was 18. He had never been in trouble with the law. He was a loving son, from a good supportive family. He was involved with surf life saving, he was a talented footballer, he was well respected and not considered violent by those who knew him.

A few weeks earlier he had been in a dispute with another young man called Samuel. On the night of the 10th Damien went to an 18th birthday party and became intoxicated. He was a diabetic and alcohol had a greater that ordinary disenhibiting effect on his temperament. After the party he encountered Samuel and Samuel's girlfriend walking on a footpath. They exchanged words. Damien was still angry at Samuel from the dispute a fortnight earlier. In his drunken angry state Damien threw a single powerful unprovoked punch over the top of Samuel's girlfriend into Samuel's face. Samuel went down backwards and his head hit the road.

Samuels's life was changed forever by this event. He suffered a fractured skull and serious brain injuries. As a result he cannot walk without a support frame. He cannot speak. He is deaf in one ear. He has double vision. He is incontinent, has lost his fine motor skills and will never resume gainful employment. He will need fulltime care for the rest of his life.

Damien was charged with the offence of grievous bodily harm. He cooperated with police, he made admissions and expressed early and genuine remorse. He gave up alcohol. He pleaded guilty. He had no previous convictions.

What sentence should he have received? What was the proper sentence for this young remorseful first offender of good background who with one stupid drunken punch occasioned such catastrophic injury to Samuel?

Let us apply the theory I have discussed. Damien needs no significant rehabilitation. He has already had the fright of his life. By the time of sentence he has given up alcohol, grasped the devastating and unpredictable effects of violence and grasped the need to avoid violence. The community does not need to be protected from Damien. There is no need to quarantine him. He is a very low risk of reoffending. He does not need to be deterred. The knowledge of the terrible injury he inflicted and his encounter with police—being charged and going thorough preliminary court appearances—has been ample deterrence. Some may say his sentence should serve to deter others yet it is unlikely purportedly deterrent penalties will have a material effect on the thinking of drunken young persons acting in the heat of the moment.

What then should the sentence be? Jail is a brutal place, particularly for young men. Hands up if you think Damien should go to jail rather than get a lesser sentence like probation or community service? … keep your hands in the air if you think Damien should get more than one year imprisonment? … keep your hands in the air if you think Damien should get more than two years imprisonment? … etc.

So what was the actual sentence? Damien was sentenced to six years imprisonment. He must serve at least two years before being eligible for parole. His appeal against the severity of that sentence was dismissed.

That exercise exposes a number of side points worth highlighting, although time and the parameters of my theme will not permit me to develop them fully.

Firstly it is impossible to identify the right sentence in a vacuum. An innate sense of fairness, the belief we should all be equal before the law, means we expect sentences to be consistent. To impose a fair sentence the Judge will want to know what range of sentence has typically been handed down in past cases like this one.

Secondly there is always a tension between the significance of mitigating and aggravating features. This makes sentencing complex and difficult. Every case is different. Precision is unattainable.

Thirdly Damien's eligibility for parole after two years does not mean it is a two year sentence, it is a six year sentence. There are exceptions but as a general rule offenders who get a jail sentence have the right to apply for release on parole once they have served half their sentence. Whether they get it depends on their behaviour in jail. Where a person pleads guilty that cooperation can be reflected by the courts setting a parole eligibility date earlier than the halfway point but again whether a person is released depends on their behaviour in jail. Parole is a helpful device to promote good behaviour during a period of imprisonment and to monitor the transition of prisoners back into the community. Unfortunately it is not well understood and often references to parole eligibility dates are wrongly interpreted as indicating the full duration of the sentence imposed. Sentencing has arguably been over complicated by statutory provisions involving the court in setting parole eligibility dates. There is much to be said for the argument then if someone is sent to jail then any discount of penalty for mitigating circumstances should simply result in a reduction of the overall term of imprisonment that would otherwise be imposed. Exactly when prisoners should be able to apply for parole prior to the expiration of the court's sentence is arguably better left to the future and those who manage the behaviour of sentenced prisoners.

Returning though to my principal theme, the point our exercise with Damien Ford does expose and which I want to develop is this: The utilitarian theory of sentencing, with its positive future outcomes or aims of incapacitation, deterrence and rehabilitation was of no real application in the case of Damien Ford. The penalty imposed on him served no meaningful future purpose.

I confess to having had that feeling in respect of many of the cases which I once prosecuted and defended. The problem I had with the sentencing process was that it often did not seem to have any future benefit. Of course I encountered some truly evil offenders from whom society needed to be protected. However many defendants I acted for were young males who had done something wrong in circumstances where the very process of arrest and preliminary court appearance had scared them witless. By the time they would get to a conference with me it seemed they had already learned their lesson and were unlikely to repeat their wrong doing in the future. Often the jolt of arrest and preliminary court appearance had had a rehabilitative impact.

Sometimes they had offended in spontaneous circumstances unlikely to ever be repeated. Generally more than twelve months and sometimes more than two years had lapsed by the time of sentence. Such delays are scandalous yet so common the system seems resigned to them. However such delays allowed many defendants to show they had rehabilitated. Often they had accumulated positive evidence in support of that conclusion. For example they had clear drug test results, they had successfully completed counselling, they had secured a job and kept it and become a valued employee, they had moved towns and away from their bad influences and dodgy acquaintances and so on. Certainly they were not needing to be jailed so the public could be protected from them. They would sit in my chambers, often with their parents and complain it was utterly pointless to send them to jail.

So, they may have been rehabilitated, they were not a public danger and they needed no personal deterrence. More often than not this left general deterrence as the only relevant limb of the utilitarian theory of sentencing. I had several reservations about general deterrence. Firstly, only a small minority of all sentences are reported in the mass media. More often than not sentence outcomes are not reported, making it difficult to believe in any individual case which is not reported that the general public could be deterred by that sentence. Secondly, time and again I read research casting doubt on the effectiveness of general deterrence. Research articles on sentencing frequently debunk deterrence as a myth. Thirdly, many defendants I prosecuted and defended had not offended after thought and planning. They did not make a conscious decision to run the risk of detection as law breakers. More often they offended without giving any thought to the potential consequences of their actions. Quite often they were intoxicated. Deterrent penalties did not enter into their thinking.

So while I did not completely abandon a belief that general deterrence might serve a purpose in some cases I doubted supposedly deterrent penalties prevented particular crimes and doubted the utility of deterrence as a justification for sentencing some offenders to jail.

In short in my days as a practising lawyer I came to think of the sentence process as coming too late to prevent a lot of crimes and wondered whether the enormous cost of jailing people who were not a public danger was better spent earlier in the process of government expenditure on crime prevention and on better educating those who might otherwise grow up and break the law.

As a Judge I of course set such thinking to one side and apply sentencing law regardless of my personal opinions. However that line of thought is supported by an abundance of academic thinking. James Cook University's Professor Chris Cunneen delivered an engrossing paper along that theme at this year's JCU open day.

So where does that leave us with the single punch of Damien Ford? If his lengthy imprisonment was not warranted in the sense of any future benefit or purpose to deter, rehabilitate or quarantine why did so many of you vote to send him to jail?

The answer is "just desserts", the other major theory of sentencing.

Damien Ford deserved to be sent to jail for a long time because his deliberately unlawful conduct caused great harm. The just desserts approach to imposing a penalty is backward looking. It accepts the crime has happened and does not pretend the sentence will significantly influence the future. Rather it focuses on past events in order to determine what punishment is justified. It contrasts with utilitarianism which is concerned only with the probable future consequences of imposing punishment.

The just desserts theory of imprisonment is also known as retributivism. The notion of retribution was at one point rejected by enlightened thinkers on sentence reform. Even now there are those who assert that retributivism sounds very "old testament". Some supposedly enlightened thinkers label just desserts theory as primitive or barbarous. They contend, consistent with the utilitarian theory of punishment, that only positive consequences achieved by punishment could possibly justify the practice of penalising others. But this consequentialist thinking would have Damien Ford go unpunished. In truth consequentialists overlook an obvious positive consequence of just desserts theory—it avoids the injustice of the guilty going unpunished. Sentencing the guilty does achieve something—justice.

It is not barbaric for the institution of the state on behalf of the community to express disapprobation of criminal misconduct. Why should not the sentence imposed with the authority of the state censure the offender? Indeed if it did not, vigilantism would take hold.

The more reasonable concern is that state imposed penalties not be excessive, that is, that they should involve what some call "penal parsimony". Penal parsimony is the civilised thinking that the state should not inflict a greater penalty than is necessary. Plainly it would be barbaric if the courts imposed penalties which were disproportionately harsh. But just desserts theory does not call for that. Rather it calls for a penalty which is proportionate to the seriousness of the crime.

That is not to suggest there ought be penalties which have a "harm for harm" equivalence. Modern thinking on just desserts theory does not call for an "eye for an eye" response. Rather it calls for a penalty which is sufficiently harsh, but not more so, to convey blame according to the offence's degree of reprehensibleness. As to what is sufficiently harsh, invariably that assessment is coloured by the norms of the era in which we live.

Regard must of course also be had to other sentences. If one crime is punished more severely than another that should signify a greater disapprobation of the former compared to the latter. Again, consideration of what is proportionate does not occur in a vacuum. It is important that significantly different degrees of severity, that is, of censure or blame, are not visited upon similarly blameworthy offending. So the question of what penalty is appropriately proportionate to the given offending is answered in part by considering the proportionality of the proposed sentence to other sentences.

Far from just desserts theory being barbaric it is thought that if it was given greater emphasis some sentences might actually become lighter. Mirko Bagaric, the Dean of Deakin University's School of Law, in recently advocating just desserts theory wrote:

> "A principal objective must be to ensure that offenders get their just desserts. This can be achieved only by adopting the principal of proportionality, which prescribes that the pain inflicted by the punishment should equal the harm caused by the offence.
>
> This would result in sentences that would have the net effect of making the system fairer and less punitive, but ensuring the offenders who ruined the lives of others were imprisoned more frequently and often for longer periods."

He went on to criticise present sentencing practice saying:

> "…[T]here is no informed intent to match pain caused by the offence with the hardship of the sanction.
>
> In a properly designed sentencing system, perpetrators of rape and serious violent offences, must always go to jail, while penalties for most other offences should drop.
>
> Welfare cheats, drug offenders and minor traffic offenders don't shatter the lives of others. They should rarely go to jail.
>
> Incredibly, half of all people in Australian jails are in there for non-violent and non-sexual offences.
>
> This is a wasteful impost on the tax payer. The $79,000 it costs annually to house these prisoners is far better invested in hospitals and schools."

So with that short analysis of the true worth of the just desserts theory of sentencing let us turn to another real life example.

Sylvia Gasenzer had been the book keeper for her employer's transport business for 20 years. For the last three and a half years of that time she overpaid herself $57,000, apparently spending much of it on a gambling habit. When detected she claimed to have borrowed the money but she produced no evidence of that nor did she repay the money. However she cooperated by pleading guilty early. At the time of sentencing she had a one year old child.

So what should her sentence be? Please raise your hands if you consider that rather than her receiving a community based order such as probation or community service she should receive a sentence of imprisonment. Keep your hands raised if you consider she should receive a sentence of imprisonment longer than one year. Keep your hands raised if you consider she should receive a sentence of imprisonment longer than two years? …etc.

So what was the actual sentence? Sylvia's actual sentence was four years imprisonment suspended after fifteen months. Her appeal was refused.

You might think that sentence, assessed by way of just desserts theory, was disproportionately harsh. As reprehensible as her behaviour was it does not appear that it drove her employer bankrupt or had some other life long impact. Remember the censure of the mere act of sentencing by a court is stigmatising. Sometimes the shaming of criminal proceedings carries with it its own punishment. Remember prison is not the only possible punishment. You might think another course may have been to impose a punishment that allowed Ms Gasenzer to remain in the community and work and required her to pay off every last cent of the money she had stolen. The sentence that was actually imposed upon her did not carry that requirement.

Let us turn to one final example. On 28 February 2009 Matthew Allen was driving his Toyota Landcruiser on Nicklin Way on the Sunshine Coast. His wife was beside him. Their baby was in a capsule in the backseat. Matthew was a 24 year old tyre shop manager. The family's sole bread winner, he had no criminal history and three entries in his traffic history. He was sober. Matthew brought his vehicle to a stop in a right hand turning lane. The circular traffic light ahead was red and the turning arrow was red. When the circular light turned green Matthew mistakenly thought he had a green arrow and moved forwards and across the oncoming traffic lane, making his right hand turn. He struck an oncoming motorcyclist, killing the rider. He stayed at the scene and cooperated with police investigators. He was charged over a year later with dangerous driving causing death. Through no fault of his the trial did not occur until over three years after the event. It emerged at trial that while he mistakenly thought he had been facing a green arrow on the evidence it must have been red. He was convicted.

What should the sentence have been? If you consider Matthew should have been imprisoned rather than placed on a community based order please raise your hand? Please keep you hand raised if you consider he should have been sentenced to a term of imprisonment longer than one year? Keep your hand raised if you think he should have received a term of imprisonment longer than two years? …etc.

What was the actual sentence? Matthew Allen was sentenced to eighteen months imprisonment with his parole eligibility date set at the half way point. His appeal against sentence was refused.

Now it is true that this offence's consequences were catastrophic but the difference between this case and that of Damien Ford, where the consequences were also catastrophic for the victim, is that Damien deliberately engaged in lawless behaviour. He deliberately threw an unprovoked punch. On the other hand Matthew Allen made a mistake of a kind that many road users make without a resulting collision occurring. His conduct was not deliberately lawless.

Up until about a decade or so ago sober drivers who drove dangerously and killed someone because of a momentary driving error would generally not be sentenced to jail. The thinking was, in effect, that we all make mistakes while driving and "there but for the grace of God" go any of us. On one view the penalty for dangerous driving causing death in respect of sober drivers who make a mistake while driving crept upwards in an unwitting reaction to the pressure of criticism from those advocating for harsher penalties for dangerous drivers who cause death. Understandably no sentence could ever be enough for some families of the victim's of

dangerous driving, which is why sentences should be imposed by someone independent. The concern is that in sending a sober driver who has caused a fatal crash in a moment of inattention to jail, courts are imposing disproportionately harsh responses to the actual offending behaviour. Such cases involve less culpability than a driver who deliberately drives dangerously or drives when intoxicated.

You might think the example of Matthew Allen illustrates the importance of not placing too much weight on the consequence of crime as distinct from the actual culpability of the conduct. More broadly you might think it illustrates how difficult sentencing is. There are so many competing considerations, so many layers, that no media article is ever likely to convey the full story.

I have tonight endeavoured to enlighten you future lawyers and equip you to educate those who will accost you seeking your explanation as a lawyer why someone they read about in the media received a particular sentence. It may be there will be times when you just cannot explain the sentence people have read about, when you know that explaining the utilitarian and just desserts theories of sentencing just will not satisfy your aunt Charlotte, your mate Jeffrey or your neighbour Candice. If so well would you remember my experience with the media when I was a student like you and at the very least assure them there is obviously more to the story than what they read about in the paper or what they heard about on the news.