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SENTENCING RAPE – A COMPARATIVE ANALYSIS

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ABSTRACT

SENTENCING RAPE – A COMPARATIVE ANALYSIS

This thesis presents a comparative study of how the courts in various common law jurisdictions sentence the crime of rape. The thesis begins by considering the seriousness of the offence through a review of the medical literature on the physical and psychological effects of rape. The legal and philosophical literature on the wrongness of rape is then considered, along with the victim's role in sentencing.

The discussion then turns towards sentencing practice in four jurisdictions: Scotland, England and Wales, New Zealand, and the Republic of Ireland. By employing a legal comparativist approach, the thesis compares rape sentencing across these jurisdictions in order to suggest possible reform of how the offence is sentenced in Scotland. The study thus presents a historical, philosophical and juridical analysis of rape sentencing. In particular, reliance is placed on analysis of reported case law, appellate sentencing guidance, appellate sentencing guidelines and, where applicable, formal guidelines issued by statutory bodies along with associated academic commentary.

Having considered the sentencing methodology of the courts in each of the four jurisdictions and having proceeded to consider the nature of any general sentencing guidance or particular sentencing guidelines, the thesis argues that reform of Scottish sentencing practice for rape is required. In particular, it is argued that sentencing guidelines are required in Scotland to guide judicial sentencing discretion. It is also argued that such sentencing guidance as does exist in Scotland – especially regarding the sentencing of relationship rape – neither adequately reflects the seriousness of the offence nor reflects modern societal attitudes towards rape. Drawing on the experiences of the courts in the three other jurisdictions examined in the thesis, the study concludes by making suggestions for the reform of Scottish sentencing practice.

The law in the various jurisdictions examined in this thesis is stated as at 1 October 2015.

CONTENTS

Contents	Pg
THESIS DECLARATION	5
STATEMENT OF COPYRIGHT	6
ACKNOWLEDGEMENTS	7
CHAPTER I	
INTRODUCTION	8
<i>Introduction</i>	8
<i>The value of a comparative analysis of rape sentencing</i>	10
<i>Why a comparative study?</i>	10
<i>The limitations of a case law-based study</i>	12
<i>Chapter outline</i>	13
CHAPTER II	
THE SERIOUSNESS OF THE OFFENCE AND THE VICTIM'S ROLE IN SENTENCING RAPE	16
<i>Introduction</i>	16
<i>The effect on the victim</i>	17
<i>The physical effects of rape</i>	18
<i>The psychological effects of rape</i>	21
<i>A “unique violation” – the wrongness of rape</i>	24
<i>Hearing the victim: the use of victim statements in sentencing rape</i>	27
<i>The court’s “duty to understand” in sentencing rape</i>	27
<i>The use of victim personal statements in sentencing rape in England and Wales</i>	31
<i>Victim statements and rape sentencing in Scotland</i>	32
<i>Conclusion</i>	33
CHAPTER III	
SENTENCING RAPE IN SCOTLAND	35
<i>Introduction</i>	35
<i>Pragmatism, flexibility and individualisation – how Scottish judges sentence</i>	35
<i>The traditional approach to sentencing</i>	35
<i>The move towards sentencing guidelines in Scotland</i>	38

<i>From Ramage and Shearer to Cooperwhite – appellate guidance on sentencing rape and relationship rape</i>	<i>41</i>
<i>(Limited) appellate guidance and the Crown’s request for sentencing guidelines: the decision in Shearer</i>	<i>41</i>
<i>Appellate views on sentencing relationship and acquaintance rape: the decisions in Ramage and Petrie</i>	<i>44</i>
<i>Towards sentencing guidelines for rape: the decision in Cooperwhite</i>	<i>50</i>
<i>The need for consistency and predictability in sentencing rape: the majority view in Cooperwhite</i>	<i>50</i>
<i>Judicial sentencing discretion “soundly exercised”? Lord Eassie’s partial dissent in Cooperwhite</i>	<i>53</i>
<i>“Too generous and too readily given”? Guilty plea discounts in sentencing rape</i>	<i>56</i>
<i>The development of guilty plea discounting in Scotland</i>	<i>56</i>
<i>The decision in Murray v HMA</i>	<i>57</i>
<i>Conclusion.....</i>	<i>60</i>

CHAPTER IV

<i>FROM GUIDANCE TO GUIDELINES – SENTENCING RAPE IN ENGLAND & WALES.....</i>	<i>62</i>
<i>Introduction.....</i>	<i>62</i>
<i>From Billam to the Definitive Guideline: the development of rape sentencing guidelines.</i>	<i>62</i>
<i>The first phase – the Roberts and Billam guidelines</i>	<i>63</i>
<i>Guideline judgments by the Court of Appeal</i>	<i>63</i>
<i>The Roberts guidelines</i>	<i>64</i>
<i>The Billam guidelines</i>	<i>64</i>
<i>Towards consistency of approach – an assessment of the Billam guidelines</i>	<i>67</i>
<i>Development of the Billam guidelines: relationship/marital rape and the decisions in Berry, Thornton and W.....</i>	<i>69</i>
<i>The second phase – the Millberry guidelines</i>	<i>71</i>
<i>The establishment of the Sentencing Advisory Panel.....</i>	<i>71</i>
<i>The Millberry guidelines.....</i>	<i>73</i>
<i>A question of balance – an assessment of the Millberry guidelines.....</i>	<i>76</i>
<i>The third phase – the Sentencing Guideline Council’s Definitive Guideline on the Sexual Offences Act 2003.....</i>	<i>79</i>
<i>An assessment of the SGC’s Definitive Guideline</i>	<i>84</i>
<i>The fourth phase – the Sentencing Council’s Definitive Guideline.....</i>	<i>86</i>
<i>The establishment of the Sentencing Council and the new format of sentencing guidelines</i>	<i>86</i>
<i>The development of the Sentencing Council’s new Definitive Guideline on Sexual Offences</i>	<i>87</i>
<i>The operation of the new Definitive Guideline</i>	<i>89</i>
<i>An assessment of the new Definitive Guideline</i>	<i>93</i>
<i>Rape sentencing and the guilty plea discount.....</i>	<i>100</i>
<i>Conclusion.....</i>	<i>103</i>

CHAPTER V

A COMPARATIVE EXAMINATION OF RAPE SENTENCING	106
Introduction.....	106
Sentencing rape in common law jurisdictions	107
New Zealand	107
<i>Sentencing practice, guidance and methodology in New Zealand</i>	<i>107</i>
<i>The Sentencing Act 2002 and the New Zealand Sentencing Council.....</i>	<i>111</i>
<i>Sentencing guidelines for rape – the decision in R v AM</i>	<i>113</i>
<i>An assessment of the AM guidelines</i>	<i>119</i>
The Republic of Ireland	121
<i>Sentencing in Ireland.....</i>	<i>121</i>
<i>A “quiet revolution” – the guideline judgments in Ryan and Fitzgibbon</i>	<i>123</i>
<i>Sentencing methodology – the staged approach.....</i>	<i>124</i>
<i>Sentencing rape</i>	<i>126</i>
Rape sentencing – lessons for Scotland from other common law jurisdictions	132
Conclusion.....	133

CHAPTER VI

CONCLUSION.....	136
What is wrong with rape sentencing in Scotland?	136
<i>Sentencing relationship/acquaintance rape – a flawed approach</i>	<i>136</i>
<i>A disproportionality low starting point</i>	<i>138</i>
The format of the proposed Scottish guidelines.....	139
Victim statements and the guilty plea discount	142
Conclusion.....	144

BIBLIOGRAPHY.....	145
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TABLE OF CASES.....	181
Scotland	181
England and Wales	183
Northern Ireland.....	187
Republic of Ireland	187
New Zealand.....	188
Australia	190
Canada.....	190

THESIS DECLARATION

I certify that this thesis has been composed by me, that the work contained in it is my own and that it has not been submitted for any other degree or professional qualification.

Dr Graeme Brown, Solicitor
Linlithgow, 18 November 2015

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CHAPTER I

INTRODUCTION

Introduction

This thesis presents a comparative study of contemporary sentencing practice for the crime of rape. Building upon a thorough review of the medical literature on the physical and psychological effects of rape; the legal and philosophical literature on the seriousness of the offence; recent scholarship on judicial decision making in sentencing; and the sentencing case law of appellate courts in common law jurisdictions, the thesis explores and critically analyses judicial approaches to sentencing rape in four such jurisdictions: Scotland, England and Wales, New Zealand, and the Republic of Ireland.

The analysis is undertaken with a view to suggesting possible reforms to rape sentencing in Scotland, where judges have traditionally enjoyed considerable discretion in sentencing¹. Although there has been a gradual move in recent years towards structuring judicial sentencing discretion in Scotland through the issuing of guidelines by the appeal court, along with an increased willingness to address questions of principle in sentence appeals, guidelines remain rare in this jurisdiction, certainly as compared with England and Wales. The recent decision of the appeal court in *HMA v Cooperwhite*, 2013 S.C.C.R. 461, however, is notable for the comments of the Lord Justice Clerk: his Lordship stressed the importance of establishing general principles for sentencing rape in Scotland to ensure consistency and predictability, insofar as is possible and desirable². As the Lord Justice Clerk indicated that the appeal court should in due course be addressed on sentencing practice in other common law jurisdictions when framing such guidance³, this thesis examines the way in which judicial discretion in rape sentencing has been structured in such jurisdictions.

The thesis argues that reform of current Scottish sentencing practice for the offence of rape is urgently required. Unlike his⁴ counterparts in jurisdictions such as England and Wales and New Zealand, a Scottish judge taking one of the most difficult and important decisions that he is called on to make – namely, determining the appropriate sentence for an offender

¹ See Chapter III.

² Paragraph [23].

³ *Ibid.*

⁴ The masculine pronoun is used throughout this thesis simply for ease of reference; however, all uses of the masculine pronoun should be read as including the feminine.

convicted of the most serious of offences – does not have the benefit of sentencing guidelines. This thesis argues that such a position is untenable. It will be argued that such guidance as does exist, especially regarding the sentencing of spousal and so-called “relationship” rape, does not reflect the seriousness of the offence as measured by the physical and, in particular, the psychological harm caused to victims. It will also be argued that the current Scottish appellate guidance on sentencing relationship rape does not reflect modern societal attitudes towards the offence.

Having compared Scottish rape sentencing practice to the guidance issued by the appellate courts in other common law jurisdictions, whether in the form of general principles or of more formal sentencing guidelines, the thesis considers what form the proposed Scottish guidelines should take. It is argued, following O’Malley (2011: 5), that in order to comply with the demands of justice, sentencing must remain discretionary and the selection of sentence in specific cases must remain exclusively a judicial task. The thesis argues against Scottish adoption of the current system of prescriptive, numerical, and presumptively binding sentencing guidelines promulgated by the Sentencing Council and used by the courts in England and Wales. It is argued that under the present English system, consistency and predictability of sentencing outcomes are achieved by standardising penal decisions (Cooper, 2008 and 2013); this approach is contrary to the traditional Scottish focus on individualised justice.

There is, however, a clear need for judicial discretion in rape sentencing to be structured by appellate guidance in order to allow judges to exercise *principled* discretion (O’Malley, 2001: 35). Following Harris and Gerry (2013: 241 – 242) the thesis argues that what is required in Scotland is a “behaviour-based” approach to rape sentencing: offending should be categorised by reference to the true character of the offence in question, thereby achieving consistency in sentencing (insofar as possible) whilst also ensuring that neither victims nor offenders are unjustly treated (*ibid.* 242). The thesis argues that this is best achieved by the Scottish courts adopting the style and format of the sentencing guidelines for rape currently in force in New Zealand (*R v AM*, [2010] 2 N.Z.L.R. 750).

The value of a comparative analysis of rape sentencing

Why a comparative study?

Freiberg (2002: 237) considers that most countries tend to be “juricentric” in their sentencing practices and their criminal justice systems “solipsistic”. In England and Wales, this criticism has recently been directed at the Court of Appeal (Criminal Division), both for its apparent unwillingness to consider the sentencing jurisprudence of other jurisdictions in the course of its judgments (Brown, 2013a: 676 – 677) and, more generally, for its refusal to engage with academic writings on issues relating to sentencing. For example, Ashworth notes that:

“I’ve had a book on sentencing since 1983 [*viz. Sentencing and Criminal Justice*], publishing regular [updates] and I’ve never once been mentioned in any court judgment – not once ... [The judges] are not interested in critical commentary” (Ashworth, 2013a)¹.

Sentencing is, however, one area of law and social policy that lends itself particularly well to comparative treatment (O’Malley, 2013a; see also Dubber, 2006: 1309). O’Malley makes the important point that although laws and structures may vary from one country to another, and different terminology may be used, we are all struggling with the same fundamental questions: why punish? What range of penalties should be available? When is a custodial sentence appropriate? How, if at all, should judicial discretion be structured (*ibid.*)?

Whilst Davies et al (2002: 273) have, in a different context, remarked upon “the problems of cultural relativity and system difference which make life hard for the comparative scholar”², such concerns do not feature to any great extent in a comparative study of sentencing practice for rape as the offence is uniformly viewed with the utmost seriousness across jurisdictions. Feinberg, for example, includes rape on a shortlist of offences that are crimes “everywhere in the civilised world”, the de-criminalisation of which “no reasonable person could advocate” (Feinberg, 1984: 10). Von Hirsch et al (2005: 210) consider rape to be one of the most

¹ The address is available as a podcast (<http://podcasts.ox.ac.uk/people/andrew-ashworth>). The relevant passage appears at one hour, 10 minutes and 30 seconds *et seq.* It should be noted, however, that Ashworth’s *Sentencing and Criminal Justice* has been cited on two occasions by the Scottish High Court of Justiciary on appeal (see *HMA v Graham*, 2011 J.C. 1 at paragraph [21] and *Gemmell v HMA*, 2012 J.C. 223 at paragraphs [14], [45], and [51]).

² See also Nelken (2012: 141) who highlights the difficulties caused by “cultural variability in ideas and values”.

demeaning impositions imaginable¹, whilst Gardner and Shute (2000: 193) observe that rape is arguably never excusable and is probably amongst those wrongs which are never justifiable². Similarly, whilst major differences between jurisdictions in offence definitions can cause problems in some areas of comparative sentencing research (see Freiberg, *ibid.* 241 – 242), the offence of rape tends to be defined in broadly similar terms across the jurisdictions examined in this study.

There is accordingly a high degree of what Nelken terms “functional equivalence” regarding the seriousness with which the courts in common law jurisdictions view the offence of rape (Nelken, 2012: 149; 2002: 332; see also Örüçü, 2007a: 50 – 53). A corollary of the seriousness with which the offence is viewed is that there is less scope in this study for falling foul of the danger of “ethnocentricity”: whilst all jurisdictions in this study regard rape as a particularly serious offence, the study seeks to compare and contrast their responses to the offence such as, for example, the use of sentencing guidelines (see generally Nelken, 2009: 291 – 292, 306 – 307; 2000: 10). Patterned differences in approaches to rape sentencing are thus considered against a background of otherwise similar social conditions (see Nelken, 2002: 332 and Dubber, *ibid.* 1308).

The present study therefore compares rape sentencing across three selected common law jurisdictions in an attempt to learn from their practice, and to challenge and improve the way in which cases of rape are sentenced in Scotland (see generally Nelken, 2009: 291 and 2007: 3, 17 – 18). The aim is to compare approaches to sentencing rape for the practical purpose of suggesting reform of how the offence is sentenced in Scotland (see generally Nelken, *ibid.* 12 – 13, 32; 2000: 11, and Örüçü, 2007a: 44, 55; 2007b: 413, 415 – 416). This is achieved through what Nelken terms a “legal comparativist” approach: I seek to classify and learn from the rules, ideals and practice of sentencing in jurisdictions furth of Scotland (see Nelken, 2012: 144 and 147). The jurisdictions selected for comparison were chosen due to their having similar sentencing traditions and legal cultures to those of Scotland (see Roberts, 2009: 232) with, in particular, a traditionally strong focus on judicial discretion.

¹ See also Bottoms, 2010: 32.

² For a full discussion of the wrongness of rape, see Chapter II.

In common with other legal comparative studies, this thesis relies mainly on historical, philosophical, and juridical analyses (*ibid.* 148; 2002: 330; 2000: 6). Particular reliance is placed on descriptions of the activities of the courts in their reported case law and on interpretation of this case law through associated academic commentary (see Nelken, 1995: 445).

The limitations of a case law-based study

Despite case law being a vital source for the understanding of the judicial approach to sentencing, the limitations of a study based purely on an analysis of case law must be recognised. As Roberts et al (2000) note, only a very small percentage of sentences imposed will be captured by the reporting services; as only noteworthy cases are reported they are not necessarily representative of the majority of sentences imposed; and such judgments that do appear in, for example, the case reports might not explain all the relevant factors considered at the time that sentence was imposed (*ibid.* 1).

It must also be acknowledged that reporting rates for the crime of rape are low¹ due to victims' fear of shame, but also of police and court procedure (Godden, 2009: 26 – 27; Heidensohn and Gelsthorpe, 2007: 397; Temkin, 2002: 1 – 11). Criminal justice processes such as the predominantly male-dominated adversarial trial system have, for example, been condemned by Lees as constituting a “secondary rape” for the victims of such crime (Lees, 2002, cited in Hall, 2010: 112). Clare McGlynn explains that whilst feminist activism in recent years has understandably concentrated on securing public acknowledgement that rape is a serious crime, demanding significant punishment, via the criminal justice system, the hope that sexual violence could be eradicated by harnessing the power of the state to condemn has not been realised (McGlynn, 2011: 836; see also McGlynn et al, 2012: 239, Godden, *ibid.* 25; 27 – 29 and Lacey, 1998: 101). McGlynn considers that although there has been extensive, often feminist-inspired, law reform² there is “yet little evidence of any reduction in the prevalence of sexual violence, few convictions of perpetrators and a system which affords victims little justice” (*ibid.*; see also McGlynn et al, *ibid.* 231). Thus, perhaps more so than with any other offence, the number of rape cases brought to appeal (either by

¹ It is estimated that between 75 and 95 per cent of rapes are never reported to the police (see HM Crown Prosecution Service Inspectorate, 2007: 34).

² For developments in England and Wales and Scotland, see respectively McGlynn (2010) and Cowan (2010).

the convicted person appealing his sentence or by the Crown appealing on the grounds of undue leniency) represent only a small fraction of the rapes committed each year within the UK (see Godden, 2013: 105)¹.

This is not to suggest that reported decisions of, for example, the Court of Appeal (Criminal Division) in England and Wales and of the High Court of Justiciary on appeal in Scotland² concerning rape sentencing are not used daily by judges in the respective jurisdictions, or that they are not a valuable source of information on the sentencing practice and culture of the courts. Indeed, as we shall see, guidelines have long existed for sentencing rape in England and Wales³, and the appeal court in Scotland is now more prepared than in the past to itself issue guideline judgments⁴. It is, rather, simply an acknowledgment that judgments are written on only a small percentage of cases sentenced by the courts⁵.

Chapter outline

Chapter II considers the nature of the offence of rape. It sets out the definition of rape in England and Wales and Scotland before considering the medical and psychological effects of the offence on the victim. The chapter proceeds to examine the wrongness of rape from a philosophical perspective and concludes with an examination of the victim's role in sentencing in England and Wales and in Scotland. In so doing, the chapter sets the scene, and provides the necessary context, for the remainder of the study.

In Chapter III contemporary sentencing practice for the crime of rape in Scotland is examined. The chapter begins by situating Scottish sentencing through an exploration of appellate guidance on the manner in which Scottish judges should undertake the sentencing

¹ As Mason and Lodrick, report the extent of sexual violence is such that approximately one in every 250 women is raped each year in the UK (Mason and Lodrick, 2013: 28). See the discussion in the introduction to Chapter II.

² On the very considerable developments made in the field of criminal law reporting in Scotland in recent years, see Reed, 2014: 165; Farmer, 2010: 97; Lord Rodger of Earlsferry, 2010: xviii; and Christie, 2000a: viii.

³ See Chapter IV.

⁴ See Chapter III.

⁵ It is also acknowledged that documentary data such as the sentencing case law of domestic and Commonwealth courts are not "surrogates for other kinds of data" (Atkinson and Coffey, 2011: 79 – 80). Ideally, the use of case law as a means of understanding judicial decision making in rape sentencing should buttress an analysis of other sources of data such as empirical data derived from interviews with judges (see, for example, Brown, 2014a; Mackenzie, 2001 and 2005; Tombs, 2004; and Ashworth et al, 1984). It was not possible, however, to conduct such empirical research for the present study given the constraints in time and resources inherent in researching and writing an M.Jur. thesis on a part-time basis whilst continuing to work full-time as a Judicial Assistant to the appeal court in Edinburgh.

task. In the absence of specific guidelines for sentencing rape, the chapter proceeds by considering a number of decisions in which the appeal court has made controversial observations on factors that may, in certain circumstances, mitigate the seriousness of an act of rape; specifically, the significance to sentence of a pre-existing, or existing, sexual relationship between a rapist and his victim. The chapter proceeds by considering the recent decision in *HMA v Cooperwhite*, 2013 S.C.C.R. 461. The chapter concludes with a discussion of the statutory requirement to consider allowing a discount in sentence to an offender who pleads guilty. The problems raised by the sentence discount in relation to sentencing rape are considered.

Chapter IV examines the development of sentencing guidelines for the crime of rape in England and Wales. The chapter begins by considering the traditional approach to sentencing by the English judiciary. The various forms of rape guideline are then considered by reference to each of the four stages in the evolution of English sentencing guidelines: firstly, the Court of Appeal's narrative guidelines in *R v Billam and others*, (1986) 8 Cr. App. R. (S.) 48 and their subsequent development in a series of cases over the following seven years; secondly, the advice of the Sentencing Advisory Panel and the subsequent guideline case of *R v Millberry and others*, [2003] 2 Cr. App. R. (S.) 31; thirdly, the Sentencing Guideline Council's Definitive Guideline on the Sexual Offences Act 2003; and finally the Sentencing Council's Definitive Guideline on the 2003 Act which came into effect on 1 April 2014. The question of whether to allow a reduction in sentence to an offender who pleads guilty – a common issue at every stage of the development of English rape guidelines – is then considered.

In Chapter V the thesis turns to examine sentencing practice for rape in New Zealand and the Republic of Ireland. The approaches of the countries' appellate courts towards sentencing the offence are considered in turn. In each case the discussion begins by considering the sentencing landscape of the jurisdiction in question: the sentencing methodology of the courts is examined along with the nature of any general sentencing guidance or particular sentencing guidelines. It will be shown that rape sentencing jurisprudence is particularly well developed in New Zealand, where judges have long had the benefit of guideline judgments to guide their discretion in imposing sentences for rape. It will be demonstrated, however, that the current guideline judgment in New Zealand – *R v AM*, [2010] 2 N.Z.L.R. 750 – is very different in both form and operation to the sentencing guidelines presently operating in England and

Wales. The guidelines in *AM* are considered in detail against the background, firstly, of the New Zealand Parliament's incursion into the common law of sentencing in the form of the Sentencing Act 2002 and, secondly, the aborted proposals to establish a New Zealand Sentencing Council. The chapter proceeds to contrast the guideline approach in New Zealand with the more discretionary-based approach to rape sentencing in the Republic of Ireland.

The concluding chapter, Chapter VI, considers the desirability of the appeal court in Scotland issuing sentencing guidelines for the offence of rape. It will be concluded that there is a need for sentencing guidelines for rape in this jurisdiction. In considering what *form* the sentencing guidance should take, however, the question will be asked whether sentencing for rape should be the "human process" advocated by commentators such as Cooper (2008) and Harris and Gerry (2013). Alternatively, it will be asked whether such guidance should take the form of the "algorithmic" process preferred by commentators such as Roberts (2011), and exemplified in the guidelines issued by the Sentencing Council in England and Wales.

CHAPTER II

THE SERIOUSNESS OF THE OFFENCE AND THE VICTIM'S ROLE IN SENTENCING RAPE

Introduction

In England and Wales, the definition of rape was expanded by section 1(1)(a) of the Sexual Offences Act 2003¹ to include oral as well as vaginal and anal penetration by a penis (Ashworth, 2015: 144). In Scotland, the definition of rape was similarly extended to include vaginal, oral and anal penetration by virtue of section 1 of the Sexual Offences (Scotland) Act 2009². In both jurisdictions, the maximum sentence for the offence is life imprisonment³. As Freiberg observes, the statutory maximum penalty serves important symbolic and practical functions by providing both the public and sentencers with a guide to the seriousness with which the community views the offence (Freiberg, 2002: 242). The maximum sentence of life imprisonment thus reflects the level of communal abhorrence whilst also providing a directive to sentencers on how to weigh the gravity of the offending (*ibid.*).

Ashworth notes that rape is one offence whose known profile has changed considerably in the last 30 years (*ibid.* 143). Mason and Lodrick report that British Crime Survey data from 2000 indicates that 0.4 per cent of female respondents aged between 16 and 59 disclosed that they had been raped in the preceding year (Mason and Lodrick, 2013: 28). Assuming that the findings would be generalizable to other years, this would equate to one in every 250 women in the UK being raped each year (*ibid.*).

A joint publication by the Ministry of Justice, Home Office and the Office for National Statistics in 2013 reviewed the data from the previous three years' Crime Surveys for England and Wales (Ministry of Justice et al, 2013: 6). The report found that the most

¹ Section 1 of the 2003 Act came into force on 1 May 2004.

² Section 1 of the 2009 Act came into force on 14 July 2009. Sheriff Alastair Brown notes that the 2009 Act represents a complete recasting and comprehensive codification of the substantive law of sexual offences in Scotland (A. N. Brown, 2009: 1; see also A. N. Brown, 2015: 1; Jones and Taggart, 2015: 237 – 238; Cowan, 2010: 157 – 165; Chalmers, 2010: i and Ferguson, 2008: 303 – 304). The 2009 Act broadly followed the recommendations of the Scottish Law Commission and adopted the terms of the Commission's draft Bill (Scottish Law Commission, 2007); see Brown, *ibid.* As Callaghan observes, following the passing into force of the 2009 Act the fundamentals of sexual offence law in Scotland do not significantly differ from those in England and Wales (Callaghan, 2014: 12); however, it must be noted that certain differences do exist between the law in England and Wales and Scotland (compare, for example, the definition of "consent" in section 74 of the 2003 Act and sections 12 to 15 of the 2009 Act).

³ See respectively section 1(4) of the Sexual Offences Act 2003 and section 48(1)(b) and Schedule 2 of the Sexual Offences (Scotland) Act 2009.

commonly reported victim-offender relationship amongst victims of the most serious sexual offences (including rape) was that of partner or former partner (56 per cent of victims); in about a third of all sexual offences the offender was found to be somebody known to the victim, other than a partner or family member (*ibid.* 16). Thus around 90 per cent of victims of the most serious sexual offences knew the perpetrator, compared with less than half for other sexual offences (*ibid.* 6).

This chapter examines the seriousness of the offence of rape, providing a foundation on which to construct the detailed analysis and critique of the case law and sentencing guidelines in the selected common law jurisdictions in Chapters III to V. The chapter commences by exploring the physical and psychological effects of the offence on the victim, reference being made to the relevant medical and psychological literature. The wrongness of the offence is then considered from a philosophical perspective. Having established, in particular, the very serious psychological effects of the offence, the chapter moves on to consider the victim's role in rape sentencing. This discussion begins by exploring Bottoms' (2010) model of social theory which, in the sentencing context, emphasises the court's "duty to understand" in passing sentence for the offence. It is argued that, particularly when sentencing rape, the court must be in a position to fully understand the effect of the offence on the particular victim: an individualised, victim-orientated appreciative description of how the offence has impacted on the victim is required before an appropriate sentence can be imposed. The chapter concludes with a brief discussion of how such material, in the form of victim personal statements, is made available to the court.

The effect on the victim

Most rapes are committed by someone known to the victim, such as current or ex-partners or husbands, or recent acquaintances (Mason and Lodrick, 2013: 28; Ministry of Justice et al, 2013: 16; Avegno et al, 2009: 331 – 332; Ingemann-Hansen et al, 2009: 185; McCall-Hosenfeld et al, 2009: 595; Martin et al, 2007: 336; McGregor, 2005: 89; Warner, 2005: 235; Jones et al, 2004: 455, 457; Stermac et al, 2001: 1218; Riggs et al, 2000: 360 – 361; Petrak et al, 1997: 342). The fact that in the UK around 90 per cent of victims of the most serious sexual offences know the perpetrator contradicts the commonly held belief that rapes are most frequently committed by strangers (Mason, 2014: 537). This section considers the

typical physical and psychological effects of rape on victims of the offence – the victims both of stranger rape and of marital, relationship and acquaintance rape.

The physical effects of rape

Payne-James et al (2011: 132) report that whilst many incorrectly assume that sexual assaults will result in injury to the victim, in the majority of cases no such injuries are seen (see also Whitwell et al, 2015: 254 – 256; Walker, 2015: 175 – 176; Cybulska, 2014a: 73; Bassindale and Rahuf, 2014: 67; White, 2013: 114, 123; Crane, 2013: 103; Mason and Lodrick, 2013: 28; Möller et al, 2012: 3142; Wyatt et al, 2011: 370; Rogers and McBride, 2011: 86; Rogers, 2009: 149; Hilden et al, 2005: 205; Warner, 2005: 235, and Shepherd, 2003: 132). A recent study by McLean et al (2011), for example, sought to obtain reliable normative data concerning the prevalence of genital injuries resulting from consensual and non-consensual intercourse (*ibid.* 27 – 28). The authors recruited 500 adult participants from a sexual assault referral centre in Manchester, along with 68 comparison participants (*ibid.* 28 – 29). It was found that less than a quarter of adult complainants of rape by a single assailant sustained injuries to the genitalia that were visible within 48 hours of the offence. Whilst this was approximately three times more than women who sustained genital injuries during consensual intercourse, the authors stressed the importance of recognising that over three quarters of all rape complainants do not sustain any genital injuries (*ibid.* 32)¹.

Whilst certain North American studies have suggested that rapes and other sexual assaults committed by strangers have tended to be more violent (see Avegno et al, 2009, Jones et al, 2004 and Stermac et al, 1995)², a number of more recent studies from the UK and Europe have reported a higher incidence of physical violence in sexual assaults committed either by partners or by acquaintances. A study of 164 cases of sexual assault between 2002 and 2006 in Belfast, for example, found that victims assaulted by acquaintances were more likely to sustain genital injuries than those assaulted by strangers (Maguire et al, 2009: 151), these findings being consistent with an earlier study by Hilden et al, 2009 (cited in Maguire et al,

¹ The authors report that their findings are consistent with those of an earlier study by Bowyer and Dalton (1997). That study, which comprised an analysis of the case notes of 83 rape complainants (*ibid.* 618), found that only 27 per cent of complainants sustained visible genital injuries, most of which comprised minor bruises, scratches and grazes (*ibid.* 619). This leads Bowyer and Dalton to conclude that the examining doctor will usually find no genital injuries upon examining women who have reported that they have been raped (*ibid.* 620).

² C.f. the studies by McCall-Hosenfeld et al (2009); Stermac et al (2001); Finkelhor and Yllo (1985), and Bergen (1996), discussed *infra*.

ibid. 152). Similarly, the study by McLean et al found that the probability of a complainant sustaining genital injuries in the course of a rape was greater when the assailant was known to her than when the assault was committed by a stranger (McLean et al, *ibid.* 32)¹.

Most recently, Möller et al explored differences in the extent of violence and physical injury sustained by victims of sexual assault committed by intimate partners compared with sexual assaults by strangers and acquaintances (Möller et al, *ibid.*). Having examined the medical and forensic records of 503 women attending a sexual assault centre in Stockholm (*ibid.* 3136), the authors found that women sexually assaulted by their intimate partners were more likely to report physical violence than women assaulted by strangers and acquaintances (*ibid.* 3139 – 3140). In particular, the violence used by intimate partners (present in 90 per cent of cases) was found to be more severe than that used by strangers and acquaintances (*ibid.* 3144). Whilst violence used by the latter groups tended to consist solely of holding the victim, the violence used by intimate partners was more variable and included a higher prevalence of kicks, punches, and attempts to strangle the victim (*ibid.* 3139 – 3140; 3144). Victims of intimate partner or acquaintance assault were also more likely to sustain a combination of vaginal and anal injuries than victims assaulted by strangers (*ibid.* 3140; 3145). The authors concluded that sexual assaults committed by intimate partners are more violent than assaults committed by strangers (*ibid.* 3144).

These studies are consistent with certain other US and Canadian studies, all of which challenge the stereotypes which suggest that rapes committed within established relationships are less serious and less violent than rapes committed by strangers. McCall-Hosenfeld et al, for example, examined the medical records of 478 sexual assault victims who attended hospitals in Massachusetts between 2003 and 2005 (McCall-Hosenfeld et al, 2009: 593 – 594). Fifty five per cent of those who reported assault by a known assailant also reported having been subjected to severe violence (*ibid.* 594). Stermac et al, meanwhile, studied the medical records of patients reporting to a hospital-based sexual assault centre in Ontario between 1992 and 1999 who had been sexually assaulted by either current or previous spouses (97 patients), partners (256 patients), or acquaintances (194 patients), (Stermac et al, 2001: 1222). The authors report that boyfriends and spouses were most likely to use physical violence and restraint in the course of the sexual assault (*ibid.* 1226 – 1227; 1230), with

¹ See also Field and Bienen who report that injuries can be greater in sexual assaults committed within relationships (Field and Bienen, 1980, cited in McLean et al, *ibid.* 28).

boyfriends being significantly more likely to use weapons (*ibid.* 1227; 1230). Victims of sexual assault by partners and spouses were significantly more likely than the victims of acquaintance assault to present with physical injuries (including both soft tissue and internal injuries)¹, the injuries also being more severe than in acquaintance assault (*ibid.* 1228 – 1229; 1231).

The earlier study by Finkelhor and Yllo (1985) – which examined 326 cases of marital rape in the Boston area – found that 48 per cent of all cases of marital rape were characterised by verbal and physical abuse. In these cases (classified by the authors as “battering rape”) marital rape was found to be an extension of general violence in the relationship (Finkelhor and Yllo, *ibid.* cited in Martin et al, 2007: 333). Similarly, Bergen found battering rape to be the most common form of marital rape in her sample of 40 rape victims (Bergen, 1996 cited in Martin et al, *ibid.*).

In cases of either stranger rape or relationship rape where genital injuries are present, their degree and extent may be influenced by the victim’s age, the type of sexual activity and the degree of intoxication of either or both of the participants (Payne-James et al, *ibid.*; Wyatt et al, *ibid.* 371). Genital injuries typically include bruising and/or lacerations whilst non-genital injuries in sexual assault (which may be more common – Welch and Mason, 2007: 1154; Sugar et al, 2004: 75) may include marks of blunt contact (such as punches or kicks), restraint (such as ties around the victim’s wrists or ankles, and grip marks), and bite marks (Walker, *ibid.* 173; Wall, 2014: 56 – 58; Payne-James et al, *ibid.* 132 – 133; Crane, *ibid.* 106 – 107; Rogers, *ibid.* 149 – 150; Cowan and Hunt, 2008: 324 – 325; Saukko and Knight, 2004: 421 – 423; Knight, 1992: 233). Even if no genital injuries are sustained, rape victims may still suffer other gynaecological complaints including bleeding, infection, irritation or chronic pelvic pain (Jina and Thomas, 2013: 18).

Emergency contraception may be required (Piegsa, 2014: 82 – 83)² and, given the potential risk of sexually transmitted infections³, appropriate prescribed medication will also be necessary (Payne-James et al, *ibid.* 129 – 130; Cybulska, 2014a: 74 – 77 and 2014b: 516 –

¹ The authors report that physical injuries were present in 76 per cent of cases of sexual assault by partners and spouses and in almost 59 per cent of cases of acquaintance assault (*ibid.* 1228).

² A US study into rape-related pregnancy estimated the rate of pregnancy at five per cent per rape among women of reproductive age (Holmes et al, 1996, cited in Piegsa, *ibid.* 81).

³ Typically gonorrhoea, chlamydia, syphilis, HIV and hepatitis B (see Welch and Mason, *ibid.* 1154 – 1156).

518; Piegsa, *ibid.* 82; Jina and Thomas, *ibid.* 16, 21; White, *ibid.* 113, 124; Rogers and McBride, *ibid.* 121; Rogers, *ibid.* 150 – 151; Welch and Mason, *ibid.* 1155 – 1156; Girardin et al, 2003: 434; Kerr et al, 2003: 269). It is standard practice to discuss antibacterial prophylaxis with victims of sexual assault and to screen for bacterial infections at a genitourinary clinic 10 to 14 days after the assault (Wyatt et al, *ibid.* 375; Rogers and McBride, *ibid.* 121 – 122; Girardin et al, *ibid.*).

The psychological effects of rape

Arguably a focus purely on the physical harm caused by rape is too narrow: regard must be had also to victims' experiences of rape – the way in which their lives are changed by the fact of having been raped (Gardner and Shute, 2000: 195 – 196)¹. Apart from any physical injury, any harm to the victim depends on her own evaluation of what has been done to her (*ibid.* 197; see also Lodrick and Hosier, 2014: 90). Whilst it has long been considered appropriate to consider the psychological as well as the physical harm experienced by the victim (see, for example, Kift, 1995: 78 and Lacey, 1998: 115), the greater focus of the new sexual offences Definitive Guideline (Sentencing Council, 2013a) on the psychological harm caused by such offences (Harris, 2013: 847) makes such a consideration essential in sentencing rape².

Mason and Lodrick (2013: 30) note that many factors will affect an individual's response to trauma and psychological reactions vary greatly between individuals (see also McGregor, 2005: 17). The “meaning” that a victim ascribes to an incident is likely to be significant and this is illustrated by the differences between stranger and acquaintance rape (Mason and Lodrick, *ibid.*). Whilst it might be assumed that stranger rape would be far more traumatic, this is often not the case; victims of acquaintance rape suffer similar levels of depression and experience greater difficulty in re-establishing intimate relationships than victims of stranger rape (*ibid.*; see also Rogers, *ibid.* 151).

¹ In this regard, Ripstein (2006) argues that assaults violate the victim's independence. On Ripstein's account the rapist, for example, violates the victim's independence by using her powers for his own purposes. As Ripstein argues: “The trespass against [the victim's] person is *primary*, and any consequent injury *secondary* to it” (Ripstein, *ibid.* 235, emphasis added).

² The current system of sentencing guidelines for the crime of rape in England and Wales are considered in Chapter IV.

Immediate psychological consequences of rape can include feelings of shock, denial, fear, confusion, anxiety, withdrawal, guilt or nervousness (Jina and Thomas, 2013: 19; Rothbaum et al, 1992: 456, 471). Post-traumatic stress disorder ('PTSD')¹ has been found to be a prominent, although not universal, response to rape (Rothbaum et al, *ibid.* 473). Symptoms such as flashbacks or recurrent nightmares can occur immediately and have been reported up to 12 months after the assault, especially if not treated (Jina and Thomas, *ibid.*; Mason and Lodrick, *ibid.* 31; see also Lodrick and Hosier, *ibid.*). A US study by Kilpatrick et al, for example, found that 51 per cent of rape victims developed PTSD sometime after the assault, and the symptoms persisted in 16.5 per cent of victims when they were re-assessed some years later (Kilpatrick et al, 1987: 487). A later study by Dahl of 55 victims of rape and attempted rape in Oslo found that the majority displayed symptoms of PTSD within the first two weeks after the assault, although the criterion of duration was not fulfilled (Dahl, 1989: 59)².

Whilst in no way seeking to minimise or understate the serious psychological effects of stranger rape, it must also be noted that marital, relationship and acquaintance rape has a profound emotional effect on the victim (Martin et al, 2007: 343), principally due to the abuse of trust involved in the commission of the offence (see Temkin, 2002: 44; Warner, 2000: 601; Gardner and Shute, *ibid.* 212). Mason and Lodrick explain:

“A woman raped by an acquaintance potentially has to question everything she ever held ‘true’. If she cannot trust her own judgement ... and of how she would respond if faced with sexual threat, how can she go about her daily life? The world is suddenly a malevolent place where sex offenders are people she knows, and not strangers ‘out there’ to be mistrusted and avoided” (*ibid.*; see also Russell, 1982: 798 – 799, cited in Kift, 1995: 84).

¹ The three broad symptom groups present in PTSD are explained by Mason and Lodrick: (i) persistent re-experiencing of the traumatic event; (ii) persistent avoidance of stimuli associated with the traumatic event and numbing of general responsiveness; and (iii) persistent symptoms of increased arousal, such as difficulty sleeping, poor concentration, anger and irritability (Mason and Lodrick, 2013: 31; see also Rothbaum et al, 1992: 456). For a formal diagnosis to be made, the symptoms must last for more than a month and lead to clinically significant distress or impairment in social, occupational, or other important areas of functioning (Mason and Lodrick, *ibid.*; Rogers, *ibid.* 151). Rape victims who experience PTSD may avoid engaging with the investigative and criminal processes, which may result in re-traumatisation (Cybulska, 2014b: 513).

² A contemporaneous, unpublished study by Resnick et al (1989) found that 76 per cent of rape victims met the diagnostic criteria for PTSD at some point within a year of the assault (cited in Rothbaum et al, 1992: 456). See also the research recently commissioned by the Sentencing Council in England and Wales which found that victims of sexual offences repeatedly stressed the long term psychological impact of such offences (Nicholls et al, 2012: 21).

Whilst certain segments of society – and indeed, certain service providers within the medical and criminal justice fields – appear to consider that marital rape is somehow less traumatic than stranger rape because one’s partner is a “known entity” or a “known quality”¹, the reality is that victims of marital rape appear to suffer even more traumatic consequences than victims of stranger rape (Bergen, 1996: 59, cited in Rumney, 2003: 874; Warner, 2005: 244). By reference to the literature on rape trauma – in particular the study by Lees (2002) – Rumney, for example, notes that acquaintance rape tends to be more traumatic and has longer-term psychological effects than stranger rape: victims of acquaintance rape find the experience more difficult to come to terms with; they frequently feel betrayed (both by the offender and, importantly, by their own judgement); and it makes them more fearful of men generally since they no longer know whom to trust (Lees, *ibid.* 17, cited in Rumney, *ibid.* 882; see also McGregor, *ibid.* 67 – 68, 71; and Koss et al, 1994, cited in Temkin, *ibid.* 51 – 52).

Studies have also shown that women who have been physically and sexually assaulted by their partners are at a higher risk of experiencing mental health problems than those who have suffered only physical abuse (McFarlane et al, 2005a; Cole et al, 2005; Stermac et al, 2001: 1220 – 1221; Bennice et al, 2003 cited in Jina and Thomas, *ibid.* 16). Victims who have been raped by a spouse or partner are likely to experience long term psychological effects such as significant depression and PTSD² (Martin et al, *ibid.* 345; McGregor, *ibid.* 68). In a study conducted with women suffering intimate partner violence, McFarlane et al found that women who reported sexual violence were over five times more likely to threaten or attempt suicide within three months compared with women who were only physically abused (McFarlane et al, 2005b, cited in Jina and Thomas, *ibid.* 19).

The psychological trauma sustained in any case of rape will have the secondary effect of reducing the victim’s ability to work or study, to forge new relationships or maintain positive relationships with family and friends (Nicholls et al, 2012: 21; Martin et al, *ibid.* 341). For example, in a small-scale study Connop and Petrak interviewed six men about their experiences following their partner’s disclosure of rape and interviewed three rape victims who discussed the impact of their own assault on their partner (Connop and Petrak, 2004:

¹ In this regard, see the comments of the Court of Appeal in the guideline case of *R v Millberry*, [2003] 2 Cr. App. R. (S.) 31 at paragraph [13], and the criticism by Rumney, 2003: 874, discussed in Chapter IV.

² Discussed above.

31). All but one of the relationships had either broken down or appeared to be on the verge of doing so (*ibid.* 33). Most respondents described difficulties with their sexual relationships (*ibid.* 34 – 35) and the authors report that there was a tendency for rape victims to experience anger and blame from their partners, as well as support and understanding, as they struggled to come to terms with the assault (*ibid.* 35; 37).

Longer term consequences include the use of alcohol or drugs as a coping mechanism (Mason and Lodrick, *ibid.*; Lodrick and Hosier, *ibid.*) which may itself render the victim more likely to experience further assault (Najdowski and Ullman, 2011: 218; 220; Hall and Moore, 2008: 296; Avegno et al, 2009: 330; Jones et al, 2004: 457). Victims may also engage in self-harming behaviour, experience panic disorders and suicidal thoughts, and suffer depression (Jina and Thomas, *ibid.*; Dahl, *ibid.* 58 – 59; Martin et al, *ibid.*).

Victims of rape and sexual assault may require counselling or psychological support following the offence (Payne-James et al, 2011: 133; Wyatt et al, 2011: 375; Rogers and McBride, 2011: 122; Kerr et al, 2003: 269). As victims may experience mental health problems at any time following the offence, either at the point of the assault or many months or years later, it may be necessary to provide appropriate care over a long period (Jina and Thomas, *ibid.* 16, 21). Rape victims suffering PTSD should be offered a course of trauma-focused psychological treatment with subsequent pharmacological treatment if symptoms persist (Mason and Lodrick, *ibid.* 34).

A “unique violation” – the wrongness of rape

In September 2009 Baroness Vivien Stern was invited by the Home Office to undertake a review into how rape complaints were handled by public authorities in England and Wales (Stern, 2010). The review began by considering the crime of rape and the framework within which the law operates (*ibid.* 28). On the nature of the offence, Stern explains:

“It is a unique violation that often leaves its victims with deep traumas that last for many years, sometimes forever ... [It is] a crime that strikes at the whole concept of human dignity and bodily integrity” (*ibid.* 28; 118).

Whilst, as Gardner and Shute observe, rape is amongst those wrongs which can never be excused or justified, the authors pose the question of what exactly makes the crime of rape worse than other crimes that can be defined in terms of absence of consent, such as vandalism, theft and assault? In what dimension is rape worse and wherein does its “worseness” lie (Gardner and Shute, 2000: 193 – 195)¹?

For Gardner and Shute, the act of rape involves the objectification of the victim. Whilst the victim’s autonomy and choice in sexual matters are violated by the act of rape, Gardner and Shute place particular emphasis on what they describe as the “instrumentalization” of the victim: rape involves the conversion of an autonomous individual with her own feelings and experiences into a mere instrument or tool for the sexual gratification of the rapist² (*ibid.* 203 – 204). Thus, as Ashworth observes, it is not just that victims are wronged by the invasion of their right to respect for private life, of which sexual autonomy is a central feature, because the distinctly sexual element of the offence brings in other considerations such as shame, humiliation, exploitation and objectification (Ashworth, 2015: 144 – 145; see also McGregor, 2005: 226 – 232, Warner, 2005: 236 and Lacey, 1998: 106)³. The rapist treats his victim as a thing and not a person (Gardner and Shute, *ibid.* 204):

“Rape ... is the sheer use of a person [often] accompanied by violence, terror, humiliation etc. ... Rape is humiliating even when unaccompanied by further affronts, because the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanizing ... [A]ll sheer use of human beings, all treatment of them merely as means, is *abuse*; and rape is the central case of such abuse” (*ibid.* 205, emphasis *per original*; see also *ibid.* 211).

¹ Gardner and Shute’s essay is reproduced (with only “a few stylistic changes and some added cross-referencing in the footnotes” – Gardner, 2007a: vii) in Gardner, 2007b: 1 – 32.

² Or, indeed, in order for the rapist to exert power, domination and control over the victim (see Welch and Mason, 2007: 1154; Stern, 2010: 31; 33; and McGregor, 2005: 225; c.f. Palmer, 1988). Ripstein, for example, conceptualises all criminal wrongdoing as “domination”, in the sense of violation of the victim’s independence (Ripstein, 2006: 231). Ripstein explains: “If I use force ... to get you to do something for me that you would not otherwise do, I wrong you ... I have used you, and in so doing, made your choice subject to mine, and deprived you of the ability to decide what to do” (*ibid.* 234).

³ Although in presenting her thesis that “an abstract notion of non-consent as the core of rape provides a distorted or (at the very least) partial representation of the real wrong of rape, in that it displaces the embodied and affective aspects of the offence” (*ibid.* 113 – 114; see also 117 *et seq.*) Lacey argues that “violation of trust, infliction of shame and humiliation, objectification and exploitation find no expression in the legal framework” (*ibid.* 106), she acknowledges that such issues “surface with increasing insistence in argument *at the sentencing stage*” (*ibid.*, emphasis added).

For Gardner and Shute, this is the line of thought that generates the basic distinction between rape and most non-sexual offences against the person (*ibid.* 205). Non-consensual sexual intercourse is a wrong against the person raped because it is a violation of their right to sexual autonomy (*ibid.* 208; see also Fenwick, 1992: 871; Childs, 2001: 311; McGregor, *ibid.* 68; Brooks, 2012: 200, 203; and Munro, 2014: 747). More particularly, and as McGregor explains, it comprises a violation of the victim's *negative* sexual autonomy in the sense that the victim is no longer free from unwanted sexual access or from having control over her sexual borders (McGregor, *ibid.* 112, see also *ibid.* 226)¹. On this account, rape amounts to the *sheer use* of the victim (Gardner and Shute, *ibid.* 212; see also Gardner, 2007c: 242).

In a similar vein, Brudner (2009) argues that the core part of criminal law concerns the protection of rights, understood as the unimpeded exercise of individual choice (Brudner, *ibid.* 31; see also Lavi, 2011: 440). Core offences – or “true crimes” (Brudner, *ibid.* 8 – 9) – comprise violations of individual rights, the most important of which for present purposes is the violation of the victim's bodily integrity (Brudner, *ibid.* 9; 171; Lavi, *ibid.*). Brudner develops a rights-based notion of “legal retributivism” (*ibid.* 19 – 20; 38 – 55). For Brudner, punishment is not justified solely on the basis of the harm caused by a criminal act but rather on the extent to which the criminal act interferes with the autonomous choice of the victim (*ibid.* 136; see also Brooks, 2011: 430 – 431). As different crimes can be distinguished “according to the importance to liberty of the interest harmed” (Brudner, *ibid.* 54), the seriousness of rape hinges on the fact that, as Archard argues, sex is central to our identity as human beings; we thus have a central interest in the non-violation of our sexual integrity (Archard, 2007: 391 – 392). As Hampton observes:

“Our humanity is deeply engaged in the sexual experience. Sexuality and humanity are deeply entangled ... Our sexuality is deeply important to each of us and in certain ways central to our sense of self” (Hampton, 1999: 147; 151, cited in Archard, *ibid.* 390; see also McGregor, *ibid.* 221 – 222, 224).

The rapist, however, treats his victim as something less than a self-respecting human being able to decide and speak for herself when it comes to her own sexuality; he treats her, in essence, as “just a sex-aid for [his] gratification” – the clearest imaginable objectification of

¹ Compare McGregor's notion of *positive* sexual autonomy which includes “the freedom to seek out opportunities, choose partners, engage in sexual activities that are mutually fulfilling, and also to choose the sexual orientation that suits” (*ibid.* 111).

her (Gardner and Shute, *ibid.* 213; see also Archard, *ibid.* 390, 393 and McGregor, *ibid.* 222, 225). Thus whilst a particular instance of rape may be aggravated by the physical and psychological harm caused to the victim¹, the wrongfulness of the rape itself remains even in the absence of such harms² (Gardner and Shute, *ibid.* 198; see also *ibid.* 212 and 217, and Gardner, *ibid.*). Rape, Gardner and Shute conclude, amounts to the most straightforward breach of another's right to sexual autonomy: it is "morally unlicensed objectification" (*ibid.* 215)³.

Hearing the victim: the use of victim statements in sentencing rape

The court's "duty to understand" in sentencing rape

In a useful discussion that draws on the work of Runciman (1983), Bottoms develops a model of sentencing theory that highlights the importance of the court being fully apprised of both the physical and psychological effects of an offence on the victim (Bottoms, 2010). For Bottoms, the essence of what he terms the court's "duty to understand" in imposing sentence is that it requires the judge to consider fully all the factual matters relevant to the sentencing decision before proceeding to make that decision (*ibid.* 27).

Bottoms explains that Runciman argues, firstly, that social theory consists of both "evaluation" (involving value-choices) and "understanding"; and, secondly, that there are three separate strands within the generic concept of "understanding": *reportage*, *explanation*, and *description* (Bottoms, *ibid.* 23). Insofar as sentencing is concerned, the end point of the judge's work in a specific case is a *decision*, namely the imposition of an appropriate sentence. In Runciman's language, in imposing sentence the judge necessarily engages in "evaluation" (*ibid.*). Bottoms notes that a key subsequent question then becomes: how can

¹ Discussed *supra*.

² For example, in cases where the victim is raped whilst unconscious due to the ingestion of alcohol or drugs (see Gardner and Shute, *ibid.* 196).

³ See also Ashworth (2015: 144 – 145) who examines the seriousness of the offence of rape through an application of the considerations set out in the scale originally conceived by von Hirsch and Jareborg (1991, see now von Hirsch, Ashworth and Jareborg, 2005: 186 – 219). The von Hirsch–Jareborg scale seeks to determine the effect of the typical case of particular crimes on the living standard of victims (Ashworth, *ibid.* 116). It is the foremost modern attempt to establish some parameters for ordinal proportionality (*ibid.*). Ashworth concludes that the seriousness of rape is reflected in the fact that it will usually result in humiliation and deprivation of the victim's privacy and autonomy to a significant degree, often compounded by a threat to physical integrity (*ibid.* 145).

“understanding”, in its various senses, help the sentencer towards a good solution to his evaluative task (*ibid.*)?

In elaborating Runciman’s thesis, Bottoms explains that the first strand of “understanding” – *reportage* – is the provision of an accurate factual account of what has happened on a given occasion or over a given period of time (*ibid.* 23 – 24). In the context of sentencing, reportage is provided in England and Wales by the prosecutor’s summary of the facts (see Wasik, 2014: 17 – 18) or, in appropriate cases, a *Newton* hearing¹ (see Wasik, *ibid.* 18 – 21). In Scottish criminal procedure the relevant reportage is provided by the Crown narrative (A. N. Brown, 2010: 160), the agreed narrative delivered by the Crown in the event of the accused having tendered a guilty plea (see McPherson, 2013: 141 – 147 and Chalmers et al, 2007a: 62 – 63) or, in appropriate cases, by a proof in mitigation (Gordon et al, 2015: para. 18-29.1; Brown, *ibid.* 161; Kelly, 1993: 15; Nicholson, 1992: 114)².

On Runciman’s account, the second strand of “understanding” is *explanation* – where reportage asks the “what” question, explanation asks the “why” question (Runciman, *ibid.* 19, cited in Bottoms, *ibid.* 24). At the sentencing stage, such “explanation” is provided by reports prepared at the request of the sentencer to provide additional factual information about the circumstances of the offence and the character of the offender. In English criminal procedure the relevant “explanation” may be provided by a pre-sentence report³ (see Ashworth, 2015: 432 – 434; Bottoms, *ibid.* 30; Wasik, *ibid.* 30 – 32) or a medical report⁴ (see Wasik, *ibid.* 32 – 33), whilst in Scotland such “explanation” may be provided by a criminal justice social work report⁵, a psychiatric report or a risk assessment⁶. In both jurisdictions, counsel for the accused will deliver a plea in mitigation (Wasik, *ibid.* 36 – 39; Ashworth,

¹ See the leading decision of *R v Newton*, (1982) 4 Cr. App. R. (S.) 388, the principles in that case being elaborated in *R v Cairns*, [2013] 2 Cr. App. R. (S.) 73.

² The Scottish proof in mitigation is broadly equivalent to the English *Newton* hearing and, as Brown (*ibid.*) reports, is relatively common.

³ See section 158 of the Criminal Justice Act 2003.

⁴ See section 157 of the 2003 Act.

⁵ See section 204 of the Criminal Procedure (Scotland) Act 1995.

⁶ A risk assessment is required if consideration is being given to the imposition of an extended sentence (see section 210A(4) of the 1995 Act; see also *Robertson v HMA*, 2004 J.C. 155 at paragraph [26]). On the risk assessment order and risk assessment report required prior to the imposition of an order for lifelong restriction under section 210F of the 1995 Act, see sections 210B and 210C respectively; see also McManus and Cherry, 2014: 46 – 47.

ibid. 434 – 435; Brown, *ibid.*; Solley, 2002: 320; Thomas, 2002: 481) which may also provide, in Runciman’s terms, the requisite “explanation”¹.

The third strand – *description* or, as Bottoms prefers, “appreciative description”² – meanwhile asks the question “what like”? (Runciman, *ibid.* 19, cited in Bottoms, *ibid.* 24). Bottoms observes that, as noted by Homans (1984), Runciman’s *description* – or Bottoms’ own *appreciative description* – can itself be divided into two sub-categories: *individual (appreciative) description* and *general (appreciative) description* (Bottoms, *ibid.*). For Runciman, appreciative description is an identifiably different task for the social scientist (or, for our purposes, for the sentencer) than either reportage or explanation (Bottoms, *ibid.* 25).

Insofar as sentencing for an offence of rape is concerned, the *general appreciative description* of the offence may, for example, be contained within a guideline judgment or set of sentencing guidelines which identify “standard” aggravating factors (see Bottoms, *ibid.* 32)³. The *individual appreciative description*, meanwhile, can be supplied through a victim personal statement in England and Wales⁴ or a victim statement in Scotland⁵. For Bottoms, the court will in certain cases need to receive such personalised and victim-orientated appreciative descriptions in order to maximise its understanding prior to imposing sentence (*ibid.* 33).

Bottoms explains that such evidence can add a valuable further dimension to the total evidence before the court and that, crucially, in the absence of such information the court might misread other (more “standardised”) evidence before it (*ibid.* 34). For example, the Crown narrative or prosecutor’s summary of the facts in a case of rape might contain information to the effect that, having been medically examined and having received medical treatment, the victim did not suffer any great physical trauma. Whilst, as we have seen⁶, this may well be true in many cases, such an account fails to consider the long-term psychological

¹ The importance of the plea in mitigation in sentencing is highlighted by Jacobson and Hough’s empirical study which found that it can often, if done effectively, be influential in the determination of sentence (Jacobson and Hough, 2007: 45; see also Ashworth et al, 1984: 43 – 45; Tombs, 2004: 43; 48; Millie et al, 2007: 256; and Roberts, 2010: 21).

² Bottoms considers that the term “appreciative description” better refers to the “internal view of the subject” (Bottoms, *ibid.* 25).

³ The development of sentencing guidelines for rape in England and Wales is considered in Chapter IV, with guidelines for the offence in other common law jurisdictions being considered in Chapter V.

⁴ Discussed *infra*.

⁵ Discussed *infra*.

⁶ See the discussion above under the heading ‘The physical effects of rape’.

trauma sustained by many rape victims and may well give an inaccurate impression of the harm caused by the particular offence¹.

Thus for Bottoms, the absence of *appreciative description* can significantly distort the sentencer's overall understanding of the seriousness of a particular offence: even accurate *reportage* (of the facts of the case) and *explanation* (in the sense of the offender's motivation, background and circumstances) can be misleading if the sentencer has no adequate appreciative-descriptive understanding of the nature of the offence and its effects on the victim (*ibid.* 35). Bottoms illustrates this point by reference specifically to an offence of rape:

“Would it be reasonable ... to say that a sentencing court that sentences a rapist while not fully appreciating, in the appreciative-descriptive sense, what it is like to be the victim of such a crime, ‘may fairly be told that it is acting on behalf of society while knowing little or nothing about what it is called upon to judge’? The answer, I think, has to be in the affirmative” (Bottoms, *ibid.*, citing Runciman, *ibid.* 34).

At the sentencing stage, reportage remains important but explanation and appreciative description are of generally enhanced significance (Bottoms, *ibid.* 39 – 40). Bottoms thus concludes that in appropriate cases (including those of particular complexity or seriousness, such as rape) the sentencing court has a duty to consider evidence relating to a victim-orientated appreciative description, principally as part of its overall “duty to understand” (*ibid.* 36 – 37). As Shapland and Hall (2010: 186) argue, proportionality in sentencing requires adequate information concerning the seriousness of the offence, including information about the effects on the victim and, in particular, the short or long term psychological harm to victims (*ibid.* 182). For Shapland and Hall, as for Bottoms, victim input is *necessary* for proper sentencing; sentencing without such victim input is “impoverished sentencing” (*ibid.* 186; see also Edwards, 2004: 976, 978). As noted above, the principal way in which sentencers in the UK are furnished with such victim-orientated appreciative descriptions of the physical and psychological effects of rape is through the use of victim personal statements.

¹ See the discussion above under the heading ‘The psychological effects of rape’. Bottoms illustrates this point by reference to the notorious ‘Ealing Vicarage Rape Case’ in 1986, the profound effect on the victim (Jill Saward), and the fact that the sentences of three and five years were imposed apparently without appreciating the enormity of the harm caused to her (see Bottoms, *ibid.* 19 – 23; 28 – 30).

The use of victim personal statements in sentencing rape in England and Wales

The ‘Victim Personal Statement’ (“VPS”) scheme was introduced in October 2001 (Ashworth, 2015: 439; Shapland and Hall, 2010: 177; Hall, 2009: 106; Doak et al, 2009: 651; Edwards, 2004: 977)¹. The scheme represents “a means of providing victims with a voice at sentencing” (Roberts and Erez, 2010: 248). A VPS gives victims a formal opportunity to say how a crime has affected them physically, psychologically and financially; it may provide helpful information to “complete the picture” of the offence and the court will take the statement into account when determining sentence (Ashworth, *ibid.* 440; Richardson et al, 2015: 620; Banks, 2015a: 125; Miller, 2014: 797; Godden, 2013: 110; Easton and Piper, 2012: 189; Shapland and Hall, *ibid.*; Hall, 2010: 156 and 2009: 106 – 107; Doak, 2008: 148; 150)².

The leading decision on the use of victim personal statements is *R v Perkins*, [2013] 2 Cr. App. R. (S.) 72 in which the Court of Appeal issued guidance as to their use and purpose (Ashworth, *ibid.* 439). In delivering the judgment of the court, the Lord Chief Justice (Judge) confirmed that a VPS provides a practical way of ensuring that the court will consider the harm caused by the offence, reflecting on the evidence of the victim about the “specific and personal impact of the offence”³. It was stressed, however, that the process does not create or constitute an opportunity for the victim to suggest or discuss the type or level of sentence to be imposed⁴. The court also emphasised that the decision whether to make a statement must be made by the victim personally; in particular, the perception should not be allowed to emerge that if a victim chooses not to do so the court may misunderstand or minimise the

¹ Current practice is governed by the Criminal Practice Direction (Sentencing) F, [2013] 1 W.L.R. 3164, as substituted by the Practice Direction (Criminal Proceedings: Various Changes), [2014] 1 W.L.R. 35 – see Richardson et al, 2015: 620 – 622.

² It should be noted, however, that the role of the victim in the sentencing process continues to generate controversy amongst academic commentators and practitioners. Debate has focused on the propriety of allowing victims input into the sentencing process and the way in which such input should be structured, with some commentators arguing that victim input may be detrimental to procedural and substantive justice, whilst also eroding defendants’ rights (see Hoyle, 2012: 411; Roberts and Erez, 2010: 232 – 233 and 2004: 223; Doak et al, 2009: 652 – 658, and Erez and Rogers, 1999: 218 – 219). Compare, for example, Ashworth (1993), (2000b) and (2015: 438 – 439) and Sanders et al (2001) with Erez (1999) and (2000), Roberts and Erez (2004) and Chalmers et al (2007b).

³ Paragraph [2].

⁴ *Ibid.*, see also paragraph [9](b). Thus, as explained by Doak (2008: 151) and Roberts and Erez (2004: 230 – 233; 2010: 233 – 234), a VPS has simply an expressive and communicative function. With regard specifically to sentencing for sexual assault, the empirical study by Miller (2014) found that “relational caring” – a strong moral sense of responsibility for the safety and emotional well-being of other potential victims – was a strong motivational factor that drove victims of such offences to make a victim personal statement (*ibid.* 802 – 806).

harm caused by the crime¹. The court concluded that “[p]roperly formulated statements provide real assistance for the sentencer”².

Ashworth (2010a: 384) notes that the Court of Appeal has stressed the importance of the VPS in sentencing cases of sexual assault. In *R v Ismail*, [2005] 2 Cr. App. R. (S.) 88, a case involving the rape of a 16 year old girl by forcible oral penetration, Lord Woolf CJ criticised the fact that no such statement was available to the sentencing judge and continued:

“In a case of this sort we consider that it should be routine to obtain a victim impact statement. It is most important that the sentencing judge has information as to that matter ... A victim impact statement, particularly when the victim is as young as 16, is absolutely essential ... [The impact on the victim] is an important factor which the courts must take into account in deciding the appropriate sentence”³.

Victim statements and rape sentencing in Scotland

Following a successful pilot scheme conducted between 2003 and 2005 (see Chalmers et al, 2007a, 2007b: 360, 2007c), victim statements⁴ were rolled out across the High Court and all sheriff courts sitting as courts of solemn jurisdiction in April 2009⁵. The purpose of a victim statement is the same as in England and Wales; it is intended to provide victims with the opportunity to make a statement as to the way in which, and the degree to which, the offence has affected or continues to affect them⁶ (see Gordon et al, 2015: para. 22-26.2.3; Ferguson and McDiarmid, 2014: 26).

Whilst the prosecutor is obliged to lay any victim statement before the court⁷, unlike practice in England and Wales⁸ there is currently no *duty* on the court to ensure that, if possible, a victim statement is available prior to the judge passing sentence in a case of rape. Given the generally low numbers of victims who take the opportunity to make victim statements in

¹ Paragraph [9](a).

² Paragraph [10].

³ Paragraph [8]. See also *R v Black*, [2006] EWCA Crim 2306 at paragraphs [28] and [29].

⁴ Under section 14 of the Criminal Justice (Scotland) Act 2003.

⁵ See the Victim Statements (Prescribed Courts) (Scotland) Order 2009 (S.S.I. 2009, No. 134).

⁶ Section 14(2) of the 2003 Act.

⁷ Section 14(5) of the 2003 Act.

⁸ See the discussion above.

Scotland (see Chalmers et al, 2007b: 367 – 369)¹, in many cases² the sentencing judge will have no information from the victim about what her experience of victimisation, and its aftermath, actually felt like (see Bottoms, 2010: 29). On Bottoms' account³, this means that whilst Scottish judges will be provided with suitable *reportage* (in the form of the Crown narrative) and suitable *explanation* (in the form of a criminal justice social work report, perhaps also a risk assessment, and the plea in mitigation), they will arguably not have an adequate victim-focused *appreciative description* of the physical and psychological trauma sustained by the particular victim (Bottoms, *ibid.*).

Conclusion

Whilst the majority of rape victims sustain no physical injury, various studies report a higher incidence of physical violence in sexual assaults committed by partners or acquaintances (e.g. Möller et al, 2012; McLean et al, 2011; Maguire et al, 2009). This chapter has argued that it is too narrow to focus purely on the physical harm caused by rape: it is essential to consider also the psychological effects on the victim. The studies discussed in this chapter (e.g. Mason and Lodrick, 2013; McFarlane et al, 2005a; Bergen, 1996) have also demonstrated, firstly, that such psychological effects can be extremely serious and, secondly, that the psychological consequences for victims of relationship rape appear to be even more severe than for victims of stranger rape. Together, these findings challenge stereotypes prevalent within society and indeed, as we shall see in Chapter III, within certain quarters of the Scottish judiciary that rapes committed within established relationships are somehow less serious and less violent than stranger rapes.

Whether a rape is committed in the course of an established relationship or whether the offender is a stranger to the victim, the offence remains “a unique violation” (Stern, 2010). Rape is an offence that strikes at the whole concept of human dignity and bodily integrity (Stern, *ibid.*); it violates the victim's right to sexual autonomy, it is a denial of her personhood, and amounts to “morally unlicensed objectification” (Gardner and Shute, 2000).

¹ The authors report that respondents in their study were more likely to make a victim statement in cases involving serious offences; however, the study still found that only 46 per cent of rape victims made a victim statement (Chalmers et al, *ibid.* 368). On the low take-up in England and Wales, see Sanders et al, 2010: 739 – 740 and Easton and Piper, 2012: 190.

² Up to 54 per cent of rape cases on the findings of Chalmers et al, *ibid.* (see above).

³ See the discussion above.

This chapter has argued that, particularly in light of the greater focus on the psychological harm caused by sexual offences contained within the new sexual offences Definitive Guideline, it is essential that the sentencing judge is fully appraised of both the physical and the psychological effects of rape on the particular victim. It has been shown that Bottoms' (2010) model of sentencing theory provides a useful framework in which to examine the judge's "duty to understand" in sentencing those convicted of rape. On Bottoms' account, the judge's "understanding" of a particular case will be shaped by the *reportage* of, for example, the prosecutor's summary of the facts and by the *explanation* of the pre-sentence report and plea in mitigation. Insofar as the effect on the victim is concerned, the sentencer's understanding of the individual case is aided to a degree by the *general appreciative description* of sentencing guidelines (at least in England and Wales). It is, however, the *individual appreciative description* supplied by a victim personal statement (VPS) that ensures the judge is fully aware of the offence's impact on the particular victim.

For Bottoms (*ibid.*) the court has a duty to consider such personalised and victim-orientated appreciative descriptions in sentencing rape. This is reflected in practice in England and Wales where the Court of Appeal has stressed the importance of judges being provided with a VPS when sentencing rape (*R v Ismail*). Although a similar scheme to that of the English VPS has operated in Scotland since 2009, the Scottish appeal court has yet to follow the approach of the English courts by stressing the importance of such victim statements in the sentencing of rape. It has been argued that this is a serious omission. It arguably leads to "impoverished sentencing" (Shapland and Hall, 2010) whereby the judge may not have an adequate appreciative description of the physical and, in particular, the psychological harm sustained by the victim when passing sentence for the offence.

Having explored the seriousness of the offence, this thesis continues to examine the response of the criminal courts to those convicted of rape. In particular, the sentencing practice of the courts in Scotland, England and Wales, New Zealand and Ireland is now considered.

CHAPTER III

SENTENCING RAPE IN SCOTLAND

Introduction

This chapter examines contemporary sentencing practice for the crime of rape in Scotland. The chapter begins by situating Scottish sentencing through an exploration of appellate guidance on the manner in which Scottish judges should undertake the task. In the absence of specific guidelines for sentencing rape, the chapter proceeds by considering a number of decisions in which the appeal court has made controversial observations on factors that may, in certain circumstances, mitigate the seriousness of an act of rape; specifically, the significance to sentence of a pre-existing, or existing, sexual relationship between a rapist and his victim. The chapter proceeds by considering the recent decision in *HMA v Cooperwhite*, 2013 S.C.C.R. 461, a Crown appeal against sentence in which a majority of the appeal court expressed a desire that sentencing guidelines for rape should be issued in the future. The chapter concludes with a discussion of the statutory requirement to consider allowing a discount in sentence to an offender who pleads guilty. By reference to *Murray v HMA*, 2013 S.C.C.R. 88 the problems raised by the guilty plea discount in relation to sentencing rape are considered.

Pragmatism, flexibility and individualisation – how Scottish judges sentence

The traditional approach to sentencing

Scottish judges have traditionally enjoyed a very wide sentencing discretion (Hutton, 1999: 173; Moody, 1995: 219 – 220). There was no concept of a “tariff” or “going rate” for specific offences (Hutton and Tata, 2010: 272) and the High Court of Justiciary sitting as a court of appeal¹ was traditionally slow to issue any form of sentencing guidelines (Tata, 2013: 238; A. N. Brown, 2010: 162; Hutton, 2008: 144; Sentencing Commission for Scotland, 2006: 15). In what remains the standard – and, to date, the only – Scottish treatise on sentencing law and practice, Nicholson reports that it was customary for judges hearing sentencing appeals to say no more than was strictly necessary for the disposal of the particular case (Nicholson, 1992: 177). The appeal court, Nicholson observes, had always

¹ Hereinafter “the appeal court”.

adopted “a pragmatic and individualised approach to questions of sentence” with cases being decided on their own facts and circumstances rather than on the basis of any declared principles (*ibid.*).

The traditional antipathy of the senior Scottish judiciary towards sentencing guidelines may have been due to a fear that such formal guidelines would inhibit some of the flexibility of Scottish sentencing practice (*ibid.* 178; see also *HMA v May*, 1995 S.C.C.R. 375¹). Senior judges in Scotland were traditionally suspicious of developing any policy on sentencing. They saw the existence of any such policy as potentially undermining the principles of judicial independence and individualised justice in which every case is considered unique and is dealt with as such (Hutton and Tata, *ibid.*; Tata, 2010: 197). The traditional approach of Scottish judges to sentencing is explained by Tombs:

“In producing coherent sentencing narratives, sentencers consider the ‘facts’ of the cases presented to them, the information provided about the circumstances surrounding the crime and offender in question, and create interpretive frameworks within which those facts and circumstances considered relevant are evaluated ... [I]n order to sentence individuals (as opposed to legal categories of offenders), [the Scottish judiciary] continue to draw on traditional sentencing values (for example, showing mercy) and their creative abilities in constructing meaningful stories about the crimes committed by contextualised individuals” (Tombs, 2008: 84 – 85).

This individualised approach to sentencing, in which judicial experience is a key factor, accords with practice in Canada and Australia. Indeed, in *Gemmell and others v HMA*, 2012 J.C. 223 a full Bench of the appeal court approved both the view of the Canadian Supreme Court of sentencing as “a delicate art” based on “competence and expertise”² and the view of the High Court of Australia that sentencing is an “instinctive synthesis” of the particular circumstances of the case and all relevant aggravating and mitigating factors³. In delivering the leading majority opinion in *Gemmell*, the Lord Justice Clerk (Gill) stressed that the assessment of sentence is “not a matter of precise arithmetical calculation” and noted that the

¹ At page 378 *per* the Lord Justice Clerk (Ross).

² See the decisions in *R v M (C A)*, [1996] 1 S.C.R. 500 and *R v L M*, [2008] 2 S.C.R. 163.

³ See the decision in *Markarian v The Queen*, [2005] H.C.A. 25. *M (C A)* and *Markarian* were approved at paragraph [59] of *Gemmell*, *supra*.

exercise “involves the making of an overall judgment from a consideration of numerous factors based on judicial experience”¹.

Lord Gill’s comments were later cited with approval by his successor as Lord Justice Clerk, Lord Carloway, in the recent decisions in *McGill v HMA*, 2014 S.C.C.R. 46² and *Ferguson v HMA*, 2014 S.C.C.R. 244. In *Ferguson*, for example, his Lordship explained, by reference to Lord Gill’s observations in *Gemmell*, that:

“Sentencing is ‘a delicate art based on competence and expertise’ rather than an exact science. A judge should not have to go through a formal checklist of procedures before arriving at the appropriate and proportionate sentence ... [The sentencing decision], although often involving a complex matrix of factual and legal material, will be instantaneous, if not quite instinctive, once the material is ingathered and understood”³.

Whilst the debate over whether sentencing should involve structured decision making or the sentencer’s instinctive or intuitive synthesis of the particular facts and circumstances has been played out in the Australian courts over a number of years with the High Court ultimately confirming instinctive synthesis as the correct sentencing methodology⁴, in *Gemmell*, *McGill* and *Ferguson*, Scotland’s two most senior judges have similarly come down in favour of the instinctive synthesis approach. Thus Scottish judges should aggregate and assess the factors bearing on a sentencing decision in a single, global process of reasoning (Brown, 2014b: 5 – 6). The decisions in *Gemmell*, *McGill* and *Ferguson* all stress the importance of judicial knowledge, experience and discretion in sentencing. This does not mean, however, that judicial sentencing discretion in Scotland is entirely unconstrained, or that it is exercised without any regard to issues of principle.

¹ *Gemmell*, *supra*, at paragraph [59]. See also the decision of Lord Philip in the earlier case of *R B v HMA*, 2004 S.C.C.R. 443 where his Lordship also conceptualised sentencing in terms of the Australian “instinctive synthesis” (paragraph [4]).

² Paragraph [13].

³ Paragraphs [103] and [104], references omitted. Lord Carloway also stressed the importance of the judge’s “knowledge and experience” in sentencing (paragraph [104]). His Lordship was later to make very similar comments in the course of a critique of the current system of English sentencing guidelines (see Carloway, 2014: 18 and 22).

⁴ See the decision in *Markarian*, *supra*.

The move towards sentencing guidelines in Scotland

Whilst discretion continues to be the hallmark of Scottish sentencing, the appeal court has a statutory power to issue sentencing guidelines. On one view, it would be *ultra vires* for the appeal court to give an exposition of sentencing policy in generality for similar cases (Shiels et al, 2015: 504). Section 118(7) of the Criminal Procedure Scotland Act 1995, however, allows the appeal court, when disposing of any solemn appeal, to “pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case” – in other words, to issue sentencing guidelines¹. Under section 197 of the 1995 Act, a court passing sentence “shall have regard” to any such opinion. Thus whilst the appeal court is empowered to issue guidelines, they are very different in nature from the system of presumptively binding guidelines in England and Wales under section 125(1) of the Coroners and Justice Act 2009². Whilst English judges *must follow* any sentencing guidelines which are relevant to the offender’s case unless satisfied that it would be contrary to the interests of justice to do so³, Scottish judges are directed merely to “have regard” to any appellate guidelines. Sentencing guidelines in Scotland are thus merely directory: there is no statutory presumption that they will be followed by the judge in the individual case.

Formal sentencing guidelines took some time to emerge from the appeal court. Leverick reports that although the first case to make explicit use of the guideline provisions under section 118(7) of the 1995 Act was *Du Plooy and others v HMA*, 2005 1 J.C. 1 on the operation of guilty plea discounts⁴, the appeal against sentence by the appellant in *Ogilvie v HMA*, 2002 J.C. 74 was remitted to a Bench of three judges so that guidelines could be issued on the appropriate sentences for cases involving the downloading of indecent images of children (Leverick, 2008a: 308; 2008b: 44). In *Ogilvie*, sentencing guidelines were issued without any explicit reference to section 118(7) of the 1995 Act (Leverick, *ibid.*).

¹ The same provision also exists in relation to summary appeals (see section 189(7) of the 1995 Act).

² See Chapter IV.

³ Section 125(1) of the Coroners and Justice Act 2009, discussed in Chapter IV.

⁴ See also Sir Gerald Gordon’s commentary to the decision in *Du Plooy* in the S.C.C.R. report (Gordon, 2003a: 651).

The change in the attitude of the senior judiciary towards the desirability of sentencing guidelines is well illustrated by the remarks of the present Lord Justice Clerk, Lord Carloway, in delivering the 2013 Sacro lecture. Having referred to the traditional approach of the appeal court in which – in an effort to preserve judicial flexibility in applying wide discretionary powers to the sentencing process – no more was said in disposing of sentence appeals than was necessary to deal with the particular facts and circumstances¹, his Lordship continued:

“[A]lthough a legal system ought to be careful and guard what is good in its traditions, built as they are upon the wisdom of generations, if the essentials are out of kilter with the fundamentals applied in all other similar civilised legal systems, it will often be time to look again at the domestic regime with a heavier degree of scrutiny” (Carloway, 2013: 10).

The number of formal guidelines issued under section 118(7) has increased substantially in recent years. Such guidelines tend to be issued either in relation to offences, or aspects of criminal procedure, about which there is public or political concern², or in relation to offences in which the appeal court perceives there to be a degree of disparity in the sentences imposed by the lower courts. For example, the *Du Plooy* guidelines on the practice of guilty plea discounting were later refined in *Spence v HMA*, 2008 J.C. 174 (and were subsequently tightened in *Gemmell and others v HMA*, 2012 J.C. 223)³; the refined and clarified guidelines were required because of the inconsistent manner in which the courts had implemented the original *Du Plooy* guidelines⁴. In *Lin v HMA*, 2008 J.C. 142 the appeal court issued guidelines for sentencing those convicted of cannabis cultivation; the guidance was considered necessary as there was significant disparity in the range of sentences imposed on cannabis “gardeners”⁵. Finally, the sentencing guidelines on social security fraud in *Gill v Thomson*, 2012 J.C. 137 were also issued due to disparity in the sentences imposed for such offences (or “divergences in view” between differently constituted sentencing courts, as the appeal court put it)⁶. Thus, sentencing guidelines have been promulgated by the appeal court in respect of a variety of offences either to direct judges on to the path of consistency in

¹ Discussed *supra*.

² See, for example, *HMA v Graham*, 2011 J.C. 1 in which revised and updated sentencing guidelines were issued for child pornography offences.

³ See also *Murray v HMA*, 2013 S.C.C.R. 88. The decisions in both *Gemmell* and *Murray* stressed the primacy of judicial discretion in guilty plea discounting. See the discussion *infra*.

⁴ See *Spence*, *supra*, at paragraph [14] and the discussion by Orr, 2007.

⁵ See *Lin*, *supra*, at paragraphs [12] and [13].

⁶ Paragraphs [11] and [19]. See also *HMA v Boyle*, 2010 J.C. 66 where guidelines were issued on the imposition of punishment parts in life sentences.

approach or to ensure that disposals are proportionate to the nature and seriousness of the offence in question¹.

The traditional concern of the Scottish judiciary that sentencing guidelines fetter the judge's discretion and inhibit the flexibility of the system has been addressed by repeated statements from the appeal court emphasising the discretionary nature of such guidelines. The court has, for example, stressed that sentencing guidelines "provide a structure for, but do not remove, judicial discretion"²; that sentencing should "always involve the sentencer's judgment and discretion"³; that guidelines are intended to help sentencers, rather than being "straitjacket[s] from which they cannot escape"⁴; and that they are not to be "interpreted and applied in a mechanistic way"⁵. It has been stated that, whilst guidelines "assist in the exercise of [the sentencer's] discretion", the decision as to the appropriate sentence lies with the sentencing judge alone⁶.

The appeal court's view that sentencing guidelines exist merely to guide and assist the sentencer accords with the actual sentencing practice of Scottish judges. In their study of how sentencers in Scotland and England and Wales differ in their sentencing decision making, Millie et al, for example, report that whilst most Scottish judges would welcome more *guidance* from the appeal court on sentencing, they were on the whole against the use of presumptively binding *guidelines* (Millie et al, 2007: 251).

¹ For similar observations in respect of the sentencing guidelines issued by the New South Wales Court of Appeal, see Anderson, 2004: 144 – 145.

² *HMA v Graham*, *supra*, at paragraph [21].

³ *Ibid.* at paragraph [22].

⁴ *Ibid.*

⁵ *Neill v HMA*, [2014] HCJAC 67 at paragraph [11], approved in *Geddes v HMA*, 2015 S.C.C.R. 230 at paragraph [18].

⁶ *Jakovlev v HMA*, 2012 J.C. 120 at paragraph [11]. See also the remarks of the Lord Justice Clerk (Gill) in *Mitchell v HMA*, 2012 J.C. 13 that sentencing guidelines are subject always to the discretion of the sentencer and, on appeal, to the discretion of the appeal court (paragraph [15]); the remarks of Lord Clarke in *Rippon v HMA*, 2012 S.C.C.R. 699 that guidelines "are of course only guidelines" and that "[e]ach case has to be decided on its facts" (paragraph [3]); and the remarks of Lady Paton in *Deeney v HMA*, 2015 S.C.L. 329 to the effect that whilst other authorities are helpful, they are "never definitive in sentencing" (paragraph [2]).

From *Ramage and Shearer* to *Cooperwhite* – appellate guidance on sentencing rape and relationship rape

(Limited) appellate guidance and the Crown’s request for sentencing guidelines: the decision in *Shearer*

A review of certain decisions of the appeal court from the late 1980s to the early 1990s suggests that sentences imposed by Scottish judges for rape were broadly in line with the sentencing guidelines then operating in England and Wales, namely the guidelines contained in *R v Billam and others*, (1986) 8 Cr. App. R. (S.) 48¹. In particular, Moody suggests that a starting point of five years tended to be seen as the appropriate figure by Scottish judges, although she acknowledges that judgments in Scottish sentencing appeals were at that time much terser and less developed than in England and Wales (Moody, 1995: 221). Similarly Robertshaw’s analysis of UK sentencing statistics suggests that there were marked similarities in outcome between the two jurisdictions (Robertshaw, 1994)².

The appeal court never formally approved the *Billam* guidelines, however, nor did it approve the revised sentencing guidelines in *R v Millberry and others*, [2003] 2 Cr. App. R. (S.) 31, let alone either of the Definitive Guidelines issued by the Sentencing Guidelines Council and the Sentencing Council³. Thus, despite the appeal court’s increased willingness to issue sentencing guidelines for a range of offences⁴, there are presently no sentencing guidelines for the crime of rape (see Morrison et al, 2000: para. N19.2). To date, the only real guidance that the appeal court has issued in relation to sentencing for this offence comprises certain observations in *HMA v Shearer*, 2003 S.C.C.R. 657.

In this Crown appeal against sentence⁵, the respondent was convicted after trial of raping the complainer “while she was unconscious or asleep and under the influence of alcohol”. The Crown appealed against the sentence of 18 months’ imprisonment imposed by the sentencing

¹ Discussed in Chapter IV.

² See also Kelly, 1993: 157 – 158 and Nicholson, 1992: 246 – 247.

³ See Chapter IV.

⁴ See above.

⁵ The appeal was thus heard by a Bench of three judges. The Crown were given the right of appeal against sentences which “appeared” to the Lord Advocate (as head of the prosecution service in Scotland) to be unduly lenient from 1 April 1996 by virtue of section 108(a)(i) of the Criminal Procedure (Scotland) Act 1995 (see now section 108(1)(a) and 108(2)(b)(i) of the 1995 Act). As the appeal court remarked in *HMA v McKinlay*, 1998 S.C.C.R. 201 at page 206, this meant that the Crown was entitled to take an interest in sentencing which it did not have before. For the background to the relevant legislation, see Maher, 1998.

judge on the ground of undue leniency. The case arose approximately a year after the law of rape in Scotland had been fundamentally altered by the decision in *Lord Advocate's Reference (No. 1 of 2001)*, 2002 S.C.C.R. 435 in which the appeal court held – overruling the decision of a Full Bench of five judges in *HMA v Sweenie*, (1858) 3 Irv. 109 – that the use of force was *not* an essential ingredient in the crime of rape¹. Thus, whilst the respondent in *Shearer* was convicted of rape, the facts were such as would, prior to *Lord Advocate's Reference (No. 1 of 2001)*, have been treated as “clandestine injury” – a common law offence comprising a particular form of indecent assault (Cowan, 2010: 155; Christie, 2000b: 517; Gane, 1992: 46 – 48).

In his report to the appeal court, the sentencing judge in *Shearer* remarked that in assessing the appropriate sentence and the culpability of the respondent, he took account of all the circumstances of the case, including the fact that the crime was committed because the complainer was incapable of giving her consent, rather than by the fact that her will and resistance were overcome by the use of force or the threat of force². The sentencing judge continued:

“It appears to me to be absurd to suggest, as appears to be suggested [by the Crown in its note of appeal], that (other considerations being equal) the culpability of an accused is the same in either case”³.

In allowing the Crown's appeal, quashing the sentence of 18 months and imposing a sentence of three and a half years' imprisonment, the appeal court expressed concern that the sentencing judge appeared to take the view that the respondent's culpability, and hence the appropriate sentence, should be affected materially by the fact that the complainer was incapable of giving her consent, rather than it being a case of her will and resistance having been overcome by the use of force or the threat of force⁴. In delivering the opinion of the court, the Lord Justice General (Cullen) explained:

¹ Paragraphs [29] and [44].

² *Shearer, supra*, at paragraph [6].

³ *Ibid.*

⁴ Paragraph [12].

“It is important, in our view, for the sentencer to avoid treating the fact that the complainer was asleep or unconscious as if it lessened the gravity of the accused having sexual intercourse with the complainer without her consent. While there are no doubt cases of rape in which the use of force or the threat of force call for very substantial sentences, we demur from the view that the present type of case should be regarded as substantially less serious, for example, than one in which the complainer was conscious but in which the least amount of force was used or threatened and the complainer experienced relatively little fear, distress or anger at the time. The culpability of the accused in each of these cases would, in our view, be broadly similar”¹.

The court did not consider that the sentences which had in the past been imposed for cases of clandestine injury provided “a reliable guide for the future” in sentencing cases of rape². In the course of its submissions, the Crown had invited the court to provide sentencing guidelines in terms of section 118(7) of the Criminal Procedure (Scotland) Act 1995 as to the range of sentences appropriate for cases involving the rape of “vulnerable females”³. Given the context of the appeal, it thus appeared that the Crown were specifically requesting sentencing guidelines for cases of what had traditionally been viewed as “non-forcible” rape⁴ in which the complainer had been raped whilst in a state of unconsciousness due either to voluntary intoxication or through the voluntary ingestion of drugs. The appeal court, however, expressly declined to issue sentencing guidelines, the Lord Justice General observing that:

“Cases of the type with which we are concerned in this appeal are relatively unusual in their circumstances. We have already indicated how such cases might be compared with cases in which the complainer is conscious. Beyond that it does not appear to us to be useful or practicable for us to indicate what sentences would be appropriate, since so much will depend upon the circumstances of the individual case”⁵.

¹ *Ibid.*

² Paragraph [13]. See, for example, *Paton v HMA*, 2002 S.C.C.R. 57 (two years’ imprisonment quashed on appeal and 300 hours community service substituted).

³ Paragraph [8]; see also Phillips, 2003: 6.

⁴ The distinction between “forcible” and “non-forcible” rape was one which had long been made by academic commentators (see Ferguson and Raitt, 2006: 188, 190; Chalmers, 2004: 145), by practitioners (see Scott, 2005: 68), and by the appeal court itself in a line of cases commencing with *Gilmour v HMA*, 1993 J.C. 15 at page 16 (*per* the Lord Justice General (Hope)) through, most recently, to *Lennie v HMA*, 2014 S.C.L. 848 at paragraph [14] (*per* the Lord Justice Clerk (Carloway)). In the recent decision of *Keaney v HMA*, 2015 S.C.C.R. 81, however, a Bench comprising Ladies Paton, Smith and Cosgrove disapproved this distinction, noting that the crime of rape is not subdivided into these two subsets; it is a single crime, the *mens rea* of which is unitary in character (paragraph [15] *per* Lady Smith).

⁵ Paragraph [13].

These comments were, with respect, unfortunate and it is disappointing that the appeal court did not accept the Crown’s invitation to provide sentencing guidelines for rape, albeit that the Crown appeared to have been seeking guidelines only in respect of cases of “non-forcible” rape. As the Lord Justice Clerk (Carloway) was later to observe in *HMA v Cooperwhite*, 2013 S.C.C.R. 461¹, experience has shown that cases of the type under consideration in *Shearer* are not at all unusual². In his commentary to *Shearer*, Sir Gerald Gordon Q.C. notes that although the decision made it clear that “rape is rape is rape, whether or not the complainer is asleep”, it also indicated that if the complainer was asleep or was unconscious then the crime would perhaps be at the lower end of the scale of seriousness (Gordon, 2003b: 663). The decision in *Shearer*, Sir Gerald observes, shifted the emphasis from the consciousness or otherwise of the complainer to the degree of force (or, perhaps, degrading behaviour) employed by the accused (*ibid.*).

Perhaps the most important aspect of the decision in *Shearer* is the fact that it has been used by judges as a form of anchoring point in sentencing cases of rape. In *Cooperwhite, supra*, for example, the Lord Justice Clerk observed that although the appeal court in *Shearer* ultimately declined to issue sentencing guidance for non-forcible rape, the sentence of three and a half years’ imprisonment imposed by the court “has undoubtedly been used by sentencers as the benchmark”³.

Appellate views on sentencing relationship and acquaintance rape: the decisions in Ramage and Petrie

In addition to the “benchmark” for sentencing rape set by the decision in *Shearer, supra*, the appeal court has also provided certain guidance on an issue in sentencing which is not uncontroversial: namely, the extent to which the nature of a pre-existing relationship between a rapist and his victim palliates the sentence imposed. The appeal court’s traditional view was that the existence of either an existing or a pre-existing sexual relationship between the

¹ Discussed *infra*.

² Paragraph [19].

³ Paragraph [19]. For a recent example, see *J D v HMA*, 9 December 2014, unreported (three years’ imprisonment imposed on appeal; see the case note by Brown, 2015a: 7 – 8). See also *Crombie v HMA*, 24 September 2008, unreported (extended sentence of five years with a custodial term of four years imposed on appeal where the appellant had raped the disabled complainer in her own bed whilst both were under the influence of alcohol; *Shearer, supra*, applied).

parties was a mitigating factor in sentencing. In *Ramage v HMA*, 1999 S.C.C.R. 592¹, for example, the appellant pleaded guilty to assaulting the complainer by, *inter alia*, pinning her down, digitally penetrating her, and by raping her. The appellant and the complainer had had a sexual relationship some six years before the commission of the offence. They had become friendly again about four months before the offence; the appellant would often call at the complainer's house late at night whilst drunk and, whilst the complainer would occasionally let him into her house, she made it clear that she did not wish to resume a sexual relationship. On the night of the offence, the appellant had spent around three hours drinking with the complainer and one of her female friends. When her friend left about 3 a.m. the complainer asked the appellant to leave. The appellant refused and, when the complainer rejected his advances, he proceeded to rape her, saying "You know you want it". The complainer was distressed and was later found crying and shaking.

The appellant was sentenced to five years' imprisonment and appealed on the basis that the period of imprisonment was excessive; in particular, it was submitted that the sentencing judge had not taken account of the fact that the appellant had resumed a relatively close relationship with the complainer. Whilst the appeal court considered this to be "a serious crime"², it considered that the previous sexual relationship between the parties and the fact that they had resumed their friendship "could perhaps justify treating the case as being less serious than would normally be the case with a rape offence"³. Although the court acknowledged that the complainer had in no way given the appellant cause to think that she wished to resume their sexual relationship, it considered that "there was perhaps room for the appellant to delude himself as to what the position was on that point"⁴. In the circumstances, the court quashed the sentence of five years' imprisonment and imposed a sentence of three years and six months⁵.

As the Lord Justice Clerk was later to observe in *HMA v Cooperwhite*, 2013 S.C.C.R. 461⁶, the court's repetitive use of the word "perhaps" in its opinion in *Ramage* shows that it may have felt "somewhat uncomfortable with what it was saying" and, indeed, with the import of

¹ A decision of a Bench of two judges.

² Page 594.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Discussed *infra*.

its dictum¹. Nevertheless, as his Lordship also noted, the decision in *Ramage* seems to be clear authority for the proposition that a prior sexual relationship between a rapist and his victim is to be regarded as a mitigating factor by the Scottish courts². The Lord Justice Clerk concluded his review of the decision in *Ramage* by noting that, following the logic of the dictum, mere acquaintanceship between the parties may be a mitigating factor in sentencing, at least compared with the rare “stranger rape”³.

It may be thought that *Ramage*, decided as it was in June 1999, simply reflected judicial views about the nature and effect of rape – albeit erroneous and outdated – at the time. This is not to condone the court’s decision to allow the appeal against what was, arguably, already a lenient sentence for relationship rape. Rumney, for example, demonstrates that there was a considerable research literature on rape trauma available at the time of the decision in *Ramage* which discussed the very serious emotional and psychological effects of marital and relationship rape (Rumney, 1999: 254 – 257)⁴. This literature would have been available to the court had it requested submissions from counsel or, alternatively, had the court conducted its own researches. This was never likely to happen, however, as the appeal against sentence in *Ramage* was heard at the time when the appeal court decided cases on their own facts and circumstances, rather than on the basis of any declared principles, and in which the court often said little more than was strictly necessary for the disposal of the particular case (Nicholson, 1992: 177)⁵.

In Scotland, as in England and Wales, complete marital immunity from prosecution for rape had traditionally been recognised (see Hume, 1797: 306). Hume’s statement that a husband “cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort” (*ibid.*) was plainly outdated in modern society (MacDonald, 1989: 208; Ferguson, 1993: 197) and was, indeed, an indefensible anachronism (Jones, 1989: 279). The statement was declared unsound in *Stallard v HMA*, 1989 S.C.C.R. 248 and the rule that marriage

¹ *Cooperwhite, supra*, at paragraph [18].

² *Ibid.*

³ *Ibid.*

⁴ Discussed further in Chapter IV under the heading ‘The first phase – the *Roberts* and *Billam* guidelines’. See also the discussion in Chapter II under the heading ‘The effect on the victim’; the critiques by Warner, 2000, and Kift, 1995, along with the studies by Petrak et al, 1997; Bergen, 1996; Koss et al, 1994; Rothbaum et al, 1992; Dahl, 1989; Kilpatrick et al, 1987; and Finkelhor and Yllo, 1985, discussed therein also being available at the time of the court’s decision in *Ramage* in 1999.

⁵ See also the discussion above under the heading ‘The traditional approach to sentencing’.

implied irrevocable consent to sexual intercourse was abolished¹. The decision in *Ramage*, however, suggested that even if *legally* spousal immunity from prosecution for rape had long since been abolished, the idea that stranger rape was more serious than relationship rape persisted amongst sentencers in Scotland.

The appeal court's view that relationship rape was less serious than stranger rape was confirmed some 12 years later in *Petrie v HMA*, 2012 J.C. 1². In *Petrie* the appellant was convicted after trial of assaulting and repeatedly raping a woman with whom he had an on-going two year sexual relationship and with whom he co-habited. The offence took place following the couple's return from a party at which they had both drunk to excess. The complainer awoke in the early hours of the morning to find the appellant touching her private parts. Despite her protestations that she did not want to engage in sexual activity, the appellant assaulted the complainer by digitally penetrating her, restraining and biting her, and by raping her twice. The sentencing judge considered this to be a frightening and distressing attack. Contrary to the position in *Ramage, supra*, the judge regarded the fact that the appellant had been in a relationship with the complainer at the time of the offence as being an *aggravating* factor since, in his view, it involved a breach of trust. The judge imposed an extended sentence³ of 10 years, comprising a custodial term of seven years and an extension period of three years.

On appeal, it was argued for the appellant – by reference to *Ramage, supra* – that the custodial term was excessive as the judge had given insufficient weight to the mitigating circumstances, in particular the relationship between the parties. In allowing the appeal, quashing the custodial term of seven years and substituting a custodial term of five years, the court said this:

“While the element of breach of trust involved in any domestic assault is an important factor in determining the appropriate penalty, the significance of an ongoing sexual relationship in determining the penalty in a case such as this, where the gravest feature is that there was penile penetration and the conviction is for rape, is a much more complex issue. The fact of the relationship is one of a complex host of facts and circumstances that have to be taken into

¹ The English courts followed suit two years later in *R v R*, (1991) 93 Cr. App. R. 1 (see the discussion in Chapter IV).

² A decision of a Bench of two judges. Although reported in the 2012 volume of *Justiciary Cases*, the court's opinion was issued on 12 January 2011.

³ Under section 210A of the Criminal Procedure (Scotland) Act 1995.

account in determining the appropriate sentence. In this case we consider that the trial judge gave insufficient weight to the fact that the couple had regularly engaged in sexual intercourse over a period of two years up to the night of the offence ... [H]aving regard to the whole circumstances, particularly the ongoing sexual relationship between the [parties], the custodial term imposed can properly be described as excessive”¹.

Thus, whilst *Petrie* affirmed the appeal court’s view that the existence of a prior sexual relationship between a rapist and his victim is a factor – perhaps, as the Lord Justice Clerk later noted in *Cooperwhite, supra*², a significant factor – that will serve to mitigate a sentence imposed for rape, the decision arguably goes further in positively *rejecting* the position of the sentencing judge that the existence of such a relationship should be regarded as an aggravating factor due to the breach of trust involved in the offence. This is a concerning development since, in re-affirming the position taken in the earlier decision in *Ramage*, the court in *Petrie* adopted what the Lord Justice Clerk later described as “a radically different approach” towards the sentencing of “relationship rape” and “acquaintance rape” from the approach taken by the English courts³. As we will see in Chapter IV, the Court of Appeal (Criminal Division) has long since taken the opposite view to the Scottish appeal court.

Unlike in *Ramage*, decided in 1999, the English sentencing guidelines on the relevance of a relationship between a rapist and his victim were available to the court in *Petrie*. It appears, however, that neither the advocate depute (who at the time had 12 years’ experience of prosecuting in the High Court) nor counsel for the appellant (an experienced solicitor advocate) drew the English guidelines to the attention of the court; indeed, the submissions by counsel for the appellant went no further than referring to the earlier decision in *Ramage*.

This is unfortunate given that, as O’Malley has noted, sentencing systems which operate with wide judicial discretion and which rely exclusively on appellate review – such as that currently operating in Scotland – place the onus on counsel as much as on judges to develop principled sentencing through a dynamic reliance upon existing precedents and the fashioning of new ones (O’Malley, 2001: 136). When one also considers the observations of the Lord Justice Clerk (Gill) in *HMA v Roulston*, 2006 J.C. 1 that it is helpful to look at the sentencing guidelines applied by the English courts and to consider, to the extent that they are relevant,

¹ Paragraphs [7] and [8].

² Paragraph [20].

³ See the opinion of the Lord Justice Clerk in *Cooperwhite, supra*, at paragraph [22].

the specific factors on which those guidelines are based¹, it can be seen that the court in *Petrie* was not favoured with comprehensive submissions on comparative sentencing jurisprudence. This was most regrettable for, as the court was later to observe in *Rodger v HMA*, 2015 S.C.L. 250, when sitting in its appellate capacity the High Court of Justiciary is (generally) a court of final instance and hence a supreme court; as such, it should be afforded the assistance of a commensurately high quality of advocacy from those who undertake the important professional responsibility of presenting appeals to it².

The result in *Petrie* was a decision which appears to have been reached in ignorance both of English sentencing practice and the empirical research and research literature on rape trauma upon which English sentencing jurisprudence in this area has long been based³. In adhering to a radically different view of the seriousness of relationship and acquaintance rape from that taken by the English courts, the court in *Petrie* perpetuated a view of rape that is outdated and at odds with modern societal views on the nature of the offence⁴. In disapproving the sentencing judge's view that the existence of the sexual relationship between the parties in *Petrie* fell to be regarded as an aggravating factor, the court can arguably be seen as regarding sexual violence by an intimate partner as less serious than stranger rape (see generally Martin et al, 2007: 332; McGregor, 2005: 6, 65, 91 – 92; Kift, 1995: 60, 76, 80). This is perhaps a position with subtle undertones of “victim blaming”: one in which some victims of rape (specifically, those who have never engaged in sexual intimacy with their attackers) are seen as more “deserving” in the eyes of the courts than others, with concomitant implications for the length of sentence. As Kift has noted, however, no amount of consensual sex is likely to lessen the humiliation and degradation associated with rape, let alone the fear generated and the resultant harm suffered, regardless of the relationship between the victim and the offender (Kift, *ibid.* 91).

The decisions in *Ramage* and *Petrie* are arguably demonstrative of a flawed approach to the sentencing of rape by the appeal court. The decisions demonstrate the court's tendency to categorise the victim in terms of being an ex-partner or an acquaintance of the offender and to *then* determine the gravity of the offence and the culpability of the offender for sentencing purposes according to the victim's designated status. This is criticised by Kift, who notes

¹ Paragraph [17]. See also Carloway, 2014: 18.

² Paragraph [13].

³ See the discussion in Chapter IV.

⁴ See the discussion in Chapter II.

that in following this approach, assumptions are made by courts as to the likely effect of the crime on the victim that bear no relationship to the *particular* victim's reaction (Kift, *ibid.* 74). For Kift, such methodology consequently fails to validly assess the offender's culpability (*ibid.*).

Although in his commentary to *Petrie*, Sheriff Tom Welsh Q.C. acknowledges that sentencing judges have "a most unenviable task" in such cases (Welsh, 2011: 429), the learned Sheriff appears to express a degree of unease about the import of the decision. In particular, Sheriff Welsh raises the question of whether there is any validity in the notion that the rape for the victim will be any less traumatic or less psychologically damaging just because the parties had consensual sexual intercourse in the course of a stable relationship in the past (*ibid.* 428 – 429)? These issues, and others, were subsequently considered by a Bench of three judges in *HMA v Cooperwhite*, 2013 S.C.C.R. 461.

Towards sentencing guidelines for rape: the decision in Cooperwhite

The need for consistency and predictability in sentencing rape: the majority view in Cooperwhite

In *Cooperwhite* the Crown unsuccessfully appealed the *cumulo* sentence of six years' imprisonment imposed on the respondent following his conviction after trial of two charges of rape committed against two former partners. The respondent had raped his wife on a single occasion in 2002 when she was pregnant and suffering from medical complications that made it unsafe to have intercourse. Having later divorced his wife, the respondent also raped his subsequent partner on at least four occasions in 2009 and 2010 after she rejected his advances; throughout the period during which these rapes took place, consensual intercourse also occurred. The Crown appealed the *cumulo* sentence on the grounds of undue leniency, it being submitted that the sentence did not reflect the gravity of the offences, the need for retribution and deterrence, and the need to protect the public¹. Counsel for the respondent accepted that the sentence was not at the higher end of the scale appropriate for offences of this type. Counsel submitted that the decisions in *Ramage v HMA*, 1999 S.C.C.R. 592 and *Petrie v HMA*, 2012 J.C. 1² demonstrated that "familiarity" between a rapist and his victim

¹ Paragraph [12].

² Considered above.

was regarded by the courts as a factor justifying a more lenient sentence than might normally have been thought appropriate; thus the sentence of six years' imprisonment had been within the range open to the trial judge¹.

The court (a Bench of three judges chaired by Lord Justice Clerk Carloway) reached the view that the sentence imposed on the respondent was not unduly lenient "without any difficulty"². The court considered that the trial judge had taken all of the various factors into account when selecting the period of custody "which would inevitably follow from a conviction for rape"³. In particular, the trial judge had balanced the repeated nature of the offending in relation to the second complainer against the respondent's lack of previous offending and his assessment as presenting a low risk of re-offending. The court concluded that although the sentence of six years was lenient, it still fell within the range of sentences reasonably open to the trial judge⁴.

In delivering the leading opinion, the Lord Justice Clerk proceeded to make a number of further observations regarding sentencing for the crime of rape⁵. His Lordship observed that the significance to sentence of a pre-existing, or existing, sexual relationship between a rapist and his victim was "one of continuing debate"; he considered it to be an issue which the appeal court should address, firstly, in the interests of certainty in sentencing policy and, secondly, to promote consistency amongst sentencers⁶. Whilst the court had intended to use the Crown's appeal in *Cooperwhite* as a vehicle through which to issue sentencing guidelines, it became clear at the hearing that the possibility of the court issuing such guidelines had not been canvassed with the parties with the result that the court did not hear submissions on the general points of principle involved⁷.

The Lord Justice Clerk accepted, by reference to *Ramage, supra*, and *Petrie, supra*, that it was "undoubtedly correct" that the existence of both a pre-existing and an existing sexual relationship between a rapist and his victim has been regarded by the appeal court, in the past,

¹ Paragraph [14].

² Paragraph [15].

³ Paragraph [16].

⁴ *Ibid.*

⁵ At paragraphs [17] to [23].

⁶ Paragraph [17].

⁷ Paragraph [17].

as a mitigating circumstance¹. Although not specifically referred to by either the Crown or by counsel for the respondent in *Cooperwhite*, the Lord Justice Clerk stated that the court was conscious of the work which had been undertaken in other jurisdictions in an attempt to provide the judiciary with useful guidance on how to approach sentencing in rape cases generally and in cases of relationship rape in particular². In this regard, the Lord Justice Clerk referred to the English guidelines then in force (the Sentencing Guidelines Council's Definitive Guideline on the Sexual Offences Act 2003 (SGC, 2007a)) and to the earlier decision of the Court of Appeal (Criminal Division) in *R v Millberry*, [2003] 2 Cr. App. R. (S.) 3³. With regard specifically to relationship rape, the Lord Justice Clerk observed that the principle in England and Wales (following *Millberry* and paragraph 2.6 of the Definitive Guideline, *supra*) was that sentencers should adopt the same starting point for relationship rape or acquaintance rape as for stranger rape⁴. This, the Lord Justice Clerk noted, was "radically different" to the approach in Scotland; this difference would, his Lordship stated, "require to be expressly addressed in any future consideration"⁵. The Lord Justice Clerk concluded with the following comments:

"It is of course possible to say that, in relation to any sentence for criminal conduct, each case will depend upon its facts and circumstances; as indeed it will. However, it is important that general principles are established in order to ensure both consistency and predictability insofar as that is possible and desirable. First-instance courts normally benefit from clear statements of principle from the appellate courts, as was the case in England following *Millberry* [...]"⁶.

In an address delivered some five months later, the Lord Justice Clerk stressed the importance of statements of principle in sentencing and of sentencing guidelines laid down by the appeal court, rather than the traditional "haphazard and inconsistent approach with no defined principles" (Carloway, 2013: 25). In *Cooperwhite* the Lord Justice Clerk was clear that any future guideline judgment from the appeal court dealing with sentencing for relationship or acquaintance rape should be informed by a comparative consideration of sentencing practice, both in England and Wales and in other common law jurisdictions:

¹ Paragraphs [18] and [20].

² Paragraph [21].

³ *Ibid.*

⁴ Paragraphs [21] and [22].

⁵ Paragraph [22].

⁶ Paragraph [23].

“In a matter of such importance as that under consideration, the court would hope also to have the benefit of guidance from the jurisdictions in the Commonwealth and beyond when it comes to address the significance of the relationship between a rapist and his victim in the future”¹.

Judicial sentencing discretion “soundly exercised”? Lord Eassie’s partial dissent in Cooperwhite

Although Lord Bracadale concurred both with the decision to refuse the Crown’s appeal and with the Lord Justice Clerk’s comments regarding the need for sentencing guidance², the third member of the Bench, Lord Eassie, expressed certain reservations with regard to the latter point. Lord Eassie was not persuaded that there was any evident need for the court to issue sentencing guidelines for rape³. His Lordship stated that he was not aware of “any wide discrepancy or difference of approach in the sentencing of those convicted of rape and similar sexual offences” in Scotland. Lord Eassie considered that the discretion of sentencing judges was “generally soundly exercised”; rape cases, his Lordship stated, tended to be “particularly ‘fact specific’”; relationships between complainers and accused “may vary considerably in their nature and quality”; and, for these reasons, Lord Eassie declared that he had reservations as to whether, in practice, the issuing of guidelines in this area would prove to be of any real assistance to sentencing judges⁴. His Lordship concluded by stating that, in his view, it is necessary to “exercise caution when considering sentencing guidance issued in other jurisdictions” as the general sentencing framework may be very different and may include provisions not available in Scotland⁵.

Lord Eassie’s comments on the need for sentencing guidelines for rape, and particularly his comments on the desirability of the appeal court undertaking reviews of comparative sentencing jurisprudence, are regrettable for the reasons discussed in Chapter I⁶ – sentencing lends itself particularly well to comparative treatment. His Lordship’s comments are also inconsistent with the appeal court’s recent practice in considering issues of principle in

¹ Paragraph [23].

² See *Cooperwhite, supra*, at paragraph [30].

³ Paragraph [28].

⁴ *Ibid.* His Lordship did, however, agree that the Crown’s appeal in the present case should be refused (paragraphs [25] and [26]).

⁵ Paragraph [29].

⁶ Discussed under the heading ‘Why a comparative study?’

criminal law more generally. The appeal court under the tenure of Lord Hope¹ and his successor, Lord Rodger², became more willing to seek appropriate comparative material in the jurisprudence of foreign systems of law (see Christie, 2000a: viii). Insofar as appeals against sentence are concerned, this trend continued under the tenures of Lord Cullen³ and Lord Hamilton⁴. In recent years, a number of extremely important sentence appeals have been decided by Benches chaired by Lord Justice Clerk Gill (as he then was) in which extensive reference was made to Commonwealth and English authority⁵. The present Lord Justice Clerk has continued the trend of examining questions of principle in sentencing by reference to case law from other jurisdictions⁶.

What is more, the comments by Lord Eassie in *Cooperwhite* appear to be at odds with recent dicta from the appeal court which has stressed the importance of considering comparative sentencing jurisprudence in sentence appeals. Although in the comparatively recent past the appeal court may not have entirely approved of attempts by counsel to cite English case law in appeals against sentence (Lord Rodger of Earlsferry, 2010: xviii), it is now recognised that where principles of sentencing law and practice are in issue, it is legitimate – and perhaps even expected – for the court to look to jurisprudence beyond its own case law for assistance⁷.

This comparative approach is to be commended since, as we have seen⁸, it is only in recent years that the appeal court in Scotland has begun to address questions of principle in appeals against sentence. Thus, the sentencing jurisprudence of the English courts and of the Supreme Courts of Commonwealth jurisdictions (particularly the High Court of Australia⁹) is

¹ Lord Hope of Craighead (former Deputy President of the Supreme Court of the UK) held the office of Lord President and Lord Justice General between 1989 and 1996.

² The late Lord Rodger of Earlsferry (former Justice of the Supreme Court of the UK) held the office of Lord President and Lord Justice General between 1996 and 2001.

³ Lord Justice General between 2001 and 2005. See, for example, *Du Plooy and others v HMA*, 2005 1 J.C. 1 and *HMA v Macpherson*, 2004 S.C.C.R. 579.

⁴ Lord Justice General between 2005 and 2012. See, for example, *HMA v Boyle*, 2010 J.C. 66 and *Lin v HMA*, 2008 J.C. 142.

⁵ See, for example, *HMA v Roulston*, 2006 J.C. 1, *HMA v Graham*, 2011 J.C. 1 and *Gemmell and others v HMA*, 2012 J.C. 223.

⁶ In addition to his Lordship's opinion in *Cooperwhite*, *supra*, see also *McGill v HMA*, 2014 S.C.C.R. 46, *Gorrie v MacLeod*, 2014 S.C.C.R. 187 and *HMA v Callander*, 2014 S.C.C.R. 135.

⁷ See *McCourt v HMA*, 2012 J.C. 336 at paragraph [16] *per* the Lord Justice General (Hamilton) and *HMA v Roulston*, 2006 J.C. 1 at paragraph [17] *per* the Lord Justice Clerk (Gill).

⁸ See the discussion above under the heading 'The move towards sentencing guidelines in Scotland'.

⁹ For a discussion of the role of the High Court of Australia in developing and refining sentencing principles in recent years, see Odgers, 2012: 18; Warner, 2007; Edney and Bagaric, 2007, Chapter 4; Edney, 2005: 3 – 4 and 20 – 29; and Colvin, 2003: 102.

both more sophisticated and more refined than in Scotland. That the Scottish courts are well able to critically examine English and Commonwealth sentencing jurisprudence in order to assess the appropriateness, or otherwise, of incorporating the principles into domestic case law is illustrated by the decisions in *HMA v McManus*, 2010 J.C. 84, *SS v HMA*, [2015] HCJAC 63 and *Murray v HMA*, 17 February 2015, unreported.

In *McManus* the appeal court declined the Crown's invitation to apply the English sentencing guidelines on assault (SGC, 2008) in a case involving assault to severe injury, permanent disfigurement, and danger of life. The court stated that it did not find reference to the guidelines to be of any assistance as English law catalogues offences against the person in various, different ways (c.f. the common law of assault in Scotland)¹. The SGC Definitive Guideline was later replaced (from 13 June 2011) with the Definitive Guideline on Assault issued by the Sentencing Council (Sentencing Council, 2011). In *SS*, a "shaken baby" case, the appeal court similarly declined to apply the new English guidelines on assault, which had been cited by counsel for the appellant, for substantially the same reasons. The court noted that the Definitive Guideline concerns English statutory offences; how those offences related to aggravated common law assault as that offence is understood in Scotland was, the court observed, unclear².

Finally, in *Murray* – a case involving the supply of heroin – the court went further and specifically disapproved the approach of the sentencing sheriff in which he had referred to, and applied, the English sentencing guidelines on drugs offences (Sentencing Council, 2012b). In allowing the appeal and halving the sheriff's sentence of three years' imprisonment the court made it clear that the sentencing sheriff had erred in applying the English guidelines for two reasons: firstly, because they are prepared in the context of a different sentencing scheme, and secondly because the current system of English guidelines comprises a more formulaic approach to sentencing than the approach adopted by the Scottish courts³.

¹ Paragraph [15]. See also *Flynn v HMA*, 2003 J.C. 153 at paragraph [87].

² Paragraph [46].

³ Paragraphs [3] and [4]. See the case note by Brown, 2015b.

One final point which did not concern the court in *Cooperwhite*, but which has generated considerable discussion in other cases in both the appeal court and the Court of Appeal (Criminal Division)¹ in recent years, is the issue of granting a discount in sentence to an accused who pleads guilty². The difficulty which guilty plea discounting can cause in cases of rape in particular is well illustrated by the recent decision in *Murray v HMA*, 2013 S.C.C.R. 88.

“Too generous and too readily given”? Guilty plea discounts in sentencing rape

The development of guilty plea discounting in Scotland

Unlike England and Wales³, guilty plea discounting is a relatively recent aspect of criminal procedure in Scotland⁴. Until recently, sentencers were directed to follow the approach to guilty plea discounting set out in *Spence v HMA*, 2008 J.C. 174 in which the appeal court issued sentencing guidelines as to the expected levels of discount. These levels took the form of a sliding scale and were set at one third for a guilty plea tendered at the first opportunity at an accelerated pleading diet⁵, one quarter for a plea tendered at a preliminary hearing, and a maximum of one tenth for a plea tendered on the day of the trial. As Leverick observes, this sliding scale was effectively identical to the guidelines issued by the Sentencing Guidelines Council in England and Wales (SGC, 2007b; see Leverick 2008a: 44 and 2008b: 311).

Use of the sliding scale was, however, disapproved by the Lord Justice Clerk (Gill) in *Gemmell and others v HMA*, 2012 J.C. 223 when a full Bench of five judges considered various questions of principle relating to the practice of guilty plea discounting. For present purposes, the important aspects of his Lordship’s opinion⁶ comprised certain observations regarding the discretionary nature of guilty plea discounting. Lord Gill considered that “the

¹ See Chapter IV.

² As noted above, the respondent in *Cooperwhite* was convicted after trial and so no issue of a guilty plea discount arose.

³ See the discussion in Chapter IV.

⁴ The statutory provisions relating to guilty plea discounts in Scotland are contained in section 196 of the Criminal Procedure (Scotland) Act 1995 which are in broadly similar terms to the corresponding English provisions (see section 144 of the Criminal Justice Act 2003). For a full discussion of the development of sentence discounting in Scotland, see Nicholson, 1981: 218 – 219; Nicholson, 1992: 191; Leverick, 2003: 267 and 2004: 360 – 369; Thomson, 2004: 1; Shiels, 2005: 9 – 10; Leverick, 2010: 148; Tata, 2010a: 203 – 204, and Leverick, 2012: 233.

⁵ Namely, the procedure set out under section 76 of the 1995 Act.

⁶ Paragraphs [1] to [106].

court's discretion to allow a discount should be exercised sparingly and only for convincing reasons"¹; that the size of any discount should be left to the sentencer's discretion, subject only to "the broad principle that, in general, the discount will be the greater the earlier the plea"²; and that as sentencing guidelines provide a structure for, but do not remove, judicial discretion, then where a sentencer has given cogent reasons for allowing a particular discount, or for declining to apply a discount at all, it would only be in exceptional circumstances that the appeal court should interfere³.

The only other member of the court in *Gemmell* to address this issue was Lord Eassie. Although his Lordship agreed that the allowance of a discount was, "in its essential nature, an exercise of discretion", his Lordship advocated recourse to the *Spence* sliding scale in all but exceptional circumstances⁴. Thus, sentencers were left to choose between Lord Gill's discretionary approach to guilty plea discounting and the more certain, although arguably more formulaic, approach advocated by Lord Eassie (see Leverick, 2012: 235). Although Lord Gill's discretionary approach was the subject of academic criticism with one commentator arguing that it was expressed in vague terms and had the potential to result in inequalities in the application of guilty plea discounts (see Leverick, *ibid.* and 2013: 261 – 262), the discretionary approach to discounting was later affirmed by a Bench of three judges in *Murray v HMA*, 2013 S.C.C.R. 88.

The decision in Murray v HMA

The decision in *Murray* throws into sharp relief the problems that face the judge in discounting a sentence where the offender has pleaded guilty to rape or other serious sexual offences for, as Leverick observes, it is in cases where the offence is particularly morally repugnant that the tensions surrounding guilty plea discounting are most acute (Leverick, 2014: 348 and 2013: 263). In *Murray* the appellant pleaded guilty at an accelerated pleading diet to various sexual assaults, including rape, committed against three elderly female residents of the care home in which he worked. The offences were described by the sentencing judge as "truly shocking", depraved, and as comprising an immense breach of

¹ Paragraph [77].

² Paragraph [78].

³ Paragraph [81].

⁴ Paragraph [145].

trust¹. All of the victims suffered from severe dementia; the appellant admitted that he had targeted them because they were incapable of communication and were thus unable to report the crimes². The offences only came to light when a colleague of the appellant discovered him sexually assaulting one of the victims late at night³.

On appeal against the *cumulo* sentence of seven years' imprisonment (discounted from a headline sentence of nine years) imposed by the sentencing judge on the ground that a supposedly insufficient discount had been allowed, the appeal court exercised its rarely used statutory power⁴ to *increase* the appellant's sentence *ex proprio motu*⁵. The court in *Murray* comprised three of Scotland's four most senior judges including, *inter alios*, Lord Gill (who had since been appointed Lord Justice General) and Lord Justice Clerk Carloway⁶. In delivering the leading opinion, Lord Gill referred to the opinion he had delivered some 12 months previously in *Gemmell, supra*, and reiterated that an accused is not *entitled* to any particular discount in return for a guilty plea, that the issue is one for the sentencer's discretion, and that in order to maintain public confidence in the criminal justice system and the credibility of sentences, this discretion should be exercised sparingly and only for convincing reasons⁷. The sentence of seven years' imprisonment was held to be unduly lenient. The appellant's sentence was increased to nine years and six months' imprisonment (discounted from a headline sentence of 12 years)⁸.

The appeal court thus applied a discount of approximately a fifth to the appellant's sentence, as opposed to the discount of one third which would have been indicated under the earlier guidelines in *Spence, supra*. As Leverick observes, the factors in *Murray* that pointed to a substantial discount weighed heavily as there were significant benefits to avoiding a trial: there was no need for the witnesses and relatives of the victims to endure a distressing wait for what would have been a harrowing trial (Leverick, 2014: 348 and 2013: 263). The factors

¹ Paragraph [13].

² Paragraph [10].

³ Paragraphs [4] to [7].

⁴ Under section 118(4) of the Criminal Procedure (Scotland) Act 1995.

⁵ Although the court's ability to do so raises questions of fairness to the appellant (see, in particular, Shead, 2008: 415), Shaw argues that claims of unfairness are outweighed by public interest considerations in seeing the court respond to unduly lenient sentences when it has the chance to do so, either on the basis of protecting the public from potentially dangerous offenders or in order to affirm public confidence in the criminal justice system (Shaw, 2014: 270).

⁶ As Sir Gerald Gordon Q.C. observes, this appears to have been the first occasion in which Scotland's two most senior judges sat together in a three judge sentence appeal (Gordon, 2013: 95).

⁷ Paragraphs [16] and [17].

⁸ Paragraphs [27] to [29], the Lord Justice Clerk and Lady Paton concurring.

that pointed to a longer sentence, however, such as the need to protect the public against a potentially dangerous offender and particularly the need for a disposal that reflected the moral gravity of the crime, weighed equally heavily (Leverick, *ibid.*). The appeal court did not face an easy task in reconciling these concerns (Leverick, 2014, *ibid.*). Indeed it was close to impossible to find a way to balance the competing public interest concerns in applying a guilty plea discount in Murray's appeal (Leverick, 2013: 264). As Leverick explains:

“If discounts are too low (or are uncertain) then the rate of guilty pleas may decline, resulting in financial costs to taxpayers (as the state will need to pay for more trials) and emotional costs to those involved on a personal level. If discounts are too high, other aims such as public protection and public confidence in the sentencing process may be compromised ... Whether or not a guilty plea should be rewarded with a discount and, if so, the appropriate amount, is a question to which there is no easy answer” (*ibid.*).

On one view the court in *Murray* may have been uncomfortable with awarding a larger discount because of the abhorrent nature of the appellant's crimes (Leverick, *ibid.* 263). As Lord Gill observed in *Gemmell, supra*, the allowance of substantial discounts may cause the sentencing decisions of the criminal courts to lose credibility and in this way may erode the authority of the courts generally¹. His Lordship also expressed concern about the possible perception of injustice that guilty plea discounts can engender, particularly in cases – such as *Murray* – where severe sentences are deserved² (see also Darbyshire, 2000: 901 – 902).

The judicial move away from allowing substantial discounts in particularly serious cases is also evident in the recent decision in *Geddes v HMA*, 2015 S.C.C.R. 230. In this case the appellant tendered an early plea of guilty to a charge of causing death by dangerous driving whilst drunk, having been almost twice the then legal limit. The appeal court again stressed that the selection of the appropriate discount is primarily a matter for the sentencing judge³; however, it was also held that “the high level of headline sentence” (11 years' imprisonment in this case) is a factor that the sentencer can take into account in fixing the level of discount⁴.

¹ Paragraph [74].

² Paragraph [76].

³ Paragraph [21].

⁴ *Ibid.*

This is an important observation; it suggests that a lesser discount may be warranted when sentencing offences with inherently high levels of harm and culpability (Brown, 2015c: 6).

The application of a guilty plea discount to serious cases such as rape can result in the sentencing process coming to be seen simply as an administratively convenient bargain unrelated to the offender or the moral gravity of his conduct (Mack and Roach Anleu, 1997: 132 – 133). The difficulty with treating offence seriousness as a relevant factor in discounting, however, is that guilty plea discounting is not a practice that lends itself to justification on intrinsic moral grounds and – as Lord Gill himself acknowledged in *Gemmell*¹ – it is most convincingly justified on the basis of cost savings to the criminal justice system (Leverick, 2014: 348). These benefits stem from cases where the offence is morally reprehensible just as they do from others and – again as Lord Gill recognised in *Gemmell*² – the seriousness of the offence is appropriately reflected in the headline sentence, *not* the discount (Leverick, *ibid.*).

Even so, Sheriff Christopher Shead observes that the decision in *Murray* is evidence that a strand of judicial thinking has emerged which holds that “discounts have become too generous and too readily given” (Shead, 2013: 95) – a view arguably shared by the court in *Geddes, supra*. The Sheriff concludes that, given “the current measure of uncertainty” in the operation of guilty plea discounts and the width of the discretion available to sentencers, it seems likely that the issue will again come to be revisited in an appeal before much longer (*ibid.*).

Conclusion

There are currently no formal sentencing guidelines for the offence of rape in Scotland, the appeal court having declined the Crown’s invitation to issue guidelines in *Shearer, supra*. Whilst this is regrettable, what is most concerning is the fact that such appellate guidance as does currently exist for the sentencing of relationship or acquaintance rape is based on a flawed and outdated understanding of the typical effects – particularly the psychological effects – of rape upon the victim. The appeal court has indicated its desire to address this problem when a suitable case arises (see *Cooperwhite, supra*). *Pace* Lord Eassie’s comments

¹ Paragraph [34].

² Paragraphs [27] to [32] and [37] to [39].

in *Cooperwhite*, it is entirely legitimate, and indeed beneficial, for the appeal court to examine comparative sentencing jurisprudence where such material discusses or sets out sentencing principles which are inadequately covered by domestic case law. The appeal court, it is submitted, should undertake this exercise with a view to issuing sentencing guidelines for rape.

Sheriff Frank Crowe makes the important point that as Scotland is a far smaller jurisdiction than England and Wales, the appeal court lacks the caseload to hear a full range of appeals arising from the same type of offence and to subsequently promulgate comprehensive guidelines (Crowe, 2013: 26). With regard to the decision in *Cooperwhite*, the Sheriff notes that, given the appeal court's lack of opportunity to commission research into a type of offending, it is to be hoped that a number of appeals against sentence in cases of rape can be gathered for consideration by the court with a view to its issuing sentencing guidelines (*ibid.*).

We have seen how the Lord Justice Clerk in *Cooperwhite* indicated an intention to issue guidelines for rape, principally for reasons of consistency and predictability in sentencing¹. Given the “radically different” approach of the Scottish courts to sentencing relationship and acquaintance rape, I suggest that there is a need for the appeal court to issue detailed guidelines on sentencing in this area. Such guidelines should be included as part of a wider guideline under section 118(7) of the Criminal Procedure (Scotland) Act 1995 on sentencing rape generally (see Brown, 2013b: 7 – 8). The guideline should also, it is submitted, address the vexed question of the guilty plea discount in sentencing sexual offences. In particular, the guideline ought to confirm the discretionary based approach to discounting set out by the Lord Justice General (Gill) in his opinions in *Gemmell, supra*, and *Murray, supra*; it should also reiterate that the seriousness of sexual offences is reflected in the headline sentence and not in any discount granted by the sentencer (c.f. *Geddes, supra*).

Given the Lord Justice Clerk's stated desire for the appeal court to be addressed on the sentencing jurisprudence of “the jurisdictions in the Commonwealth and beyond” when it comes to frame guidelines for rape², the following two chapters examine and critique sentencing practice in England and Wales and in other common law jurisdictions in an attempt to ascertain what form the intended Scottish guidelines should take.

¹ See paragraph [23].

² *Ibid.*

CHAPTER IV

FROM GUIDANCE TO GUIDELINES – SENTENCING RAPE IN ENGLAND & WALES

Introduction

This chapter examines the development of sentencing guidelines for the crime of rape in England and Wales. The chapter begins by considering the traditional approach to sentencing by the English courts. The importance of judicial discretion is noted along with the judicial preference for consistency in the approach to sentencing offenders, rather than seeking uniformity in sentencing outcomes. The various forms of rape guideline are then considered by reference to each stage in the evolution of English sentencing guidelines: from the early guideline judgments issued by the Court of Appeal through to the Definitive Guideline on Sexual Offences issued by the Sentencing Council which came into effect on 1 April 2014. At each stage the relevant case law is examined. The question of whether to allow a reduction in sentence for an offender who pleads guilty – a common issue at every stage of the development of English rape guidelines – is then considered.

From *Billam* to the Definitive Guideline: the development of rape sentencing guidelines

Player reports that the English judiciary has traditionally insisted that a degree of judicial discretion is essential for the just application of legal rules and principles since rigid rules are incompatible with the sentencer's duty to take account of the complex combination of facts that arise in individual cases (Player, 2012: 248). The result, as Player observes, has been a judicial focus on conformity (or uniformity) of *approach* to sentencing, rather than seeking a conformity (or uniformity) of *outcome* (*ibid.*). As Lane CJ observed in delivering the judgment of the Court of Appeal (Criminal Division) in *R v Bibi*, (1980) 2 Cr. App. R. (S.) 177:

“We are not aiming at uniformity of sentence; that would be impossible. We are aiming at uniformity of approach”¹.

¹ Page 179. See also Ashworth, 1987: 34 (“The goal must be to reduce disparity by increasing uniformity of approach”).

Whilst uniformity of approach is a difficult thing to measure, it is – as Wasik observes – “unbelievable” that a system which operates sentencing guidelines is no more consistent or principled than one which operates without them (Wasik, 2008: 259). Ashworth and Roberts explain that the sentencing guideline movement in England and Wales has evolved rapidly in recent years: the development of English guidelines can be seen, broadly, as comprising four “phases” (Ashworth and Roberts, 2012: 881 – 882 and 891): firstly, the handing down of guideline judgments by the Court of Appeal; secondly, the issuing of draft sentencing guidelines by the Sentencing Advisory Panel (SAP); thirdly, the issuing of definitive guidelines by the Sentencing Guidelines Council (SGC); and finally, the establishment of the Sentencing Council which replaced the SAP and SGC. The development of English guidelines for the offence of rape will now be considered against the background of each of the four “phases” described by Ashworth and Roberts.

The first phase – the Roberts and Billam guidelines

Guideline judgments by the Court of Appeal

In the first phase of the development of English sentencing guidelines, the Court of Appeal began in the 1960s to set out various statements of general principle in certain of its judgments in appeals against sentence. As Ashworth observes, this was a slow and essentially reactive way by which to develop sentencing principles; however, the Court of Appeal began to develop a more active role in this regard from the 1980s through to the late 1990s (Ashworth, 2009: 243 and 2013: 16). The Lord Chief Justice would select a particular appeal case (or several cases listed together) in which to deliver a guideline judgment. The court’s judgment would set out the parameters of sentencing for a range of variations of the crime in question (Ashworth, 2009: 243; Wasik, 2008: 253; Henham, 1995: 220 – 221). The Court’s aim in issuing such guideline judgments was to foster consistency in sentencing (Ashworth and Roberts, 2013: 3). The judgments often set out one or more starting points along with various aggravating and mitigating factors (Easton and Piper, 2012: 47 – 48; Ashworth, 2001: 73). As Thomas noted of the system as it then operated, such guideline judgments began to provide a framework for sentencing the offence in question around which sentencers could analyse the circumstances of the individual case (Thomas, 1987: 19; see also Ranyard et al, 1994: 203 – 204).

The Roberts guidelines

The Court of Appeal first provided general sentencing guidelines for the crime of rape in early 1982 in its judgment in *R v Roberts and Roberts*, (1982) 4 Cr. App. R. (S.) 8. It was held that an immediate custodial sentence was called for in all but wholly exceptional circumstances, the length of the sentence depending on all the circumstances¹. A number of general aggravating factors were set out². Whilst the guidance in *Roberts* was an important first step in the development of sentencing guidelines for rape, nothing explicit was said about the level of sentencing in either normal or aggravated cases (Temkin, 2002: 31).

Despite it being well settled in the English common law of sentencing that a plea of guilty should normally attract a reduction in sentence, with the scale of the reduction being greater the earlier the plea was intimated (see Thomas, 1979: 50, Ashworth, 2015: 179, and the decision in *R v De Haan*, (1968) 52 Cr. App. R. 21), the issue of the guilty plea discount was not considered by the court in *Roberts*. Thus, as Temkin concludes, the *Roberts* guidelines were too vague to be of much assistance (*ibid.*).

The Billam guidelines

Amidst mounting public concern about sentencing in rape cases (Temkin, 2002: 30 – 33; Rumney, 2003: 870), more extensive guidance for sentencing rape was subsequently provided by the Court of Appeal in the guideline judgment in *R v Billam and others*, (1986) 8 Cr. App. R. (S.) 48. Ten cases of rape or attempted rape involving 12 different appellants were listed together to give the court the opportunity to “restate principles”, as the Lord Chief Justice (Lane) put it, which were to guide judges on sentencing in what was acknowledged to be a “difficult and sensitive” area of the criminal law³. Thus, on one view, and as Thomas notes in his commentary to the decision, the sentencing guidelines were intended to restate the practice of the court rather than establish a new approach (Thomas, 1986: 348). Temkin, however, considers that the guidelines were necessary to deal with the relatively lenient approach to sentencing rape adopted by some judges (Temkin, *ibid.*)⁴.

¹ Page 10 *per* the Lord Chief Justice (Lane).

² See pages 10 and 11.

³ Page 49.

⁴ Temkin’s view is persuasive and is, arguably, to be preferred to Thomas’s view of the *Billam* guidelines amounting to merely a restatement of the *status quo* given that, in the course of delivering the new guidelines, the court in *Billam* specifically stated that sentences imposed for rape were too low (*Billam, supra*, at page 50, discussed *infra*).

The comments with which the Lord Chief Justice prefaced the new sentencing guidelines demonstrated that the court was aware of changing societal attitudes towards the seriousness of the offence and, in particular, to the psychological harm sustained by victims of rape¹. His Lordship observed that it was the experience of the court that, in recent years, the “nastiness” of offences of rape had increased, with what had hitherto been regarded as “incredible perversions” now being commonplace².

Having reviewed the statistics on the length of custodial sentences imposed for the crime of rape in 1984, the court considered that sentences imposed for rape were too low³. Thus – *pace* Thomas, *ibid.* and the court’s apparent declaration to the contrary⁴ – one of the major rationales for the guidelines in *Billam* was to increase levels of sentence for rape: the decision was clearly one manifestation of the increasing seriousness with which the offence had come to be viewed by society since the 1970s (Ranyard et al, 1994: 205; see also Warner, 2002: 506). Whilst the court acknowledged that the variable factors in cases of rape were so numerous that it was difficult to lay down guidelines as to the proper length of sentence in terms of years⁵, it proceeded to set out guidelines based on four separate starting points which reflected different levels of seriousness.

Firstly, for a rape committed by an adult without any aggravating or mitigating features, five years’ imprisonment was said to be the starting point in a contested case. Secondly, a starting point of eight years’ imprisonment was set for cases in which a rape was committed by two or more men acting together; by a man who had broken into or otherwise gained access to a place where the victim lived; by a person who was in a position of responsibility towards the victim; or by a person who abducted and held the victim captive. Thirdly, for an offender who had carried out a campaign of rape against a number of different women and who was thus to be regarded as representing more than an ordinary danger to the public, the starting point was said to be 15 years or more. Finally, the court considered that where the offender’s behaviour displayed what was described as “perverted or psychopathic tendencies or gross

¹ See the discussion in Chapter II.

² Page 49.

³ Page 50.

⁴ See above.

⁵ *Ibid.*

personality disorder” and where he was likely to remain a danger to women for an indefinite time, a life sentence would not be inappropriate¹.

The court also set out certain aggravating factors². These factors broadly mirrored the guidance provided in *Roberts, supra*, and included the effect on the victim. The court stated that the effect on the victim, whether physical *or* mental, was “of special seriousness”³. Thus the court in *Billam* went further than the court in *Roberts* by directing sentencers to have particular regard to the physical and mental effect of the offence on the victim.

The court went on to say that where any one or more of the aggravating factors was present the sentence should be substantially higher than the figure suggested as the starting point⁴. The court, however, attached no specific weight to the various aggravating factors either singly or in combination (Thomas, *ibid.*; Ashworth, 2000a: 113 – 114). Ashworth considers this to be a major shortcoming of the guideline: its vagueness on this point made it difficult to state how closely *Billam* governed sentencing for rape (*ibid.* 114).

Guidance was also provided in *Billam* on the effect of a guilty plea on sentence. The court considered that the extra distress which giving evidence can cause to a victim meant that a guilty plea, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence, although the amount of such a reduction would depend on all the circumstances⁵.

With regard to the behaviour of the victim prior to the offence, the court stated that it was not a mitigating factor that the victim may have exposed herself to danger by acting imprudently; similarly, her previous sexual experience was irrelevant⁶. This, as Thomas notes, finally laid to rest the notion that a victim could be found to have been “contributory negligent” in her own rape (Thomas, *ibid.* 349; c.f. Warner, 2002: 518). Although an offender’s previous good character was said to be only of minor relevance in sentencing, the court allowed some scope

¹ Pages 50 and 51.

² Page 51.

³ *Ibid.* As Temkin notes, however, the effects of rape are almost invariably serious or very serious for its victims and it was not entirely clear what extra evidence was necessary for the effect to constitute an aggravating feature (Temkin, 2002: 40). Temkin suggests that serious injury (whether physical or psychological) would seem to qualify, as presumably would pregnancy or disease (*ibid.*).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

for mitigation in circumstances where the victim had behaved in a manner such as to suggest to the offender that she would consent to sexual intercourse¹. Finally, with regard to the sentencing of offenders under the age of 21, it was noted that most offences of rape are so serious that a non-custodial sentence cannot be justified, and that in the ordinary sense the appropriate sentence would be one of youth custody, following the term suggested as terms of imprisonment for adults but making some reduction to reflect the offender's youth².

Towards consistency of approach – an assessment of the Billam guidelines

Whilst the *Billam* guidelines were far more specific than those set out in *Roberts* (Temkin, 2002: 33), the post-*Billam* sentencing practice of the courts was criticised by some commentators who suggested that sentencers had failed to adhere to the *Billam* guidelines (Warner, 2002: 504; Rumney, 1999: 259 – 265; Ranyard et al, 1994: 209 – 215; c.f. Robertshaw, 1994: 344 – 345 and Moxon, 1988: 11 – 13). In spite of this, the *Billam* guidelines were widely used by the courts and were consistently applied in subsequent appellate cases (O'Malley, 2013c: 659; Wells and Quick, 2010: 536; Banks, 2003: 484; Lacey and Wells, 1998: 401; Henham, 1994: 506 – 507)³. The Court of Appeal regularly referred to the guidelines in hearing appeals against sentence following convictions for rape and, as Temkin observes, they had a clear impact in driving up sentences for this offence (Temkin, *ibid.* 36 – 37; see also Lacey and Wells, *ibid.* and Moody, 1995: 235, fn. 72).

Temkin reports that, on the whole, the Court of Appeal applied the starting points set out in *Billam*: whilst both the five and eight year starting points were observed, sentences were frequently imposed well above the level of eight years where aggravating features were present (Temkin, *ibid.* 37 – 38). Indeed, having undertaken a useful review of case law from the late 1980s and early 1990s, Temkin concludes that some decisions of the Court of Appeal suggested a rule of thumb by which a year was added to the eight year starting point for each aggravating factor present in a given case (*ibid.* 38 – 39)⁴. Temkin also demonstrates that previous convictions for rape also substantially increased the offender's sentence (*ibid.* 39)

¹ *Ibid.*

² *Ibid.*

³ See also *R v Millberry*, [2003] 2 Cr. App. R. (S.) 31 (discussed *infra*) at paragraph [5].

⁴ Although rape by a person in a position of trust tended to attract sentences at a lower level – see Temkin, *ibid.* 38 and the cases cited therein.

and that the list of aggravating factors set out in *Billam* were not treated as exhaustive by the courts (*ibid.* 40).

The *Billam* guidelines were thus an important step both in guiding sentencers towards consistency in sentencing rape and, crucially, in developing judicial understanding of the emotional and psychological effects of the offence on the victim. As with other guideline judgments issued by the Court of Appeal – an innovation which, as Ashworth notes, the senior judiciary could rightly be proud (Ashworth, 2001: 74) – the decision in *Billam* provided direction to sentencers in a judge-friendly way, and based on judicial experience, in order to shape judicial sentencing discretion without constraining it too tightly (Ashworth, *ibid.*).

One important area which the court in *Billam* did not consider – and, indeed, given the state of the criminal law in 1986, *could not* consider – was the approach to sentencing in cases of marital rape (Warner, 2000: 595). As the law stood at the time that the *Billam* guidelines were issued, a husband could not be guilty of raping his wife. The “marital immunity” rule was later abolished in *R v R*, (1991) 93 Cr. App. R. 1, a decision upheld by the House of Lords the following year in *R v R*, (1992) 94 Cr. App. R. 216 (Munro, 2014: 751). Thus, following *R v R* – from a definitional perspective at least – the law of rape made no distinction between marital and extra-marital rape (Rumney, 1999: 243): women had the right to full protection from violation whatever the status of the attacker (Fenwick, 1992: 871). In delivering the judgment of the Court of Appeal in *R, supra*, for example, Lane LJ remarked that “a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim”¹. Shiels observes that, whilst this observation was made in the context of removing a husband’s immunity from rape, it could also be taken to mean that the *Billam* sentencing guidelines should apply equally in cases of marital rape (Shiels, 1992: 366).

As sentencing for marital rape was not an issue for the court in *Billam*, the relevance of a past or present sexual relationship with the victim was not mentioned (Warner, *ibid.*); neither did the court consider sentencing for relationship or acquaintance rape other than to state, as we have seen, that the victim’s previous sexual experience was “irrelevant”². As Rumney observes, however, the broad wording of this part of the *Billam* guidelines did not prevent the

¹ Page 8.

² *Billam, supra*, at page 51 discussed above.

courts from using the existence of a previous sexual relationship between the victim and the offender as a mitigating factor in sentencing (*ibid.* 247).

Development of the Billam guidelines: relationship/marital rape and the decisions in Berry, Thornton and W

As Rumney (1999: 247) and Warner (2002: 512) both observe, the first post-*Billam* case to consider the relevance to sentence of a pre-existing relationship between an offender and his victim was *R v Berry*, (1988) 10 Cr. App. R. (S.) 13 in which the appellant pleaded guilty to the rape of a former partner. In allowing the appeal against a sentence of six years' imprisonment and substituting a sentence of four years, the court remarked that the rape of a former sexual partner *may* be less serious than rape committed by a stranger. The court considered that whilst the woman who is raped by a stranger will inevitably be "violated" and "defiled", these features are not always present to the same degree when the offender and the victim had previously had "a long-standing sexual relationship"¹. The implication seemed to be that although a previous settled relationship may have some mitigating effect in a case of rape, that effect is relatively limited (Thomas, 1988: 325).

Rumney criticises the decision as fundamentally flawed in a number of respects: the court provided little explanation for the basis of its decision and failed to consider the realities of stranger and marital rape (*ibid.* 247 – 248; see also Rumney, 2003: 871 – 872 and Warner, 2002: 512 – 513 and 2000: 600 – 601). Underlying the court's reasoning was the assumption that the fact that a woman had previously had *consensual* intercourse with her partner would then diminish the gravity of any subsequent *non-consensual* intercourse (Rumney, 1999: 248). For Rumney, this approach was based on a false premise: that rape and consensual intercourse are in many respects the same thing, whilst many victims of marital rape in fact perceive the act as one of violence and humiliation (*ibid.*)².

The decision in *Berry* thus de-emphasised the violence and trauma which are inherent within the act of non-stranger rape (*ibid.*). The Court of Appeal failed to provide a detailed rationale for its view of non-stranger rape (Rumney, 2003: 871 – 872; 2002: 1282). The decision in *Berry* distorted the application of the *Billam* guidelines (*ibid.*). The reasoning in *Berry* was

¹ *Per* Mustill LJ at page 15.

² See the discussion in Chapter II under the heading 'The psychological effects of rape'.

nevertheless subsequently approved by the Court of Appeal in *Attorney General's Reference (No. 7 of 1989) (sub nom R v Thornton)*, (1990) 12 Cr. App. R. (S.) 1 where it was held that the fact that the parties had previously co-habited for some two years was “a factor to which some weight can be given by the sentencing court”¹.

Thornton was subject to trenchant academic criticism. The *ratio* of the decision was that the length of cohabitation was a factor in sentencing cases of relationship rape (Rumney, 1999: 249; see also Warner, 2000: 597 and Fenwick, 1992: 871). For Fenwick, this raises the unwelcome possibility of sentencing in cases of marital and relationship rape involving “a crude categorisation of domestic rapists”: at one end of the sentencing scale would be husbands of long standing who lived with their wives at the time of the rape and, at the other, would be former lovers who had cohabited with the victim for only a few months (Fenwick, *ibid.*).

As in *Berry*, the court in *Thornton* did not explain how or why a long-term sexual relationship between a rapist and his victim should reduce the seriousness of the rape (Rumney, *ibid.*). Indeed, it could be argued that the consequences for the victim of being raped by a long-term partner would be *greater* than for victims who had been in such relationships for a shorter period of time: to be raped by a man with whom the victim had shared intimacy and trust over a long period might be viewed as particularly shocking and psychologically devastating (*ibid.*; see also Wells and Quick, 2010: 537; Temkin, 2002: 41; Warner, 2002: 512 – 513 and 2000: 602).

The appropriate sentence for rape committed by a husband upon his wife was subsequently considered in *R v W*, (1993) 14 Cr. App. R. (S.) 256 – the first case in which the Court of Appeal gave consideration to a case of marital rape where the victim and the offender were still co-habiting at the time of the offence (Rumney, *ibid.* 250; see also Temkin, *ibid.* 42, Wasik, 2001: 316 – 317 and Warner, *ibid.* 597). In refusing the appeal against a sentence of five years' imprisonment, the court distinguished between marital rapes involving neither violence nor threats, where more lenient sentences could be given, and those where the conduct was “gross” and did involve threats or violence, where the *Billam* standard should apply².

¹ Per Lane CJ at page 6.

² Per Taylor CJ at page 260; see also Temkin, 2002: 42.

The decision in *W* was criticised as being inconsistent with the guidance in *Billam* since, on an application of that guidance, the sentence should have been considerably higher than five years on account of the presence of various aggravating factors (see Rumney, *ibid.* 250 – 251; see also Lacey and Wells, 1998: 401; Warner, *ibid.* 598 – 599; Temkin, *ibid.* 43; Wells and Quick, 2010: 536 – 537). For commentators such as Rumney, Warner and Temkin (*ibid.*) the decision in *W* appeared to indicate that the courts were unwilling to view even grave cases of marital rape in the same manner as stranger rapes. Throughout the 1980s and 1990s, sentences imposed for marital rape almost invariably continued to fall short of the *Billam* standard, with the courts continually distinguishing these cases from other cases of rape (Temkin, *ibid.* 42 – 43; see also Warner, *ibid.* 600).

Whilst women’s actual experiences are central to understanding what rape is, its impact, and its wider societal significance¹, the various judicial pronouncements on the trauma of non-stranger rape in *Berry*, *Thornton* and *W* took no account of women’s experiences (Rumney, *ibid.* 253). In particular, Rumney considers that the judiciary was, at this stage in the development of sentencing guidelines for rape, working from the perspective that some forms of rape were more akin to sexual intercourse and should not therefore be subject to the same level of criminal sanction as “real” (i.e. “stranger”) rape. This, Rumney maintains, was the product of an approach to understanding rape which took no account of the available research evidence on rape trauma (*ibid.*; see also Wells and Quick, 2010: 536; Temkin, *ibid.* 44; Warner, 2002: 511 – 513 and 523, and 1998: 174 and 188). This unsatisfactory position persisted until the Court of Appeal, acting on the advice of the recently created Sentencing Advisory Panel, issued its judgment in *R v Millberry*, [2003] 2 Cr. App. R. (S.) 31 in December 2002.

The second phase – the Millberry guidelines

The establishment of the Sentencing Advisory Panel

The second phase of the development of English sentencing guidelines had commenced in 1998 with the creation of the Sentencing Advisory Panel (“SAP”). The government at the time had been persuaded that a new machinery for generating sentencing guidelines should

¹ See Chapter II.

be tried (Ashworth, 2013b: 16). Ashworth reports that the main arguments in favour of this development were threefold: firstly, that although discretion in sentencing was recognised as essential, it was thought that greater attention should be paid to the rule of law and to the articulation of common principles and standards of sentencing; secondly, that this would be best achieved through a coordinated set of sentencing guidelines which would bring greater consistency of approach to sentencing (the Court of Appeal having insufficient time and resources to develop such coordinated guidelines); and thirdly, that since the task was one of policy creation, the guidelines should be created not only by judges but also by those with experience of other aspects of the criminal justice system (Ashworth, 2009: 244).

Thus the new system aimed to draw into the process a wider range of experience of sentencing, whilst preserving the authority of the Court of Appeal to issue guideline judgments (Ashworth, 2013b: 16). To this end the SAP, a statutory body established under sections 80 and 81 of the Crime and Disorder Act 1998, came into being on 1 July 1999; it started England and Wales “upon the journey towards more structured sentencing” (Roberts, 2012a: 333).

The SAP’s function was to make proposals for new guidelines which the Court of Appeal could issue when a suitable case or cases came before the court (Easton and Piper, 2012: 49). As Roberts explains, the SAP prepared guidelines for sentencing particular offences, conducted professional and public consultations on the proposed guidelines, and remitted its advisory guidelines to the Court of Appeal (Roberts, *ibid.*; see also Ashworth, 2013b: 16, 2008: 113, and 2006: 3). The court was free to adopt the SAP’s proposals, or to amend or reject them and so the power, authority and, above all, the discretion of the Court of Appeal was preserved (Ashworth, 2013b: 16 – 17). In practice, however, the SAP’s proposed guidelines were usually accepted and were incorporated (sometimes with modifications) into guideline judgments when a convenient case arose (Roberts, *ibid.*; Ashworth, 2010b: 389). The authority of these judgements stood on the same foundations as those of earlier guideline judgments devised by the Court of Appeal itself (Ashworth, 2009, *ibid.*).

The Millberry guidelines

A series of developments since the *Billam* guidelines were issued in 1986 indicated a need for revised and updated sentencing guidelines for rape. In addition to the legal recognition of marital rape¹ and an increase in the number of cases of non-stranger rape reported to the police (Rumney, 2003: 871), major changes to the substantive law of rape were made by the Sexual Offences Act 2003. The 2003 Act expanded the definition of rape to include oral as well as vaginal and anal penetration by a penis² (Ashworth, 2005: 127, 2010a: 133, and 2015: 144; Munro, 2014: 751). Shortly before the 2003 Act was passed, the Court of Appeal, responding to advice from the SAP³, handed down revised guidelines for the sentencing of rape in *R v Millberry and others*, [2003] 2 Cr. App. R. (S.) 31, the first major revision to the English sentencing guidelines in 16 years (Wells and Quick, 2010: 537; Ashworth, 2005: 127 – 128, 2010a, *ibid.* and 2015 *ibid.*).

In its advice to the Court of Appeal, the SAP identified three “dimensions” to be used in assessing the gravity of an individual offence of rape: firstly, the degree of harm to the victim; secondly, the level of culpability of the offender; and thirdly, the level of risk posed by the offender to society (SAP, 2002: para. 9; see also Rumney, *ibid.*). The SAP’s advice regarding the sentencing of non-stranger rape was informed by research which it commissioned in which public attitudes to “date” rape and relationship rape – including the attitudes of some rape victims – were examined (Clarke et al, 2002). The SAP’s advice was largely accepted by the Court of Appeal in *Millberry* (Rumney, *ibid.* 872).

As a result of the SAP’s advice, three applications for leave to appeal were listed so that the court could consider what revised guidelines should be given⁴. The judgment in *Millberry* was issued by the Lord Chief Justice, Lord Woolf. The guidelines retained the general structure and levels of the previous *Billam* guidelines⁵ with some minor but significant changes to take account of the new legislation and changes in the nature of the offence since the *Billam* guidelines were issued (Ashworth, 2005: 128; SAP, *ibid.* para. 6; Bottoms, 2010: 42, fn. 14; Shapland and Hall, 2010: 182). In particular the court accepted the SAP’s

¹ Discussed above.

² Section 1(1)(a) of the 2003 Act, brought into force on 1 May 2004.

³ The advice of the SAP was published following a process of public consultation (Rumney, 2003: 870).

⁴ *Millberry*, *supra*, at paragraph [1].

⁵ Discussed above.

proposals that sentencers should consider each of the three dimensions of harm, culpability and risk whenever a sentence for rape was imposed¹.

Following the structure of the *Billam* guidelines, the general starting point for a conviction for rape after a contested trial in cases featuring no aggravating circumstances was set at five years' imprisonment². A general starting point of eight years was set where one or more of seven stated aggravating factors was present³. The eight year starting point in such cases was recommended by the SAP either because of the impact of the offence upon the victim, or the level of the offender's culpability, or both⁴. A starting point of 15 years was set where the offender had either repeatedly raped the same victim over a course of time or where multiple victims were involved⁵. Finally, again as in *Billam*, a life sentence was said not to be inappropriate where the offender "manifested perverted or psychopathic tendencies or gross personality disorder" or where the offender was likely to remain a danger to women for an indefinite time⁶. From the appropriate starting point the court would move downwards to take account of any mitigating factors⁷ and an offender's plea of guilty, and upwards to take account of any aggravating factors not otherwise built into the sentence⁸ (see generally Ashworth, 2005: 128).

As the court accepted the comments of the SAP as to starting points, there was no substantial departure from the general approach laid down in *Billam*⁹ (Thomas, 2003: 109). As Ashworth notes, however, what was new about the SAP's advice and the court's guidelines in *Millberry* was a change in the approach to relationship rape, where the parties had recently been, or were still, involved in a sexual relationship (Ashworth, *ibid.* 129). One of the clear outcomes of the research commissioned by the SAP (Clarke et al, *supra*) was the view that relationship rape was no less traumatic, and therefore no less serious, than stranger rape;

¹ Paragraph [7].

² Paragraph [19].

³ Paragraph [20].

⁴ Paragraph [21].

⁵ Paragraph [22].

⁶ Paragraph [23].

⁷ In this regard, the court stated (again endorsing the view of the SAP) that an offender's previous good character, whilst it should not be ignored, did not justify a substantial reduction of what would otherwise be the appropriate sentence (paragraph [29]). With regard to young offenders, the court in *Millberry* also agreed with the SAP that custody would normally be appropriate because of the seriousness of the offence; however, the court also agreed with the SAP that sentences for young offenders should be "significantly shorter" (paragraph [30]).

⁸ See paragraph [32].

⁹ See paragraph [26].

specifically, the breach of intimate trust involved in relationship rape could have equally severe effects on the victim; and relationship rape was experienced as harder to deal with and to recover from by victims (*ibid.*). Thus in its advice to the court, the SAP said this:

“... the Panel proposes that the Court of Appeal should make a clear statement to the effect that the starting point for sentence is that cases of ‘relationship rape’ and ‘acquaintance rape’ are to be treated as being of equal seriousness to cases of ‘stranger rape’, with the sentence increased or reduced, in each case, by the presence of specific aggravating or mitigating factors”¹.

As Rumney notes, this recommendation amounted to the effective reversal of the *Berry* formulation that non-stranger rape was to be viewed as a less serious offence than stranger rape (Rumney, 2003: 872). The court stated that it was in general agreement with these propositions² but qualified its acceptance of this part of the SAP’s advice. The court considered there to be some cases of relationship rape – such as, for example, where a woman is raped by her partner after he consumed so much alcohol that he “failed to show the restraint he should have” – which it would be “contrary to common sense” to treat as being equivalent to stranger rape³.

The court also considered that, in cases of stranger rape, sentencers should not overlook the fact that “the victim’s fear can be increased because her assailant is an unknown quantity”, in the sense that the victim will not know whether her attacker is also a murderer as well as a rapist⁴. The court did, however, agree with the SAP that the same guidelines and starting points should apply in principle to male rape, to female rape⁵ and to historic cases of rape⁶; and that no inherent distinction should be made for sentencing purposes between anal and vaginal rape⁷. With regard to the effect on sentence of the victim’s behaviour, the court agreed with the SAP that the offender’s culpability would, as in all offences, inevitably vary

¹ *Millberry, supra*, at paragraph [9].

² *Ibid.*

³ Paragraph [26]. For criticism of this approach, see below.

⁴ Paragraph [13]. This statement is also considered *infra*.

⁵ Paragraph [10].

⁶ Paragraph [17]. The court noted, however, that a sentencer was always entitled to show a limited degree of mercy to an offender of advanced years (*ibid.*).

⁷ Paragraph [11].

from case to case and that the degree of the offender's culpability should be reflected in the sentence¹.

A question of balance – an assessment of the Millberry guidelines

By largely accepting the SAP's advice on the seriousness of relationship and acquaintance rape, the *Millberry* guidelines went a considerable way towards breaking from past sentencing practice in which stranger rape was perceived as the paradigm of real rape (Rumney, 2003: 872 and 883; Warner, 2002: 511). The change in the court's approach to the sentencing of relationship rape was significant. Judicial views that relationship and acquaintance rape were less serious than stranger rape had been so entrenched that, as Ashworth reports, when the SAP first put the findings of Clarke et al (2002)² – namely, that relationship rape was no less traumatic than stranger rape due to the deeply unsettling aspect of breach of trust – to the Court of Appeal judges, the judges found them so counter-intuitive that some of their Lordships questioned whether the research had been properly conducted (Ashworth, 2013b: 18). It was only once the judges had received assurances that the research was reliable that the guideline judgment in *Millberry* was issued (*ibid.*)³.

As Rook and Ward (2004: 12) observe, however, the court in *Millberry* was reluctant to place the culpability of the “stranger” rapist and the “relationship” or “acquaintance” rapist on precisely the same footing. This aspect of the court's judgment is criticised by Rumney (2003) who considers that the judicial view of non-stranger rape continued to be obscured and distorted by conceptions of harm and seriousness that failed to consider the full range of impacts experienced by rape victims (*ibid.* 883). Rumney considers that the court tended to minimise the offender's culpability in cases of non-stranger rape (*ibid.* 878 – 881). For Rumney, the breach of trust inherent in cases of relationship and acquaintance rape ought to have been regarded by the court in *Millberry* as a distinct aggravating factor in sentencing (*ibid.* 881 – 883) as it constitutes a distinct, additional and ultimately unique harm not present in cases of stranger rape (*ibid.* 882)⁴.

¹ Paragraph [14].

² Discussed above.

³ Professor Andrew Ashworth was a member of the SAP 1999 to 2009 and was Chairman from 2007 to 2009.

⁴ See the discussion in Chapter II.

One aspect of the decision in *Millberry* that is arguably insufficiently recognised by Rumney, however, is the fact that the court stressed the importance of flexibility in the application of the guidelines. The various starting points did not mean that the sentence would be the same in the case of all offences to which the respective starting point applied for, as the court stated, “[a]ll the circumstances of the particular offence, including the circumstances relating to the *particular victim* and the *particular offender* are relevant” (emphasis added)¹. In explaining how the guidelines were to operate, and in emphasising the importance of judicial discretion in sentencing rape, the court said this:

“[W]e would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances ... Guideline judgments are intended to assist the judge [to] arrive at the current sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge”².

Thus the task facing the sentencer was said to be one that involved a balancing exercise – balancing any circumstances of mitigation against the aggravating circumstances³. Although the court in *Millberry* did not specifically regard the breach of trust in relationship or acquaintance rape as an aggravating factor, the court’s emphasis on flexibility in the application of the guidelines, its reference to the importance of judicial discretion, and its observations on the limited extent to which certain factors could operate to mitigate a sentence arguably meant that sentencers were well placed – in appropriate cases – to *increase* sentences arrived at through an application of the *Millberry* guidelines where this was warranted due to breach of trust by the offender.

This appears to be accepted by Rumney towards the end of his critique where, having set out at length his criticisms of the decision in *Millberry*⁴, he concedes both that “cases of non-stranger rape, as with cases of stranger rape, will have to be sentenced on a case-by-case

¹ Paragraph [13].

² Paragraph [34], subsequently approved by the High Court of Justiciary on appeal in the Scottish guideline case of *HMA v Graham*, 2011 J.C. 1 at paragraph [22]. Banks opines that this guidance applies equally to the present set of English rape guidelines, discussed *infra* (Banks, 2015b: para. 318.3).

³ Paragraph [13].

⁴ Discussed above.

basis” (*ibid.* 882) and that “[t]he nature and perhaps quality of the relationship may have a bearing on sentencing decisions in the context of breach of trust” (*ibid.*). Rumney acknowledges that the court in *Millberry* had issued general guidance and could not be expected to explore every possible eventuality (*ibid.* 883); however, he concludes his argument by making only brief mention of the fact that the court warned against the mechanistic application of the guidelines (*ibid.* 883 – 884). Nevertheless, in focusing mainly on the perceived shortcomings of the judgment in *Millberry* and by omitting consideration of the sentencing discretion that judges retained, Rumney’s account arguably fails to recognise a key point in sentencing: namely, the discretionary and individualised nature of the sentencing task (see Krasnostein and Freiberg, 2013: 267; Tombs, 2008: 84 – 85; Aas, 2005: 86 – 87; and Manson, 2001: 62) which was still an important feature of sentencing practice at this stage in the development of sentencing guidelines in England and Wales.

As Padfield observes, the decisions which sentencers are called on to make are fact-specific and individual offences and offenders are infinitely complicated (Padfield, 2011: 99). Individualised justice remained possible under the *Millberry* guidelines because, as O’Malley observes with regard to the importance of appellate courts setting out general principles in sentencing, the principles laid down in the judgment operated at a higher level of generality than rules and were sufficiently flexible to permit departure and variation when the particular circumstances of a case so demanded (see O’Malley, 2013c: 533). Although most sentences imposed in the Crown Court reflected the guidance in *Millberry*¹ the discretion afforded to judges enabled them, once they had taken the *Millberry* guidelines into account, to “stand back”, to consider the circumstances of the particular case as a whole, and to impose the sentence which was appropriate “having regard to all the circumstances”². This could result in the imposition of custodial sentences either below the levels set out in *Millberry*³ or above

¹ See *Attorney General’s References* (Nos. 37, 38, 44, 54, 51, 53, 35, 40, 43, 45, 41 and 42 of 2003), [2004] 1 Cr. App. R. (S.) 84 at paragraph [7], c.f. *Attorney General’s References* (No. 153 of 2004 and Nos. 14 and 2 of 2005), [2005] EWCA Crim 954 at paragraph [3].

² All as per the court’s direction at paragraph [34] of *Millberry*, set out above. See also *R v Ismail*, [2005] 2 Cr. App. R. (S.) 88 at paragraph [15] (“guidelines are no more than guidelines”).

³ See, for example, *Attorney General’s Reference* (No. 80 of 2006), [2006] EWCA Crim 2305 (two and a half years’ imprisonment upheld); *Attorney General’s Reference* (No. 96 of 2006), [2007] 2 Cr. App. R. (S.) 30 (community order upheld), and the observations at paragraphs [14] and [15] of *Attorney General’s Reference* (No. 62 of 2004), [2004] EWCA Crim 2036.

(sometimes substantially above) the levels set by the court¹, provided that there were good reasons for applying the necessary flexibility².

The principles in *Millberry* thus guided judges in navigating their way through the facts in order to arrive at an acceptable sentence (see O'Malley, *ibid.*). The guidelines led to a more structured, principled and informed approach to sentencing. The guidelines were arguably flexible enough to allow judges to impose sentences commensurate with both the offender's culpability and both the physical and psychological harm caused to the victim.

The third phase – the Sentencing Guideline Council's Definitive Guideline on the Sexual Offences Act 2003

In 2004 the development of English sentencing guidelines entered its third phase with the creation of the Sentencing Guidelines Council ("SGC") under section 167 of the Criminal Justice Act 2003³. As Easton and Piper (2012: 49) note, this was a very significant change in the production of sentencing guidance. Under section 170(9) of the 2003 Act, the SGC had the power to issue "definitive guidelines". In terms of section 172(1)(a) of the Act, judges were obliged to "have regard" to any guidelines which were relevant to an offender's case. Section 174(2) of the Act imposed a duty on judges to give their reasons for departing from a definitive guideline⁴ and section 170(5) of the Act imposed on the SGC the aim of having regard to "the need to promote consistency in sentencing" (see Ashworth, 2013b: 23; Roberts, 2011: 1001; Gerry and Sjölin, 2010: 477; Roberts and Baker, 2008: 568 – 569; O'Malley, 2006: 59 – 60). Thus although the SGC had judicial and lay members and was chaired by the Lord Chief Justice, it effectively assumed the Court of Appeal's responsibility for issuing guidelines (Easton and Piper, *ibid.*). As Ashworth and Roberts (2013: 5) explain, this change accelerated the development of definitive sentencing guidelines in England and Wales, which became one of the few countries outside of the United States to implement a national criminal sentencing guidelines system (Wiles, 2015: xiii).

¹ See, for example, *R v Asi-Akram*, [2006] 1 Cr. App. R. (S.) 47 (14 years' imprisonment upheld); *R v B*, [2006] 2 Cr. App. R. (S.) 60 (detention for life upheld); *R v S*, [2005] EWCA Crim 3520 (life imprisonment upheld); and *R v Steward*, [2005] 1 Cr. App. R. (S.) 5 (12 years' imprisonment upheld).

² See the observations of the court in *Attorney General's Reference (No. 36 of 2006)*, [2007] 1 Cr. App. R. (S.) 38 at paragraph [13].

³ Section 167 of the 2003 Act came into force on 27 February 2004 and followed the report of the Halliday Review (Home Office, 2001).

⁴ Section 174 remains in force in an amended form.

In this third phase of development, the SAP performed much the same function as before; however, it advised the SGC rather than the Court of Appeal (Wasik, 2008: 253). The SGC was then required to formulate draft guidelines and to consult government ministers and a parliamentary committee; it was then authorised to lay down definitive sentencing guidelines (Ashworth, 2010b: 389). The work of the SAP and the SGC resulted in the creation of a substantial corpus of sentencing guidelines, including guidelines on sexual offences (Ashworth, *ibid.*; Ashworth and Roberts, 2012: 882; Pina-Sánchez, 2015: 77).

Ashworth (2009: 245) explains that the guidelines issued by the SGC tended to consist of two parts. The first part was essentially narrative; it discussed the features of the particular offence and factors that might increase or decrease its seriousness. The second part consisted chiefly of a sentencing table for the offence; it set out three or four levels of seriousness and assigned a sentencing range to each of them (*ibid.*). The guidelines included a narrative description of the table and its levels of seriousness in the preceding pages and a list of aggravating and mitigating factors appeared beneath the table (*ibid.*). The aim of these guidelines, as Wasik reports, was not to eliminate proper decision-making by judges but to structure it (Wasik, *ibid.* 255).

The Sexual Offences Act 2003 contained a significant number of new or amended offences for which there was no sentencing case law (Cooper, 2008: 281) and so on 30 April 2007 the SGC published its definitive guideline on the sentencing of offenders convicted of offences under the 2003 Act (SGC, 2007a). The guidelines applied to all offenders sentenced on or after 14 May 2007, irrespective of the date of the offence (*ibid.* i; Rook and Ward, 2008: 1 and 2010: 10). The guidelines used the starting point of five years' imprisonment for the rape of an adult with no aggravating or mitigating factors derived from the decision in *R v Millberry*, [2003] 2 Cr. App. R. (S.) 31¹ as the baseline from which all other sentences for sexual offences in the guideline were calculated (SGC, *ibid.*).

¹ Considered above.

The guidelines for the offences of rape¹ and assault by penetration² were set out at pages 23 to 30 of the definitive guideline³. In relation to rape, the guideline adopted the starting points established in *Millberry, supra*; namely five years where no aggravating factors were present and eight years where any of the particular aggravating factors identified were involved (SGC, *ibid.* 23). The starting points and sentencing ranges for rape, set out in tabular form, ranged from a starting point of five years' imprisonment (with a sentencing range of between four and eight years) for a single offence by a single offender committed against a victim aged 16 or over; through a starting point of eight years' imprisonment (with a sentencing range of between six and 11 years) for rape accompanied by any one of six specified aggravating factors⁴; to a starting point of 15 years' imprisonment (with a sentencing range of between 13 and 19 years) for the repeated rape of the same victim over a course of time or for rape involving multiple victims (SGC, *ibid.* 25). The guidelines stressed, however, that these were simply starting points: the existence of aggravating factors could significantly increase the sentence (*ibid.* 23).

The guidelines also discussed the harm caused by non-consensual sexual offences. The guideline noted that such offences involved the violation of the victim's sexual autonomy and that the seriousness of the violation may depend on a number of factors; the nature of the sexual behaviour would, however, be the primary indicator of the degree of harm caused in the first instance (*ibid.* 19). The principle established in *Millberry, supra*, that judges should adopt the same starting point for "relationship" rape or "acquaintance" rape as for "stranger" rape⁵ was applied to all non-consensual offences in the guideline (*ibid.*). The SGC explained:

"Any rape is a traumatic and humiliating experience and, although the particular circumstances in which the rape takes place may affect the sentence imposed, the starting point for sentencing should be the same" (*ibid.*).

¹ Section 1(1) of the 2003 Act.

² Section 2 of the 2003 Act.

³ For a concise overview of the relevant guidelines applicable to the crime of rape, see Rook and Ward, 2008: 1 – 10 and 2010: 10 – 23.

⁴ Namely abduction or detention; knowingly suffering from a sexually transmitted infection; more than one offender acting together; abuse of trust; an offence motivated by prejudice; or a sustained attack.

⁵ Discussed above.

Thus, as Rook and Ward observe, this section of the definitive guideline finally laid to rest the debate as to whether “relationship rape” or “acquaintance rape” should attract the same sentence as “stranger rape” (Rook and Ward, 2010: 14).

The extreme youth or old age of a victim was stated to be an aggravating factor (SGC, 2007a, *ibid.*). In addition, the SGC considered that, in principle, the younger the child and the greater the age gap between the offender and the victim, the higher the sentence should be, account being taken in all cases of the youth and immaturity of the offender (*ibid.*). The SGC considered that all offences of rape involved a high level of culpability on the part of the offender since that person will have acted either deliberately without the victim’s consent or without giving due consideration to whether the victim was able to or did, in fact, consent (*ibid.* 21).

With regard to offences involving children under 13¹, the SGC noted that there would be cases involving victims under 13 where there was, *in fact*, consent where, *in law*, such consent could not be given. In such circumstances the SGC considered that the presence of consent could be material in relation to sentence, particularly in relation to a young offender where there was close proximity in age between the victim and the offender or where the mental capacity or maturity of the offender was impaired (*ibid.*)². The fact that an offender had a reasonable belief that the victim was aged 16 was said to be capable of being taken into consideration as a mitigating factor (*ibid.*). As Selfe notes, the court was required to undertake a significant weighing of interests in such cases (Selfe, 2011: 6). The guideline did not amplify the point about consent and it was left to the sentencer to decide how significant the presence of actual consent should be in any given case (Thomas, 2008: 159). Finally, the guideline stated that planning of an offence indicated a higher level of culpability than an opportunistic or impulsive offence (*ibid.*).

The SGC also referred to the Court of Appeal in *Millberry*, *supra*, having established that an offender’s culpability would be “somewhat less” in cases where the victim had consented to sexual familiarity with the offender on the occasion in question than in cases where the

¹ Namely rape of a child under 13 (section 5 of the 2003 Act); assault by penetration of a child under 13 (section 6); and causing a child under 13 to engage in sexual activity where the activity included sexual penetration (section 8).

² This section of the definitive guideline developed the principles set out by the Court of Appeal in *R v Corran*, [2005] 2 Cr. App. R. (S.) 73 at paragraphs [6] to [10] (see Selfe, 2011: 6). The guidance in *Corran* was given in the expectation that the SGC would pronounce on the subject (Rook and Ward, 2010: 183).

offender had set out with the intention of committing rape (*ibid.*). In broadly accepting this statement but also in elaborating upon it, the SGC noted that:

“Save in cases of breach of trust or grooming, an offender’s culpability may be reduced if the offender and victim engaged in consensual sexual activity on the same occasion and immediately before the offence took place. Factors relevant to culpability in such circumstances include the type of consensual activity that occurred, similarity to what then occurs, and timing. However, the seriousness of the non-consensual act may overwhelm any other consideration” (*ibid.*).

The guideline also contained cross-references to associated criminal activity – most importantly the Definitive Guideline on Domestic Violence (SGC, 2006a) – which ensured that the wider aim of the criminal justice system to extend protection to victims of crime in all areas of life was achieved (Cooper, 2008: 282). As Cooper notes, whilst in the past there had been a worrying tendency within the criminal justice system to treat domestic violence as less serious than other crimes, the guidelines played a significant role in drawing domestic violence into the mainstream of criminal behaviour by stating that it was to be treated by the court as seriously as other cases of violence (Cooper, *ibid.* citing SGC, *ibid.* i and 3).

Despite the imposition of the statutory duty to “have regard” to the relevant sentencing guidelines in cases of rape, judges still retained a significant degree of discretion in sentencing. As the Court of Appeal observed in *R v Oosthuizen*, [2006] 1 Cr. App. R. (S.) 73¹, “having regard” to a relevant guideline did not mean that it had to be followed². The court would frequently stress that the final responsibility for determining a just and appropriate sentence lay with the judge and that sentencing guidelines were simply an aid which allowed the judge to effectively exercise his discretion in the individual case (see Thomas 2008: 160 and Ashworth, 2013b: 23). In the years following the implementation of this third phase of guidelines, the court observed that sentencing was not a mathematical exercise since sentencing was infinitely more complex and refined than mathematical problems³; it noted that as each case is different the judge had to ensure that each case was

¹ The first decision of the court concerning the treatment of definitive guidelines issued by the SGC (see Thomas, 2005: 981).

² Paragraph [15] *per* Rose LJ, referring to the dicta of Lord Woolf CJ in *R v Last*, [2005] EWCA Crim 106 at paragraph [16]. See also *R v Matthews*, [2005] EWCA Crim 2768 in which the court observed that section 172 of the 2003 Act fell well short of “a demand for robotic adherence” (paragraph [9]).

³ See *R v Martin*, [2007] 1 Cr. App. R. (S.) 3 at paragraphs [18] and [21].

assessed on an individual basis¹; and it stressed the importance of doing “justice in the circumstances of an individual case”². Judges were, the court noted, entitled to disregard a definitive guideline if an injustice would result from following it: sometimes justice would require a more merciful sentence than indicated in a guideline; sometimes a more severe one³.

In *R v Larcombe*, [2008] EWCA Crim 2310, the court discussed the way in which sentencers should use the guideline. In delivering the judgment of the court, Pitchford J explained that the sentencing tables did not stand alone and noted that sentencers would be misled if they neglected the principles and the explanatory guidance which applied to them⁴. His Lordship noted that flexibility is required in the sentencing of sexual offences, that the starting points and ranges are not rigid, and that movement within and between ranges will depend on the circumstances of individual cases, particularly the aggravating and mitigating features⁵.

An assessment of the SGC’s Definitive Guideline

In a valuable critique of the system of sentencing guidelines under the SGC, the barrister John Cooper Q.C. commends the work of the SGC in amalgamating various key decisions of the Court of Appeal since the implementation of the Sexual Offences Act 2003 into a fully developed sentencing guideline (Cooper, 2008: 281 – 282). This, Cooper notes, was of particular assistance to the legal profession: as a general proposition, providing sentencing guidelines to judges and practitioners on a range of offences and sentencing options provided an “invaluable tool” to enable the Crown and the defence to focus on the important issues that would affect the mind of the sentencer (*ibid.* 278). Such guidelines lead to predictability and consistency in the field of sentencing; they allow relevant and defined argument to take place in court; they permit counsel to manage the lay client’s expectations of the sentencing outcome; and assist the Crown in managing the expectations of victims of crime (*ibid.*). With regard to the guideline on sexual offences in particular, Cooper notes that the SGC had provided “a welcome consolidation of the pre-existing and new sexual offences sentencing regimes into one document”; he considers that “any initiative which seeks to make available a

¹ *Attorney General’s References (Nos. 32, 33 and 34 of 2007)*, [2008] 1 Cr. App. R. (S.) 35 at paragraph [16].

² *Attorney General’s References (Nos. 7 to 9 of 2009)*, [2010] 1 Cr. App. R. (S.) 67 at paragraph [39].

³ *Ibid.*

⁴ Paragraph [10].

⁵ Paragraphs [11] and [13].

complex series of sentencing developments in one document will be favourably received by those who practise” (*ibid.* 282).

Cooper does not, however, consider the third phase of sentencing guidelines under the SGC to be an unqualified success. Cooper expresses some important reservations with regard to what members of the criminal bar perceive to be an apparent erosion of judicial discretion in sentencing (*ibid.* 279). In particular, he reports that the majority of both the judiciary and the legal profession perceived that the guidelines were heavily prescriptive, if not in fact mandatory, with the Crown all too often presenting the guidelines to the judge “as if written in stone” (*ibid.*). A common complaint from the bar was that the SGC’s guidelines had resulted in the sentencing process becoming a “box ticking” exercise, at the expense of a flexible sentencing regime (*ibid.* 279 – 280). Indeed, the layout of the guidelines lent itself to what Cooper describes as a “multiple choice” approach (*ibid.* 280). Practitioners saw the guidelines being used by judges not as helpful signposts to a proper disposal, but rather as “fireproofing” against any subsequent appeal against sentence (*ibid.*).

For Cooper, the sentencing regime requires sophistication rather than prescription (*ibid.* 284). It appeared that, despite the observations of Pitchford J in *R v Larcombe*, [2008] EWCA Crim 2310¹ on the proper approach to the application of the guideline, practitioners were of the view that judges applied the guideline rigidly, inflexibly and in a mechanistic fashion. Sentencing, however, is not – and never should be – a rigid and formulaic process (Selfe, 2012: 4).

In Cooper’s view, the approach of the SGC prioritised sentencing the offence, rather than the offender, thus making a constructive disposal highly unlikely. Although the seriousness of rape meant that cases in which the court was able to impose a non-custodial disposal were few in number, from the practitioner’s perspective there nevertheless existed a fundamental conflict between the need for conformity and certainty in sentencing and the reality that each case would inevitably depend upon its own facts (Cooper, *ibid.* 285). Inherent within this problem was the erosion of judicial discretion to deal with each case individually and, ultimately, fairly (*ibid.* 286)².

¹ Discussed above.

² See also Cooper’s criticism of the new format of guidelines issued by the Sentencing Council (Cooper, 2013), discussed *infra*.

The fourth phase – the Sentencing Council’s Definitive Guideline

The establishment of the Sentencing Council and the new format of sentencing guidelines

The task of issuing amended guidelines fell to the Sentencing Council for England and Wales (“the Council”). The Council was established in April 2010 under the Coroners and Justice Act 2009¹. The 2009 Act changed the previous arrangements for the issuing of guidelines in two important ways. Firstly, the courts’ duty to comply with sentencing guidelines was amended. Whilst the previous statutory requirement was for sentencers to “have regard” to any relevant guidelines², section 125(1) of the 2009 Act introduced the requirement that sentencers *must follow* the relevant guidelines, unless satisfied that it would be contrary to the interests of justice to do so (see Pina-Sánchez, 2015: 77; Roberts, 2013: 12 – 13; Hutton, 2013: 92; Roberts, 2012b: 273 – 274; Ashworth, 2012: 93 – 94; Easton and Piper, 2012: 51; Roberts, 2011: 1010; Ashworth and Roberts, 2012: 882)³. Secondly, the Council⁴ replaced the SAP and the SGC.

The Council began to issue its own guidelines in 2011. The Council’s guidelines follow a different structure from guidelines issued by the SGC; they set out a multi-staged process for determining sentence and, in so doing, seek to promote what Roberts describes as “uniformity” and consistency in sentencing (Roberts, 2013: 5; 22). Section 120 of the 2009 Act requires the Council to prepare sentencing guidelines which may be general in nature or limited to a particular offence, category of offence, or particular category of offender. Wasik explains that under section 121, the guidelines should specify the “offence range” appropriate for a court to impose on an offender convicted of that offence and, if the guidelines describe different categories of case, they should specify for each category a “category range” within the offence range (Wasik, 2014: 48 – 49). The guidelines should also specify the “starting point” within the offence range or within each category range (Wasik, *ibid.* 49; see also Maslen, 2015: 173).

¹ See sections 118 to 136 of the 2009 Act. For the background to the 2009 Act and the changes to the sentencing environment it introduced, see Roberts, 2013: 3; Ashworth, 2013b: 24 – 25; Ashworth and Roberts, 2013: 5; Easton and Piper, 2012: 50; Ashworth and Roberts, 2012: 882; Roberts, 2012a: 334 – 335; Roberts, 2012b: 270 – 271; Roberts, 2011: 998 – 999 and 1006 – 1009; and Ashworth, 2010b: 389 – 390.

² Under section 172(1)(a) of the Criminal Justice Act 2003 (discussed above).

³ For a recent example of a sentencing judge declining to apply the Sentencing Council’s Definitive Guideline on Sexual Offences (discussed *infra*), and being commended by the Court of Appeal for his “pragmatism and good sense” in doing so, see *R v Buchanan*, [2015] 2 Cr. App. R. (S.) 13 at paragraph [18].

⁴ Established under section 118(1) of the 2009 Act.

Under this fourth phase in the development of English sentencing guidelines, judges are directed to undertake a nine step process in arriving at sentence (Ashworth and Roberts, 2013: 6; Maslen and Roberts, 2013: 131; Hutton, 2013: 94 – 98; Roberts, 2012b: 275 – 278; Roberts, 2011: 1011; Roberts and Rafferty, 2011: 682). To date, all Council guidelines have followed the style of the Definitive Guideline on Assault which came into effect on 13 June 2011 (Sentencing Council, 2011); as Roberts has reported, the assault guideline was intended to serve as a model for all future guidelines issued by the Council (Roberts, 2013: 4)¹. Firstly, the judge determines which of three levels of seriousness is appropriate in the particular case. Once he has determined the appropriate category range, he will use the starting point within the range as a point of departure. Secondly, the judge will then “fine tune” the sentence within the chosen range by considering others factors relating to the seriousness of the crime as well as any personal mitigation (Wasik, 2014: 51 – 52). The judge must then follow a series of seven further steps – required mainly for technical or legal reasons (Hutton, 2013: 96) – to determine the final sentence (Irwin-Rogers and Perry, 2015: 194 – 195; Ashworth and Padfield, 2015: 657; Roberts, 2013: 8 – 10; Padfield, 2013: 38; Dhami, 2013: 174; Ashworth and Roberts, 2012: 883 – 884 and 2013: 5 – 9; Roberts and Rafferty, 2011: 682 – 686; Ashworth, 2010b: 391)². The first two steps in the nine step process are regarded as the most important as they encompass the performance of individualised sentencing by the judge and involve a judicial assessment of the seriousness of the particular case (Hutton, *ibid.* 98 – 99).

The development of the Sentencing Council’s new Definitive Guideline on Sexual Offences

By 2012 the Sexual Offences Act 2003 had been in force for eight years. A clearer picture had emerged of the way in which the courts were approaching the use of certain new offences introduced under the Act. Also, the nature of certain established offences had changed with technology increasingly being used in the commission of sexual offences (Sentencing

¹ Professor Julian Roberts is a member of the Sentencing Council. It should be noted, however, that the assault guideline need not necessarily serve as the model or template for all future guidelines for, as Harris and Gerry observe, the 2009 Act gives the Sentencing Council discretion as to the form that a guideline takes (Harris and Gerry, 2013: 240).

² Namely consideration of whether the sentence should be reduced to reflect assistance provided to the prosecution or police; consideration of whether to reduce the sentence for a guilty plea; consideration of whether to impose an extended sentence; consideration of the totality principle and whether the sentence is proportionate; consideration of whether to make a compensation or other ancillary order; explanation of the effect of the sentence; and consideration of any time served on remand (for a full discussion, see Roberts, 2013: 10 – 11, Ashworth and Roberts, 2013: 8 – 9 and Wasik, 2014: 52 – 53).

Council, 2012a: 6). For example, in addition to the use of technology to facilitate the sexual exploitation and grooming of children, a concerning trend in sexual offending more generally, and in cases of rape in particular, had been highlighted by the Court of Appeal in *Attorney General's Reference (Nos. 3, 73 and 75 of 2010)*, [2011] 2 Cr. App. R. (S.) 100. In two of the three cases of rape referred by the Attorney General in this case, the offenders had used mobile phones to photograph the victims (both of whom were bound and in states of undress) following their having raped them; in one of these cases the offender had threatened to post the images of the victim on the internet if she told anyone about the incident. In delivering the judgment of the court, the Lord Chief Justice (Judge) said this:

“A pernicious new habit has developed by which criminals take photographs of their victims – often just to show off to their friends; often just to add something to the humiliation which the victim is already suffering; and sometimes ... either as a form of pressure to discourage any complaint ... but also possibly for the purposes of blackmail ... We make it clear that from now onwards the taking of photographs should always be treated as an aggravating feature of any case and in particular of any sexual cases. Photography in these circumstances usually constitutes a very serious aggravating feature of the case”¹.

Thus, as Thomas (2011: 583) observes, the court in this case took the opportunity to amplify the terms of the previous guideline then in force (SGC, 2007a)². It was therefore thought that the SGC's definitive guideline on sexual offences required to be amended in order to reflect developments such as these (Sentencing Council, 2012a: 6).

The process of issuing the new definitive guideline began in December 2012 when the Council issued its draft guideline for consultation (Sentencing Council, 2012a). As Rook and Ward observe, the Council's review of the SGC's guideline took place against a background of a greater awareness of sexual offending that extended to an increased understanding of the impact of sexual abuse upon victims (Rook and Ward, 2014: x). In its consultation document, the Council stressed that the perspective of victims was central to its considerations (Sentencing Council, *ibid.* 5). The gravity of sexual offending and the very particular emotional and physical harm experienced by victims meant that engagement with

¹ Paragraph 7(2).

² Discussed above. In this case the court also held that the appropriate sentence for a rape committed in the course of a burglary would rarely be less than 12 years' imprisonment, and aggravating features would raise the starting point to 15 years (see paragraph [8]).

victims and with those who work with them was a vital part of the Council's development of the guidelines (*ibid.* 12). In particular, the Council commissioned research into victim and public attitudes to the sentencing of sexual offences (Nicholls et al, 2012). A key issue to emerge from the research was a strong desire from victims for the criminal justice system to demonstrate an accurate understanding of the overarching and long-term harmful effects of sexual violence and abuse, of how it impacts on the life of the victim and their family, and to consider this to a greater extent within the sentencing process (*ibid.* 58 – 59). The Council considered these matters with great care in identifying harm factors for each of the offences in the guideline (Sentencing Council, *ibid.*).

The operation of the new Definitive Guideline

The new sentencing guidelines for rape are particularly important for, as the Council noted in its consultation, these guidelines set a benchmark for the sentence levels for many other sexual offences (Sentencing Council, 2012a: 15). Following the consultation period, the new Sexual Offences Definitive Guideline was published by the Council on 12 December 2013 (Sentencing Council, 2013a). The guideline applies to the sentencing of all adult sex offenders from 1 April 2014, whenever the offences were committed (Rook and Ward, 2014: x). Following the Court of Appeal's guidance in *R v Boakye*, [2013] 1 Cr. App. R. (S.) 2, in which it was held that sentencing guidelines do not apply retrospectively¹, the SGC's guideline applies to cases sentenced up until that date. In accordance with the guidance given by the Court of Appeal in *R v H*, [2012] 2 Cr. App. R. (S.) 21², however, the new guideline applies to historic cases of sexual abuse (Rook and Ward, *ibid.*).

A press release issued by the Council when the new Definitive Guideline was published stated that the intention was to reflect more fully the psychological and longer-term effects on the victim (see Wasik, 2014: 276). The new guideline places an emphasis on the *harm* caused by sexual offences and on the *culpability* of the offender. The structure for determining these aspects varies according to the offence concerned so that, in theory, the guideline is tailored to the particular offending behaviour (Rook and Ward, *ibid.* xi). Rather

¹ See paragraphs [10] to [23].

² Broadly, that so far as it is possible to do so consistent with changes in the statutory framework of sentencing, an offence should be dealt with in accordance with *current* sentencing practice and that the sentencer should not attempt to investigate what the conventional sentencing practice would have been at the time of the commission of the offence (see paragraphs [16], [46] and [47a] to [47g]).

than focussing on the nature of the particular sexual activity, the guideline focuses on the extent of the harm caused to the victim. A number of models for addressing harm and culpability are used, each of which are different from the model used in the previous Sentencing Council guidelines.

As the Council explained in its consultation, the first step that the court must take is to consider the main factual elements of the offence; the sentencer will do this by considering the harm to the victim and the culpability of the offender. In the Council's previous guidelines on assault and burglary the formulation of harm and culpability was achieved by recourse to a number of factors that indicated greater or lesser harm and higher or lower culpability (Sentencing Council, 2012a: 15). The Council explained that it moved away from this formulation in recognition of the fact that all rape is extremely harmful to the victim (Sentencing Council, 2012a *ibid.*). The approach recommended in the consultation (and carried through to the final guideline) was to assume that there is *always* a baseline of harm, for as the Council explained:

“The violation of the victim through the act of rape is harm in itself. It would be unhelpful to articulate this as ‘lesser harm’ as these offences are inherently harmful” (*ibid.* 16).

Whilst the previous guideline on sexual offences considered the gravity of the offence in terms of the *physical nature* of the sexual activity, the Council was concerned that simply labelling sentence levels in terms of activity did not fully reflect the seriousness or complexity of the offence (*ibid.*). The model used for the majority of offences in the new guideline, including rape, thus has a lowest level (a baseline) in which inherent harm and culpability are assumed (Rook and Ward, *ibid.*). An offence can be moved to a higher category of harm or culpability (with a correspondingly higher starting point) where one or more factors from an exhaustive list are present (*ibid.*).

The maximum penalty for rape is life imprisonment¹ and the offence range specified by the guideline is four to 19 years' imprisonment. As Wasik explains, a sentence passed outside this range would be a departure from the guideline and, under section 174(6)(b) of the Criminal Justice Act 2003, would require the judge to give reasons why it would be contrary to the interests of justice to sentence within the offence range (Wasik, 2014: 276). The

¹ Sexual Offences Act 2003, section 1.

guideline does provide, however, that offences may be of such severity (for example, involving a campaign of rape) that sentences of 20 years or more may be appropriate (Sentencing Council, 2013a: 10)¹.

In common with all other Council guidelines, the judge must first determine the offence category by assessing both the degree of harm and the level of culpability (“step 1”, Sentencing Council, *ibid.*). The harm may fall into one of three categories, 1, 2 or 3. Category 2 provides a closed list of relevant factors: severe psychological or physical harm; pregnancy or sexually transmitted infections as a consequence of the offence; additional degradation or humiliation; abduction; prolonged detention or the sustained nature of the incident; the use of violence or the issuing of threats (beyond that which is inherent in the offence); forced or uninvited entry into the victim’s home; and the particular vulnerability of the victim due to personal circumstances (*ibid.*). The harm caused by a particular offence *may* fall within category 1 as a result of the “extreme nature” of one or more category 2 factors, or the “extreme impact” caused by a combination of category 2 factors (*ibid.*). This approach relies on the sentencer, in full possession of all the facts of the case, being best placed to determine whether a particular case should be so elevated (Rook and Ward, *ibid.* 6 – 7). Category 3 applies where the factor(s) in categories 1 and 2 are not present (*ibid.*). As Rook and Ward explain, this is designed to indicate to the sentencer that once an offender has been found guilty of rape, they do not need to identify additional factors for the offence to be deemed harmful or serious (Rook and Ward, *ibid.* 5).

With regard to culpability, levels are described as A or B, rather than “higher” or “lower” as in other Council guidelines. A case will fall within culpability level A where there has been a significant degree of planning; where the offender acts together with others to commit the offence; where alcohol or drugs are used on the victim to facilitate the offence; where there is abuse of trust²; where previous violence has been used against the victim; where the offence is committed in the course of a burglary; where the offence is recorded³; where there is commercial exploitation and/or motivation in committing the offence; where the offence is

¹ For recent examples, see *R v Watkins*, [2015] 1 Cr. App. R. (S.) 6 and *R v D J*, [2015] 2 Cr. App. R. (S.) 16. Harris (2015b: 653) observes that sentencing levels in serious sexual offence cases have increased dramatically in recent years to levels that “would have been unthinkable just a short time ago”.

² See the recent decision in *R v D O*, [2015] 1 Cr. App. R. (S.) 41 – a case of relationship rape – in which it was held that the Sentencing Council did not intend that every case of rape within an established relationship should be treated as a breach of trust (paragraph [31]). For critical commentary to the decision, see Harris, 2015a: 380.

³ Thus incorporating the observations of the Court of Appeal in *Attorney General’s Reference (Nos. 3, 73 and 75 of 2010)*, *supra*, discussed above.

racially or religiously aggravated; or where the offence is motivated by hostility to the victim based either on his or her sexual orientation or on his or her disability (Sentencing Council, *ibid.*). A case will fall into culpability level B if the factors in category A are not present (*ibid.*). No factors are listed in culpability level B to reflect the fact that the act of rape inherently involves a high level of culpability (Rook and Ward, *ibid.* 11). Thus level B is not a lower culpability category, but simply reflects the absence of any of the additional factors found in culpability level A; it also indicates the baseline of culpability that exists whenever rape is committed (*ibid.*).

These combinations of harm and culpability generate a matrix (Wasik, *ibid.* 277). The sentencer must proceed to “step 2” by using the corresponding starting points to reach a sentence within the appropriate category range (Sentencing Council, *ibid.*). Category 1 harm has a starting point of 15 years’ imprisonment (with a range of between 13 and 19 years) where the culpability falls within level A and a starting point of 12 years (with a range of between 10 to 15 years) where the culpability falls within level B. Category 2 harm has a starting point of 10 years’ imprisonment (with a range of between nine and 13 years) where the culpability falls within level A and a starting point of eight years (with a range of between seven and nine years) where the culpability falls within level B. Finally, category 3 harm has a starting point of seven years’ imprisonment (with a range of between six and nine years) where the culpability falls within level A and a starting point of five years (with a range of between four and seven years) where the culpability falls within level B (Sentencing Council, *ibid.* 11; see also Wasik, *ibid.* and Ashworth, 2015: 144).

As part of “step 2” the sentencer is also directed to consider a list of aggravating factors¹ and a considerably shorter list of mitigating factors² to either increase or reduce the seriousness of an offence (Sentencing Council, *ibid.*). The relevant factors are set out in tabular form and are specifically stated to be non-exhaustive. The presence of aggravating or mitigating

¹ Namely the statutory aggravating factors of previous convictions and whether the offence was committed whilst on bail, together with the following general aggravating factors: specific targeting of a particularly vulnerable victim; ejaculation; blackmail or the use of threats; location and timing of the offence; the use of a weapon to frighten or injure the victim; the victim being compelled to leave their home; failure to comply with current court orders; commission of the offence whilst on licence; exploitation of contact arrangements with a child to commit an offence; presence of others (especially children); and any steps taken to prevent the victim reporting the offence (Sentencing Council, *ibid.*).

² Namely an absence of previous convictions or relevant/recent convictions; remorse; previous good character and/or exemplary conduct (the more serious the offence, the less weight will be attached to this factor); age and/or lack of maturity where it affects the offender’s responsibility; and mental disorder or learning disability, particularly where linked to the commission of the offence (Sentencing Council, *ibid.*).

factors entitles the sentencer to move up or down within the category range or to move into a different category from that selected at step 1 (*ibid.*). In particular, relevant recent convictions are specifically stated to be a factor likely to result in an upward adjustment (*ibid.*). Thereafter, the sentencer is directed to follow the remaining seven steps¹ to reach the final sentence (*ibid.* 12); in particular, an appropriate reduction should be made to reflect an offender’s plea of guilty at step 4².

An assessment of the new Definitive Guideline

Rook and Ward welcome the introduction of the new guideline, noting that it is important that sentencing guidelines adapt to long-term changes associated with the particular criminal behaviour to which they relate – particularly so in relation to the sensitive and complex area of sexual offending (Rook and Ward, 2014: x). The authors consider that the guideline addresses core aspects of harm and culpability in sexual offending, whilst retaining sufficient flexibility to accommodate future developments and increased understanding (*ibid.*; see also Leveson, 2013 and Treacy, 2013).

The Council’s Response to the Consultation itself disclose that 165 responses were received from, *inter alia*, the judiciary, legal practitioners, victims’ groups, academics and the public, 92 of which addressed the draft guidelines for rape (Sentencing Council, 2013b: 5, 9). The Council prefaces its discussion of the responses with a quote from the Police and Crime Commissioner for Northumbria who, in commending the “comprehensive and welcome piece of guidance” says this:

“In my opinion this guidance has the potential to reach much further than its original intent of delivering tougher and more appropriate sentences ... It isn’t often that sentencing guidelines are capable of changing the public perception of an offence but these draft guidelines might just help to do that” (Baird, 2013, cited in Sentencing Council, *ibid.* 4).

¹ See above.

² Discussed *infra*. Judge David McFarland reports that whilst the guidance from the Sentencing Council does not have direct application to Northern Ireland, “the general approach to arriving at the commensurate sentence and range for all [sexual] offences has been broadly similar” (McFarland, 2010: 1217; see also McFarland, 2014: 662). Historically, however, Northern Ireland has generally adopted higher starting points than England and Wales for sexual offences, the starting point for rape having been set at seven years (see *R v McDonald*, [1989] N.I. 37, *R v Molloy*, [1997] N.I.J.B. 241, *R v JD*, [2002] 6 B.N.I.L. 98 and *Attorney General’s Reference (No. 3 of 2006)*, [2006] N.I.C.A. 36, cited by McFarland, 2010: 1217 – 1218).

The following comments from Dr Fiona Mason, a consultant forensic psychiatrist and specialist in the psychiatric treatment of rape victims, are cited by the Council as reflecting the generally positive responses it received to its proposed sentencing guidelines for rape:

“The proposed guidelines are a welcome move in the right direction in the campaign for justice for victims of rape and serious sexual assault. They acknowledge the psychological harm suffered by victims and shift the exclusive focus on physical harm. Importantly, vulnerable victims are given particular emphasis, especially children and people with a mental disorder” (Mason, 2013, cited in Sentencing Council, *ibid.* 9).

In particular, the majority of respondents favoured the move away from the structure of previous Council guidelines in assessing harm and culpability, and the introduction of a “baseline” for these factors which reflected the harm and culpability inherent in the act of rape (Sentencing Council, *ibid.* 10). With regard to the specific culpability factors at step 1 of the guideline, the Council reports a high level of agreement both with the proposed approach and with the individual factors included in culpability level A (*ibid.* 15). Similarly, there were high levels of agreement with those factors that the Council had identified as specific aggravating factors in cases of rape (*ibid.* 15 – 16).

There was disquiet amongst some respondents at the consideration of any *mitigating* circumstances in the guideline due to the nature of the harm caused by rape and the very high culpability of any offender convicted of the offence; however, the Council considered that as a general principle, and for reasons of transparency, it was important that common mitigating factors were listed in the guideline so that the sentencer’s difficult task of weighing the various factors was understood (*ibid.* 17). Whilst a number of respondents queried the inclusion of remorse as a specific mitigating factor on the basis that it could be easily faked or “switched on” by manipulative offenders, the Council notes that it is a factor that appears in all Council guidelines and is one that sentencers are adept at assessing (*ibid.*).

The concern expressed by certain victims’ groups over the inclusion of previous good character and/or exemplary conduct as mitigating factors met with a similar response from the Council. The Council notes that sentencers would carefully assess the relevance of previous good character in the particular case and that, in any event, the Court of Appeal had previously recognised that this factor should have only limited impact in sexual offences,

reference being made to the decisions in *Attorney General's Reference (No. 38 of 2013)*, (*sub nom R v Hall*), [2014] 1 Cr. App. R. (S.) 61 and *R v Millberry and others*, [2003] 2 Cr. App. R. (S.) 31, respectively (*ibid.* 18).

Finally, with the regard to the sentence levels for rape, the Council notes that the levels proposed in the draft guideline retained the starting points in the previous SGC guideline of five and eight years' imprisonment¹; however, a "clearer articulation of the culpability of the offender" meant that these starting points increased to seven and 10 years² (*ibid.* 19). The Council reports that, *inter alios*, the government, the CPS, the Law Society, the Criminal Bar Association, the Council of HM Circuit of Judges [*sic*], and the Police Federation all agreed with the proposed sentence levels (*ibid.*). The increased sentence levels reflected current sentencing practice which, the Council notes, had seen average sentences for sexual offences rise since 2005 (*ibid.*).

Although the Council's Definitive Guideline only came into effect in 2014, certain reservations have been expressed by practitioners. Criticism has tended to focus on the format of the new system of guidelines and on the potential for injustice that a rigid adherence to guidelines may cause. Although Lyndon Harris³ welcomes the greater focus on the psychological harm caused by offences (noting that sentences should reflect all the factors in a particular case and that the new guideline ought to facilitate this), he criticises the format of the guideline itself (Harris, 2013: 847). For Harris, the problem is that the culpability and harm assessment still gives no assistance as to how much weight sentencers should ascribe to a particular factor (Harris, 2015c: 828 – 829). Harris posits the example of a case where violence is used: if such violence is worth, say, a 12 month uplift (this itself being unclear as the guideline provides no details), then how much is extreme violence worth? Whilst these factors will result in different uplifts, with the sentence being adjusted differently in different cases, no guidance is provided as to how to sentence in such cases (Harris, 2013, *ibid.*). Harris explains:

¹ See the respective starting points for category 3, level B offences and category 2, level B offences (Sentencing Council, 2013a: 11).

² See the respective starting points for category 3, level A offences and category 2, level A offences (*ibid.*).

³ A barrister and a previous editor of the practitioner textbook *Banks on Sentence*.

“The conclusion to be drawn is that the guidelines, regrettably, offer little assistance. In terms of the most common examples of each offence, they probably work quite well. Ironically, these are the offences where sentencers and practitioners need little assistance. The cases in which most help is needed are the unusual cases, those on the borders, the extreme examples of the offence (be they high or low) and yet these cases are the ones in which the new sexual offences guideline fails miserably” (*ibid.*)¹.

In an earlier paper written in response to the Council’s consultation on the new guideline, Harris and Gerry criticise the guidelines’ format as unduly mechanistic and restrictive (Harris and Gerry, 2013: 239). The authors consider that the guidelines fail to appreciate the often complex nature of offending and that such a “broad brush” methodology has the potential to result in serious injustice (*ibid.*). In particular, they consider the Council’s system of ranges and starting points to be an artificial method of calculating sentence (*ibid.* 241). The system places what Harris and Gerry consider to be an undue emphasis on a mathematical approach to sentencing: once the category is selected, movement up or down within the range is based on reference to a list of factors²; however, sentencers are given no assistance as to the weight to attribute to each factor (*ibid.*). As the authors explain:

“The focus is placed on the presence or absence of the factors, as opposed to identifying the real feature of the offending ... What is required at sentence is a true examination of the offending behaviour in order to ensure the correct sentence is imposed” (*ibid.* 241 – 242).

Experience in the criminal courts has shown that the problem with the mechanistic approach of the Council’s guidelines is that, in many cases, sentencing hearings are reduced to “unseemly exercises in trading figures” that the public finds impossible to follow (*ibid.* 240). Victims, for example, may not understand why a particular sentence has been chosen on the *facts*, merely that it has been chosen on the Council’s *figures* (*ibid.*). In many situations, recourse to the Council’s guideline hinders the sentencer’s ability to do justice (*ibid.* 242). Harris and Gerry conclude that the present format of sentencing guidelines has “led to an over-dependence on mathematics and undue criticism of judges who take a fact-based approach” (*ibid.*).

¹ See, for example, *R v J*, [2013] 2 Cr. App. R. (S.) 42 (Harris, *ibid.* 847 – 848). For similar concerns regarding the potential for the new rape guidelines to produce “unfairness, confusion and perverse results”, see the discussion of the hypothetical examples explored by Harris and Gerry, 2013: 241.

² See above.

Harris and Gerry are not alone in their criticism of the new system of sentencing guidelines. Nicola Padfield (an academic and barrister who sat as a Recorder for 12 years between 2002 and 2014) considers the Council's guidelines "less easy to apply" and "more difficult to use" than the guidelines issued by the SGC (Padfield, 2013: 35)¹. In his case commentary to the decision in *R v Karam*, [2013] 2 Cr. App. R. (S.) 65 (a case involving rape and theft) the late Dr David Thomas Q.C.² criticises the nine step process involved in the Council's guidelines as "increasingly mechanistic", as "time-consuming and not often productive", and as having the potential to turn judges into "mere technicians oiling the wheels" (Thomas, 2013: 1000)³.

In a recent critique of the new system of sentencing guidelines, John Cooper Q.C. persuasively argues that the new guidelines format focuses on offence severity and offender culpability at the expense of personal mitigation (Cooper, 2013: 158), a view shared by Harris and Gerry (*ibid.* 240). Cooper regards the Council's approach as, on the whole, victim-centric (*ibid.*) and suggests that the Council has gone so far as to interpret public opinion – with what the Council perceives to be public distaste for personal mitigation⁴ – as being "the arbiter of how the guidelines should be calibrated" (*ibid.* 163).

Whilst the approach of the SGC was to provide guidance by means of specific fact-based scenarios, sentencers are now directed to weigh harm – in its new, expanded form incorporating psychological harm – and culpability equally in order to reach a specific category of offence within the guidelines (*ibid.* 159). Cooper maintains that as seriousness is

¹ On the lack of clarity in the Definitive Guideline on Sexual Offences, see Harris, 2015d: 552. See also Ashworth and Padfield's review of the first five years of the Sentencing Council where the question is asked: "Is anyone monitoring the user-friendliness of guidelines – comparing the style of the earlier SGC guidelines with the more rigid steps of the current generation of guidelines?" (Ashworth and Padfield, 2015: 658). That the guidelines issued by the Sentencing Council are becoming "increasingly complex" is acknowledged by Professor Julian Roberts, himself a member of the Council (see Roberts and Hough, 2015: 13).

² The learned author, who was one of the leading authorities on English sentencing law and practice (see Judge, 2014 and Ashworth and Ormerod, 2013), passed away on 30 September 2013. His commentaries to decisions of the Court of Appeal in the *Criminal Law Review* were a cornerstone of English sentencing jurisprudence (Ashworth and Ormerod, *ibid.* 946). It would have been most instructive to have had the benefit of Dr Thomas's views on the operation of the Council's new format of sentencing guidelines, such as the Definitive Guideline on Sexual Offences.

³ The new format of guidelines was also criticised by the Court of Appeal in *R v Perkins*, [2013] 2 Cr. App. R. (S.) 72, the leading decision on victim personal statements discussed in Chapter II. In this case (which concerned, *inter alios*, an appellant who had repeatedly raped his victim) the sentencing guidelines for sexual offences were criticised as being "something of a distraction" and "in some ways academic" (paragraph [52]). C.f. Treacy, 2014: 298.

⁴ Cooper considers it misleading to assume that the public do in fact take this view. By reference to studies such as those by Lovegrove (2010) and Roberts and Hough (2011), Cooper notes that if the sentencing process is properly and clearly explained to the public then the preponderance of opinion understands and endorses the importance of all forms of mitigation (Cooper, *ibid.* 163).

the overwhelming determinant of sentencing severity, the influence of personal mitigation has been marginalised and reduced to the extent that it is hardly mentioned in any of the Council's guidelines (*ibid.*). For Cooper, the Council's tendency to present long lists of aggravating factors but correspondingly short lists of mitigating factors in its guidelines puts personal mitigation into a subordinate position and makes it, to a significant extent, reliant upon judicial inclination: the more serious the offence, the less likely it is in practice that the sentencer will take personal mitigation into account (*ibid.* 163).

The juxtaposition of a detailed matrix of criteria linked to aggravating factors and seriousness with the paucity of guidance in relation to personal mitigation also drew adverse comment from the Howard League in its response to the Council's consultation on the draft guidelines for sentencing rape. The Howard League considers that this tendency:

“... connotes a reluctance to include mitigating factors in the sentencing guideline and suggests that the consideration of mitigating factors is not an important element in [the] sentencing of sexual offences” (Howard League, 2013, cited in Sentencing Council, 2013b: 17).

These comments drew the ire of the Council, who replied that they strongly refuted such a suggestion and stated that they had spent much time considering mitigation, ensuring that common factors were included to achieve transparency for victims, offenders and sentencers (Sentencing Council, *ibid.*).

Nevertheless, Cooper considers that the Council interprets personal mitigation very narrowly (*ibid.* 160). In practice, the only real mitigating factors available for the sentencer to consider will be issues relating to remorse and assisting the police (*ibid.*). Personal mitigation is, however, a more complex consideration than the Council seems to acknowledge; in Cooper's view, the concept remains under-developed as the Council has concentrated upon seriousness and on aggravating circumstances (*ibid.*).

Cooper argues that the focus on aggravating factors at the expense of mitigation clearly affects the ability of sentencers to respond to the characteristics of the individual offender (*ibid.*). In order to address these problems, Cooper suggests listing mitigating factors in a separate step of the guidelines methodology; expanding the list of guideline factors relating to

personal mitigation (to include, for example, pressing personal or family need, the offender's mental health, and exceptional personal responsibilities undertaken by the offender); and the issuing of a generic guideline on personal mitigation to list the "enormously wide" range of factors advanced in mitigation and to thus ensure a more consistent and principled approach to consideration of mitigating factors (*ibid.* 161 – 162).

Cooper considers that there is no principled reason why personal mitigation should play a lesser role in sentencing for more serious crimes; he stresses that the pursuit of fairness and justice must include a central role for personal mitigation (*ibid.* 164). In a scathing criticism of the Sentencing Council's approach, Cooper concludes:

"The sentencing of offenders is a complex and individual exercise; there is no blue-print or a 'one size fits all' solution. In the Council's quest for consistency the complex and idiosyncratic nature of offenders has been shelved in place of a process which, it is argued, can be easily understood by the public. This approach is superficial, and perhaps worse, it is patronizing. Sometimes, sentencing cannot be reduced to this two dimensional approach ... [I]t is time to acknowledge that the sentencing exercise is often difficult, sometimes complex, and always individualized" (*ibid.*)¹.

Thus for practitioners such as Cooper, Gerry and Harris, the ability of the judge to do justice in a particular case of rape may be hampered by the format of the Council's Definitive Guideline. Although the nature of rape is such that in many cases any personal mitigation will be completely outweighed by the seriousness of the offence (or may only be afforded a certain weight depending on the facts of the individual case), cases of rape do arise in which the factors advanced in mitigation are so compelling as to warrant the imposition of non-custodial sentences².

¹ See also Cooper's criticism of the guideline system under the SGC, discussed above.

² See, for example, *Attorney General's Reference (No. 117 of 2014)*, [2015] EWCA Crim 44 (suspended sentence of two years imposed on a mentally disordered offender held unduly lenient but not increased as there was no public interest in doing so), *R v Charles*, [2012] 1 Cr. App. R. (S.) 74 (suspended sentences with supervision requirements imposed on appeal) and *R v B*, [2011] EWCA Crim 165 (conditional discharge imposed on appeal). See also *R v Cleverley*, [2011] 1 Cr. App. R. (S.) 84 and *R v Mooney*, [2010] 2 Cr. App. R. (S.) 97 (where short custodial sentences were imposed).

With the Council's focus on harm and culpability in the new Definitive Guideline, the fact that the Definitive Guideline is presumptively binding on sentencers¹, that any departure from the Guideline will have to be justified² and, perhaps most importantly, the fact that the judge's assessment of sentence will take place against a background of numerous aggravating factors with correspondingly few mitigating factors, the imposition of constructive disposals *in appropriate cases*³ will arguably now be far less likely. As Harris observes, since the implementation of the new Definitive Guideline, defence counsel have found it "harder to mitigate for a defendant convicted of a sexual offence" (Harris, *ibid.* 848).

Rape sentencing and the guilty plea discount

At step 4 of the Council's Definitive Guideline, judges are directed to make an appropriate reduction in the sentence to reflect an offender's plea of guilty (Sentencing Council, 2013a: 12)⁴. This is a long-standing but not uncontroversial aspect of English criminal procedure (Ashworth, 2015: 179 – 185 and 186 – 188)⁵. It is also one of the most important principles in sentencing as it arises in the majority of cases falling to be sentenced by the courts (Wasik, 2014: 71), albeit that a lower proportion of those charged with sexual offences – and with rape in particular – plead guilty compared to those charged with other offences⁶. In terms of section 144(1) of the Criminal Justice Act 2003, in sentencing an offender who has pleaded guilty to an offence the court must take into account (a) the stage in the proceedings at which the offender indicated his intention to plead guilty; and (b) the circumstances in which this indication was given.

Sentencing practice is governed by the SGC's Definitive Guideline on *Reduction in Sentence for a Guilty Plea* (SGC, 2007b)⁷, which explains that a reduction in sentence is appropriate where an offender pleads guilty as the plea avoids the need for a trial; shortens the gap

¹ Under section 125(1) of the Coroners and Justice Act 2009, discussed above.

² Under section 174(6)(b) of the Criminal Justice Act 2003, discussed above.

³ As in *Charles*, *supra* and *B*, *supra*.

⁴ Thus, questions of aggravation and mitigation should be dealt with at step 2, before the question of reduction for a guilty plea arises (Wasik, 2014: 72).

⁵ For certain objections to the principle of guilty plea discounting, see Ashworth, *ibid.* and the discussion in Chapter III under the heading "Too generous and too readily given? Guilty plea discounts in sentencing rape".

⁶ In 2011, for example, 7,061 defendants were tried at the Crown Court for sexual offences, of whom 2,713 (38.4 per cent) pleaded guilty. The pleas varied by sexual offence group, however, with defendants charged with rape of a female having the lowest proportion of guilty pleas at 20.8 per cent (Ministry of Justice et al, 2013: 34).

⁷ A revised version of an earlier guideline issued in 2004.

between charge and sentence; saves considerable cost; and saves victims and witnesses from the concern about having to give evidence (*ibid.* 4). Thus the guilty plea discount principle derives from the need for the effective administration of justice and not as an aspect of mitigation (*ibid.*). The Definitive Guideline sets out a sliding scale with the greatest reduction (a recommended one third) given where the plea was entered “at the first reasonable opportunity”¹. This reduces to a recommended one quarter where a trial diet has been set, and to a recommended one tenth where the plea is entered at “the door of the court” or after the trial has begun (*ibid.* 5).

Particular tensions surround the practice of guilty plea discounting in cases such as rape where the offence is especially serious and morally repugnant (Leverick, 2014: 348 and 2013: 263)². Whilst condign punishment is required for offences of rape, the benefits of a guilty plea (principally, in cases of rape, cost savings to the criminal justice system and saving the victim from what may be the ordeal of giving evidence) accrue equally in cases where the offender’s conduct is morally reprehensible as from less serious offences. A related question is whether an offender who has no realistic option other than to plead guilty should still receive credit for his plea? Although pre-guideline practice suggested that the discount could be withheld in such circumstances (Ashworth, *ibid.* 184; Easton and Piper, 2012: 94; Thomas, 2012: 562; Wasik, *ibid.* 74 and the decision in *R v Costen*, (1989) 11 Cr. App. R. (S.) 182), the Definitive Guideline now states that where the prosecution case is “overwhelming” it may not be appropriate to give the *full* reduction of one third; whilst there is a presumption in favour of the full reduction, a lesser reduction of 20 per cent may be given for a plea at the first reasonable opportunity where the Crown case is indeed overwhelming (SGC, *ibid.* 6; see also *R v Darkwa*, [2015] EWCA Crim 260 at paragraphs [8] and [9]).

The tensions that arise in such cases and the subsequent balance that the court must attempt to strike are well illustrated by the decision in *R v Wilson*, [2012] 2 Cr. App. R. (S.) 77. The appellant in this case pleaded guilty within a few days of his arrest to two counts of rape of a child under 13 and to various other sexual offences committed against teenaged girls over the

¹ It is stated in Annex 1 to the Definitive Guideline that this will vary with a wide range of factors and that the court must make a judgement on the particular facts before it (*ibid.* 10). Further guidance was provided by the Court of Appeal in *R v Caley*, [2013] 2 Cr. App. R. (S.) 47 (see in particular paragraphs [9] to [22]).

² See the discussion in Chapter III under the heading “‘Too generous and too readily given?’ Guilty plea discounts in sentencing rape”.

internet. The victims in the charges of rape were two three-year-old girls; the appellant filmed himself on his mobile phone orally penetrating both girls whilst employed in a nursery. Following his pleas of guilty the judge sentenced him to custody for life on the two counts of rape with a minimum term of 15 years on each count. The judge declined to allow a discount in sentence for these offences (although discounts were granted in respect of the sentences imposed for the internet offences), noting that the appellant had “no option but to plead guilty”¹. On appeal, it was argued, *inter alia*, that the judge had misdirected herself by withholding any credit for the guilty pleas on the charges of rape.

In allowing this aspect of the appeal, the court referred to the SGC Definitive Guideline and noted that a guilty plea has a distinct benefit even in an overwhelming case². Whilst the court understood the sentencing judge’s reluctance to make any allowance for the guilty pleas in relation to the charges of rape, it considered that uncertainty and inconsistency in sentencing would result if the guideline were to be disregarded³. In the circumstances, it was held that the sentencing judge should have made some allowance for the appellant’s guilty pleas. The court took “a broad view” of the appropriate allowance and did not permit itself to be “beguiled by mathematics”: the notional determinate sentence was reduced from 30 years to 27 years⁴. This approach was later endorsed by the court in *R v Caley*, [2013] 2 Cr. App. R. (S.) 47 where it was noted, firstly, that the various public benefits which underlie the practice of guilty plea discounting apply just as much to overwhelming cases as to less strong ones and, secondly, that whilst it cannot be assumed that defendants will make rational decisions or ones which are born of any inclination to co-operate with the system, those who do so merit recognition⁵.

Thus the message from the Court of Appeal is clear. One can sympathise with the judge who, when faced with a defendant who has pleaded guilty to rape, either allows a lesser discount in sentence than is mandated in the SGC Definitive Guideline or declines to allow a discount at all due to the serious nature of the offence⁶. The judge who follows this course will, however, have misdirected himself and will in all likelihood have his sentence

¹ Paragraph [25].

² *Per* Judge LJ at paragraph [29].

³ Paragraphs [30] to [32].

⁴ Paragraph [33].

⁵ *Per* Hughes LJ at paragraph [24]. See also *R v Rossi*, [2015] 1 Cr. App. R. (S.) 15 at paragraphs [17] to [19].

⁶ In this regard, compare the approach in Scotland and the decision in *Murray v HMA*, 2013 S.C.C.R. 88 discussed in Chapter III.

overturned on appeal. A plea of guilty to a charge of rape will result in the same administrative benefits as a plea of guilty to a lesser offence. Whilst a reduced discount in the order of a fifth may be warranted where such a plea has been tendered in the face of overwhelming evidence, the rapist is entitled to credit for his guilty plea in the same way as any other offender.

Conclusion

Judges in England and Wales have benefited from guidelines for sentencing rape since the Court of Appeal issued its judgment in *Roberts and Roberts* in 1982. Although this early guidance was undoubtedly a step in the right direction, it was rightly criticised as being too vague to be of any real assistance (Temkin, 2002). This chapter has traced the subsequent expansion of English rape sentencing guidelines through the development of the four “phases” of sentencing guidelines in this jurisdiction (Ashworth and Roberts, 2012): firstly, the Court of Appeal’s narrative guidelines in *Billam* and their subsequent development in *Berry, Thornton, and W*; secondly, the advice of the SAP and the subsequent guideline case of *Millberry*; thirdly, the SGC’s Definitive Guideline on the Sexual Offences Act 2003; and finally the Sentencing Council’s Definitive Guideline on the 2003 Act.

The most serious criticism of the early guidelines issued by the Court of Appeal concerned the sentencing of marital or relationship rape. As the law stood in 1986, the Court was unable to consider the issue of sentencing marital rape in *Billam* and neither did it consider the relevance to sentence of a pre-existing relationship between the parties. The later decisions in *Berry, Thornton and W* which expanded the *Billam* guidelines were, however, the subject of trenchant academic criticism: these cases were based on a flawed understanding of the realities of stranger and marital rape (Fenwick, 1992; Rumney, 1999; Warner, 2000 and 2002; Temkin, *ibid.*). The unsatisfactory position whereby an existing relationship between the parties was viewed by the courts as a mitigating factor persisted until the SAP issued its advice to the Court of Appeal in 2002, the advice being largely accepted by the Court in its guideline judgment in *Millberry*. This decision greatly assisted judges in navigating their way through the facts of a particular case in order to arrive at an appropriate sentence.

Subsequent Definitive Guidelines issued by the two statutory bodies tasked with bringing about consistency – or indeed “uniformity” (Roberts, 2013) – in sentencing have further developed the sentencing guidelines for rape. Whilst there was much to commend the approach of the SGC (in particular, in finally laying to rest the debate as to whether relationship or acquaintance rape should attract the same sentence as stranger rape), the latest Definitive Guideline has been less well received by practitioners and, indeed, by some judges. In particular, criticism has focused on the format of the new guidelines as being too rigid, as having the potential to result in injustice, and as not being conducive to public understanding of the sentencing process (Harris, 2013; Harris and Gerry, 2013). At least one judge considers that the new guidelines are more difficult to use and are less easy to apply than those issued by the SGC (Padfield, 2013). Criticism has also been levelled at the new guidelines’ focus on aggravating factors at the expense of personal mitigation (Cooper, 2013; Harris and Gerry, *ibid.*).

A factor common to sentencing rape at every stage of development of the guidelines has been the requirement to consider allowing a discount in sentence to an offender who pleads guilty. This can be a controversial stage in sentencing for it is precisely in morally repugnant cases such as rape that the tensions surrounding guilty plea discounting are most acute (Leverick, 2013, 2014). In *Wilson and Caley*, however, the Court of Appeal recently confirmed that the various public benefits which underlie the practice of guilty plea discounting apply just as much in such cases. Thus rapists who plead guilty in advance of trial can expect a discount in sentence in line with the guidance contained in the SGC’s Definitive Guideline (SGC, 2007b), albeit that a lesser reduction may be warranted in cases where the evidence is overwhelming.

The English jurisprudence on sentencing rape is thus far better developed than in Scotland. The English courts have had the benefit of sentencing guidelines for rape in one form or another for over 30 years. These guidelines have not remained static. They have developed over the years to reflect changing societal attitudes to the offence and to adapt to long-term changes associated with the commission of rape. As we have seen in Chapter III, however, the Scottish courts are currently grappling with questions surrounding the sentencing of relationship and stranger rape that were considered by the English courts between 1988 (in *Berry*) and 1993 (in *W*), with a satisfactory conclusion being reached by the Court of Appeal in *Millberry* in 2003. The remainder of this thesis examines sentencing practice for rape in

other Commonwealth jurisdictions before considering how the Scottish courts should address the paucity of sentencing guidance within their own jurisdiction and, in particular, what form Scottish sentencing guidelines for this offence should take.

CHAPTER V

A COMPARATIVE EXAMINATION OF RAPE SENTENCING

Introduction

Thus far, this thesis has considered how the courts in the United Kingdom approach the sentencing of rape. The use of sentencing guidelines in England and Wales has been examined, together with the professed intention of the appeal court in Scotland to issue guidelines after a consideration of the sentencing jurisprudence and sentencing guidance available from the jurisdictions of the Commonwealth and beyond. The thesis now turns to examine sentencing practice for rape in two such jurisdictions: New Zealand and the Republic of Ireland.

The approach of the countries' appellate courts towards sentencing the offence are considered in turn. In order to understand the way in which rapists are sentenced it is important to clarify how the sentencing contexts differ between the jurisdictions (see generally Davies et al, 2002: 261 and 272). One must appreciate the cultural context of the policies, procedures and practice of sentencing (*ibid.* 273 – 274; see also Bussani and Mattei, 2012: 3 – 6; Grande, 2012: 195 – 197; and Öricü, 2007a: 53). As Hodgson cautions, a real attempt at understanding the structure and operation of a legal process *in its own context* is required and not simply a cursory glance to see “if they do what we do, better” (Hodgson, 2000: 152). Thus in each case the discussion begins by considering the sentencing landscape of the jurisdiction in question: the sentencing methodology of the courts is examined along with the nature of any general sentencing guidance or particular sentencing guidelines. It will be shown that rape sentencing jurisprudence is particularly well developed in New Zealand, where judges have long had the benefit of guideline judgments to guide their discretion in imposing sentences for rape.

It will be demonstrated, however, that the current guideline judgment – *R v AM*, [2010] 2 N.Z.L.R. 750 – is very different in both form and operation to the sentencing guidelines currently operating in England and Wales. The guidelines in *AM* are considered in detail against the background, firstly, of the New Zealand Parliament's incursion into the common law of sentencing in the form of the Sentencing Act 2002 and, secondly, the aborted proposals to establish a New Zealand Sentencing Council. The chapter proceeds to contrast

the guideline approach in New Zealand with the discretionary-based approach to rape sentencing in the Republic of Ireland.

Sentencing rape in common law jurisdictions

New Zealand

In New Zealand, the crime of rape is defined in similar terms to the offence in Scotland and England and Wales. Rape comprises the penile penetration of the genitalia without consent¹ and carries a maximum sentence of 20 years' imprisonment². There is a statutory presumption in favour of imprisonment for rape: an offender *must* be sentenced to imprisonment unless, having regard to the particular circumstances of both the offender and the offence, the court considers a custodial sentence inappropriate³. This section considers current sentencing practice in New Zealand and the forms of appellate guidance currently issued by the Court of Appeal. Recent statutory attempts to promote consistency in sentencing are then briefly considered. The section concludes by examining the guideline judgment for sentencing rape in *R v AM*, [2010] 2 N.Z.L.R. 750.

Sentencing practice, guidance and methodology in New Zealand

The most significant feature of sentencing in New Zealand is the discretion vested in the sentencing judge (Hall, 2007a: 253; Young and King, 2013: 211). The judge must weigh, usually intuitively, the various purposes of punishment; he must consider the circumstances of both the particular offence and the individual offender, and then choose a disposal that does justice to the victim, the offender and the community alike (Hall, 1993: para. 1; 2007b: 1). The traditional, discretionary approach of the New Zealand courts towards sentencing is described by Richardson J in *Fisheries Inspector v Turner*, [1978] 2 N.Z.L.R. 233:

¹ Crimes Act 1961, section 128(2).

² *Ibid.* section 128B(1).

³ *Ibid.* section 128B(2) and (3).

“It is only by allowing the sentencing authorities a wide discretion that they are enabled to take account of the innumerable factors affecting the nature of the offence, the circumstances of the offence, and the circumstances of the offender, all of which should ordinarily be weighed in determining the appropriate sentence in the particular case”¹.

Hall reports that the purpose of this discretion is not to allow individual judges to pursue personal sentencing preferences but to enable the judge to tailor the sentence to the facts of the case and to the offender’s personal circumstances (Hall, 2007a: 254; 2007b: 1). In so doing, the New Zealand judge – in common with his counterparts in England and Wales – will consider the seriousness of the offence having regard to the offender’s culpability and the degree of harm caused by the offence with reference to its impact on the victim (Hall, 2007a: 254, fn. 32). The limits of the judge’s sentencing discretion are constrained by the offence of which the offender is convicted and by the maximum penalty prescribed for that offence (Hall, 2007a: 253 – 254; Young and King, 2013: 202; 2011: 209 – 210; 2010: 254), thereby ensuring sufficient flexibility to allow the sentencer to achieve individualised justice (*R v Puru*, [1984] 1 N.Z.L.R. 248; Hall, *ibid.* 254). As Hall explains:

“Sentencing is not a rational mechanical process; it is a human process and is subject to all the frailties of the human mind. A wide variety of factors, including the Judge’s background, experience, social values, moral outlook, penal philosophy and views as to the merits or demerits of a particular penalty influence the sentencing decision” (*ibid.*).

Despite the importance of individualised justice in New Zealand, sentencing should still be conducted on a principled and consistent basis (Hall, *ibid.* 261). Influenced by the practice of the Court of Appeal in England and Wales, in the late 1970s the New Zealand Court of Appeal began to issue sentencing guidance in the form of guideline judgments (Young and King, 2011: 225; Young, 2008: 182; Young and Browning, 2008: 289; Hall, 2007b: 14). In so doing, the court sought to facilitate the development of a measure of consistency in sentencing without undermining the importance of judicial discretion in the individual case (Hammond, 2007: 218). As is increasingly the case in Scotland, the development of such comprehensively drafted appellate decisions led to the establishment of a significant corpus of sentencing law (Young and King, 2010: 256). Whilst – as was then the case in England and Wales – there was no statutory basis for guideline judgments (Hall, 2007a: 262), they

¹ Page 237.

were characterised by the assumption that “consistency would flow from a proper analysis of sentencing decisions and the reinforcement of existing sentencing patterns”¹.

The New Zealand Court of Appeal continues to issue such guideline judgments² which focus on specific offences or offence types, prescribing “bands” of seriousness and the sentence ranges within each band whilst allowing room for departure from the guidelines (Young and King, 2013: 203 and 211; 2011: 210; 2010: 254). Such guideline judgments become the standard reference point for all future sentencing decisions in relation to that offence type (Young and King, 2010: 254; Hammond, *ibid.*) and enable the formulation and dissemination of judicial sentencing policy (Hall, *ibid.*). Hall explains that guideline judgments provide judges with a clear, integrated and detailed framework within which to assess the factors that influence the determination of the appropriate sentence (*ibid.*). As with early guideline judgments in England, they are expressed in narrative form, giving an indication of how the court will deal with sentence appeals, whilst preserving the freedom of the sentencing judge to impose a different sentence should a particular case feature an unusual combination of factors (*ibid.* 263).

The status of New Zealand guideline judgments is akin to those of guideline judgments in Scotland: although they should be observed by trial courts they are not to be slavishly applied and departure may be warranted by the facts of a particular case (Hall, *ibid.*)³. For example, the decisions in *R v Pehi*, [2007] B.C.L. 58 and *R v H*, CA 488/05, 4 September 2006, unreported⁴ both stated that the guideline judgment on sentencing rape that was then in force⁵ was not to be applied in a formulaic or rigid manner. More recently, in delivering the guideline judgment in *R v Taueki*, [2005] 3 N.Z.L.R. 372 (on serious violent offending), the Court of Appeal explained:

¹ *R v AM*, *supra*, at paragraph [9].

² O’Malley (2011: 125 – 126) observes that the court has occasionally recommended the use of guidelines issued by the English Sentencing Guidelines Council for offences which had not yet been the subject of a guideline judgment within New Zealand itself (see, for example, *R v Clode*, [2009] 1 N.Z.L.R. 312 on guidelines for child pornography offences).

³ Note, however, that section 12 of the Sentencing Amendment Act 2007 (part of the sentencing reforms that were never brought into force – discussed *infra*) inserts a new section 21A into the Sentencing Act 2002. Section 21A provides that the court “must impose a sentence that is consistent with” any sentencing guidelines which are relevant to the offender’s case, unless the court is satisfied that it would be “contrary to the interests of justice” to do so (see Young and King, 2013: 213; 2011: 215). Thus the proposed new format of New Zealand guidelines (discussed *infra*) were to be presumptively binding (O’Malley, 2011: 126) in the same way as the present system in England and Wales.

⁴ Both cited in Hall, 2007a: 262, fn. 65.

⁵ Namely *R v A*, [1994] 2 N.Z.L.R. 129, discussed *infra*.

“What we seek to achieve is consistency in the approach adopted by sentencing Judges, which should in turn lead to consistency in sentencing levels. This does not override the discretion of sentencing Judges, but rather provides guidance in the manner of the exercise of that discretion”¹.

The development of guideline judgments has been associated with an increased emphasis on structured sentencing². Where the judge determines imprisonment to be the appropriate disposal, sentencing practice is based around a methodology which was first explained by the Court of Appeal in *Taueki, supra*. The methodology was refined by the Court of Appeal in *Hessell v R*, [2010] 2 N.Z.L.R. 298, and was subsequently endorsed by the Supreme Court in *Hessell v R*, [2011] 1 N.Z.L.R. 607.

New Zealand sentencing methodology involves a staged approach. As a first step, the sentencer must identify a “starting point” sentence which appropriately reflects the “intrinsic seriousness” of the offence³. The “starting point” thus takes into account aggravating and mitigating features of *the offending* but excludes mitigating and aggravating features relating to *the offender*⁴. As the court put it in *R v Mako*, [2000] 2 N.Z.L.R. 170, the starting point is a level of sentence that would be appropriate in a case of conviction after trial in the absence of any relevant mitigating or aggravating factors relating to the offender⁵.

The second step involves evaluating the aggravating and mitigating factors personal to the *particular offender*: the “starting point” sentence is adjusted up or down to reflect these factors⁶. Thus, the actual sentence may be higher or lower than – or, occasionally, the same as – the starting point sentence (Hall, *ibid.* 264).

The third step involves the application of an appropriate discount in sentence if the offender pleads guilty. Whilst the Court of Appeal initially considered the application of a sentence discount as comprising part of the second step in the sentencing methodology⁷, it refined its

¹ Paragraph [10].

² *R v AM, supra*, at paragraph [13].

³ *Ibid.*

⁴ *R v Taueki, supra*, at paragraph [8].

⁵ Paragraph [34]. See also *R v Clifford*, [2012] 1 N.Z.L.R. 23 at paragraph [57].

⁶ *R v AM, supra*, at paragraphs [13] and [84]; *R v Clifford, supra*, at paragraph [58]. See also Hall, 2007a: 263 – 264.

⁷ See *R v AM, supra*, at paragraph [14]; *R v Fatu*, [2006] 2 N.Z.L.R. 72 at paragraph [21] and Hall, 2007a: 263 – 264.

approach in *Hessell v R*, [2010] 2 N.Z.L.R. 298 so that it formed a separate, third step¹. This third and final step is to be undertaken only after the sentencing judge has determined what sentence would have applied to the offender in the absence of the guilty plea, having taken into account all other personal mitigating and aggravating factors². This third step in the New Zealand sentencing methodology was endorsed by the Supreme Court in *Hessell*'s subsequent appeal (*Hessell v R*, [2011] 1 N.Z.L.R. 607)³ and was later reiterated by the Court of Appeal in *R v Clifford*, [2012] 1 N.Z.L.R. 23⁴.

The Court of Appeal acknowledged in *R v AM*, *supra*, that heavily structured approaches to sentencing of this nature are not universally popular⁵. One can, for example, compare the “instinctive synthesis” approach favoured by both the High Court of Australia⁶ and the appeal court in Scotland⁷. The court in *AM*, however, considered structured sentencing to have advantages in terms of consistency and transparency; it also noted that the structured approach was “well embedded” as the appropriate sentencing methodology in New Zealand⁸. Finally, the court considered that sentencing based on “instinctive synthesis” would not be in conformity with the New Zealand Sentencing Act 2002⁹.

The Sentencing Act 2002 and the New Zealand Sentencing Council

The Sentencing Act 2002 was passed against a background of increasing public scrutiny and criticism of New Zealand's sentencing system¹⁰. The Act represents the New Zealand legislature's first real incursion into the common law of sentencing (Young and King, 2011: 210). The Act specifies, for the first time, the purposes of sentencing¹¹ and the principles that

¹ *Hessell v R*, *supra*, at paragraph [14].

² *Ibid.* See also *R v Clifford*, *supra*, at paragraph [58].

³ See paragraphs [73] – [74], albeit that the Supreme Court disapproved the practice of incorporating an offender's remorse into the discount and stated that sentencing credit should properly be given for remorse as a distinct factor at stage two of the methodology *before* the guilty plea discount is applied (see paragraphs [51], [56] – [57], [60] – [61], and [64] – [65]).

⁴ Paragraphs [57] to [60].

⁵ Paragraph [15].

⁶ See *Markarian v The Queen*, [2005] H.C.A. 25.

⁷ See Chapter III.

⁸ Paragraph [15].

⁹ *Ibid.*

¹⁰ For a full discussion, see Roberts, 2003; Hall, 2007a: 258 – 259; Young, 2008: 180 – 181; Young and Browning, 2008: 287 – 288; Young and King, 2010: 255 – 256 and 2011: 210 – 212.

¹¹ Section 7. The purposes include, *inter alia*, providing for the interests of the victim (ss. (c)); denunciation (ss. (e)); deterrence (ss. (f)); protection of the community (ss. (g)); rehabilitation (ss. (h)); and any combination thereof (ss. (i)).

the court must take into account when sentencing an offender¹; it also includes a non-exhaustive list of aggravating² and mitigating³ factors that judges must take into account “to the extent that they are applicable” in a given case.

Young and King (2011: 212) report that the Act’s purposes, principles, and aggravating and mitigating factors mostly codified the current approach to sentencing. These factors did not represent Parliament’s view about any new sentencing policy but instead were, broadly, those most commonly relied upon by the courts when imposing sentence (*ibid.*; see also Roberts, 2003: 254 – 257; Young, 2008: 180 – 181; Young and Browning, 2008: 287; Young and King, 2010: 255; and O’Malley, 2013c: 526). In particular, the 2002 Act offered no guidance as to sentencing severity levels (Young and Browning, *ibid.* 288; Young and King, 2010: 256) and neither did it specify the relative weight to be given to each factor (Young and King, *ibid.*; 2011: 212). Judges thus continued to make their own decisions about the weight of each statutory factor in light of the culpability of the particular offender and the seriousness of the individual case (*ibid.*).

Faced with a rapidly rising prison population through the early to mid-2000s, the New Zealand government asked the Law Commission to consider whether improvements could be made to the country’s sentencing and parole structures (Young, 2008: 179; Young and King, 2010: 256; 2011: 208 – 209). In particular, the government asked the Commission in February 2006 to consider whether New Zealand should establish a sentencing council to give more guidance to judges regarding appropriate types and levels of punishment (*ibid.*; Hall, 2007a: 291). The Commission’s subsequent report recommended the establishment of a sentencing council to draft sentencing guidelines (New Zealand Law Commission, 2006).

The government at the time announced that it accepted the Commission’s recommendations and would introduce legislation to give effect to them (Young, *ibid.*). Ahead of the intended creation of the New Zealand Sentencing Council – and to ensure that guidelines could be implemented as soon as possible – the government asked the Law Commission to prepare

¹ Section 8. The principles include, *inter alia*, the gravity of the offending and the offender’s culpability (ss. (a)); the seriousness of the offence (ss. (b)); the “general desirability” of consistency (ss. (e)); and the notion of parsimony (ss. (g)).

² Section 9(1). The factors include, *inter alia*, use of violence (ss. (a)); unlawful entry into a dwelling place (ss. (b)); the extent of any loss, damage or harm caused (ss. (d)); particular cruelty in committing the offence (ss. (e)); abuse of a position of trust (ss. (f)); and the vulnerability of the victim (ss. (g)).

³ Section 9(2). The factors include, *inter alia*, the offender’s age (ss. (a)); his diminished intellectual capacity (ss. (e)); remorse (ss. (f)); and previous good character (ss. (g)).

draft sentencing guidelines in collaboration with the judiciary that could be considered by the Council once it was established (Young and King, 2010: 259; 2011: 209; O'Malley, 2011: 126). This was achieved by the establishment of a Sentencing Establishment Unit ("SEU") within the Law Commission, staffed by members of the Commission and four seconded judges (Young and King, *ibid.*; Young and Browning, 2008: 294). The work of preparing the draft guidelines was undertaken in 2007 and 2008, with the SEU drawing extensively on the experience of the English Sentencing Guidelines Council in developing its proposals (Young and King, 2010, *ibid.*; Young, 2008: 186). A total of 59 sets of draft guidelines were prepared (Young and King, 2011: 213)¹, including a draft guideline on sexual violation (New Zealand Law Commission, 2008)².

Although the relevant legislation³ was enacted by Parliament, it was never implemented. Following a general election in November 2008, the succeeding administration indicated that it did not wish to proceed with the establishment of a sentencing council (Young and King, 2013: 203; 2011: 226; 2010: 260)⁴. In the absence of a sentencing council, the SEU's draft guidelines are held by the Law Commission⁵. The Court of Appeal, however, developed a practice whereby it would draw on the SEU's draft guidelines in issuing its own guideline judgments when it considered that it was appropriate to do so (see Young and King, 2010: 260; 2011: 213, fn. 12, 221 – 222; O'Malley, *ibid.*). This is precisely the route that the Court of Appeal followed in issuing revised sentencing guidelines for rape in *R v AM*, [2010] 2 N.Z.L.R. 750.

Sentencing guidelines for rape – the decision in R v AM

Whilst sentencing practice for the crime of rape was considered by the Court of Appeal in *R v Pawa*, [1978] 2 N.Z.L.R. 190 and *R v Pui*, [1978] 2 N.Z.L.R. 193 where general tariff guidance was provided, sentencing guidelines were first set out by the court in *R v Clark*, [1987] 1 N.Z.L.R. 380. In *Clark* the court cited with approval the English guideline

¹ For a full discussion on the format of the SEU's draft guidelines, see Young, 2008: 186; Young and King, 2010: 259 – 260 and 2011: 213 – 215.

² The SEU's draft guidelines were never made widely available due to their "uncertain status" (Young and King, 2010: 261, fn. 21; 2011: 209, fn. 2).

³ The Sentencing Council Act 2007.

⁴ For a full discussion, see Young, 2008: 180 – 181; Young and Browning, 2008: 287 – 288; Young and King, 2010: 255 – 256 and 2011: 210 – 212.

⁵ Personal communication with Mr Peter Adamson (manager, information services) of the New Zealand Law Commission (31 March 2015).

judgment of *R v Billam and others*, (1986) 8 Cr. App. R. (S.) 48¹ and followed the English Court of Appeal in setting a figure of five years' imprisonment as a starting point for a contested case². Hall reports that *Clark* became accepted in subsequent cases as setting the New Zealand "going rate" or "tariff" for rape at five years (Hall, 2007b: 49).

When the statutory maximum penalty for rape in New Zealand was increased from 14 to 20 years' imprisonment³ the Court of Appeal re-examined the starting point in *R v A*, [1994] 2 N.Z.L.R. 129. The court noted that additional indignities and the use of force had become "a very marked feature of evidence relating to rape"⁴ and that the five year starting point in *Clark* had come to be seen by judges as being "rather on the low side"⁵. The court increased the starting point in a contested case to eight years⁶ but observed that its judgment was not intended to fetter sentencing judges in assessing the gravity of particular cases: the court stressed that almost everything would turn on the facts of the particular case and it was part of the judicial responsibility to weigh those facts⁷.

By 2010 the Court of Appeal considered that the guidance in *A* had, in some respects, been overtaken by emerging evidence about, and evolving social attitudes to, rape⁸. The guidance in *A* also gave little assistance in cases where the culpability of the offender was particularly high⁹. Two further problems were identified with the judgment in *A*: firstly, the courts had come to treat eight years' imprisonment as if it were the *minimum* available starting point, which the Court of Appeal had not intended; secondly, sentencing outcomes tended to be closely clustered around the eight year starting point with the result that sentencing for rape tended not to be closely calibrated to an offender's culpability¹⁰. The court thus issued revised, integrated sentencing guidelines for sexual violation where rape is the lead offence and for sexual violation where other unlawful sexual connection (such as digital penetration) is the lead offence in *R v AM*, [2010] 2 N.Z.L.R. 750¹¹.

¹ Discussed in Chapter IV.

² *R v Clark*, *supra*, page 383. The court also broadly accepted the same aggravating and mitigating factors listed in *Billam* (*ibid.*).

³ By section 2 of the Crimes Amendment Act (No. 3) 1993.

⁴ Page 131.

⁵ *Ibid.*

⁶ Pages 131 – 132.

⁷ Page 132.

⁸ *R v AM*, [2010] 2 N.Z.L.R. 750 at paragraph [1].

⁹ *Ibid.*

¹⁰ Paragraph [28].

¹¹ See paragraphs [2] and [5].

The court explained that because sentencing practice in England and Wales is very similar to that in New Zealand, the sentencing guidelines it issued were influenced by the work of the English Sentencing Guidelines Council¹. The court also drew on the SEU's draft sexual offence guideline, noting that it had been the subject of considerable consultation with interested parties and that it provided more information than would ordinarily be available to the court in a guideline case².

In remarks very similar to those of the English Court of Appeal in *R v Millberry and others*, [2003] 2 Cr. App. R. (S.) 31³, the court emphasised that its intention was to provide guidance for sentencing judges⁴. The court also stated that it intended to provide direction in the manner of application of the requirements of the Sentencing Act 2002⁵, to ensure properly graduated sentencing for rape, and to avoid the previous clustering of sentences around the eight year mark⁶. It began by discussing what it termed “culpability assessment factors”, setting out a non-exhaustive list of nine aggravating and two mitigating factors in sentencing rape⁷. The various factors, the court observed, had been treated as relevant in domestic authorities and in the approaches taken by both the SEU and the SGC⁸. The court prefaced its discussion of the various factors with the following observation:

“[I]t is trite but important to emphasise that what is required is an evaluation of all the circumstances. Listing relevant factors and setting out bands in the way we have done does not remove the need for judgment. A mechanistic approach is not appropriate”⁹.

¹ Paragraph [18]. On the work of the SGC, see the discussion in Chapter IV.

² Paragraph [20].

³ Discussed in Chapter IV.

⁴ Paragraph [29]. See also paragraphs [84] (“The point of the guidelines is not to impose a straitjacket on sentencing judges – quite the reverse”) and [88] (“[O]ur role in these matters is not a legislative one but is rather to provide guidance for sentencing judges”). Compare *Millberry*, *supra*, at paragraphs [13] and [34] and *R v Oliver and others*, [2003] 2 Cr. App. R. (S.) 15 at paragraph [13].

⁵ Paragraph [35]. The 2002 Act is discussed *supra*.

⁶ Paragraph [33]. See also paragraph [88].

⁷ Paragraphs [37] to [60].

⁸ Paragraph [36]. The court erroneously referred to the various factors as having been treated as relevant in “the United Kingdom guidelines” [*sic*] (see also paragraph [57]). This is a paradigm example of “the UK” really meaning “England and Wales” in legal discourse (see generally Garland, 1999: xiv; McAra, 2008: 481, and Croall et al, 2010: 5 – 8).

⁹ Paragraph [36].

With that caveat, the court listed the following factors as aggravating an offence of rape: planning and premeditation; violence, issuing threats, intimidation, abduction, detention and home invasion; the vulnerability of the victim due to, for example, age or health; physical and psychological harm caused to the victim; rape committed by more than one offender acting in concert; the scale of the offending, repeated rape, and associated degradation or indignities including recording or photographing the offence; breach of trust; hate crime; and the degree of violation, in the sense of the length of the assault and the amount of force used¹. The two factors that were listed as being capable of mitigating an offence were, firstly, a genuinely mistaken belief as to consent² and, secondly, circumstances in which consensual sexual activity took place immediately before the offending³. The court accepted that this latter consideration was “difficult and controversial”⁴; however, it was included as a mitigating factor on the basis that immediate prior consensual sexual activity may correlate with a lack of premeditation⁵.

Before setting out the relevant sentencing bands or ranges for rape, the court dealt with two further important sentencing issues. Firstly, with regard to the sentencing of so-called “relationship rape” – an issue which, as we have seen, has greatly exercised the English Court of Appeal⁶ and which continues to cause divisions of judicial opinion in Scottish sentencing jurisprudence⁷ – the court was unequivocal:

“Culpability is not reduced by any sense of entitlement associated with a current or previous relationship. As this Court has said, there is no separate regime for sexual violation of a spouse or partner or those who have previously been in a relationship”⁸.

Although not cited by the court in *AM*, the rationale for this approach was articulated by the New Zealand Court of Appeal as far back as 1987 in *R v N*, [1987] 2 N.Z.L.R. 268. As we have seen, in 1987 neither the English Court of Appeal nor the Scottish appeal court had considered the issue of sentencing relationship rape. The matter was not addressed in the

¹ See paragraphs [37] to [52].

² Paragraph [53], disapproving *R v Hill*, CA 94/02, 21 October 2002, unreported.

³ Paragraphs [54] – [60].

⁴ Paragraph [59].

⁵ *Ibid.*

⁶ See the discussion in Chapter IV.

⁷ See the discussion in Chapter III.

⁸ Paragraph [61], reference here being made to the decisions in *R v Tikitiki*, CA 195/96, 10 August 1998, unreported and *R v H*, CA 248/02, 31 October 2002, unreported.

guideline judgment in *Billam, supra*, and it would be another 12 months before the court in *R v Berry*, (1988) 10 Cr. App. R. (S.) 13 held that a prior sexual relationship could serve to *mitigate* a sentence¹. The Scottish appeal court was at that time some 12 years away from considering the issue, only to similarly determine, in *Ramage v HMA*, 1999 S.C.C.R. 592, that a prior sexual relationship could amount to a mitigating factor in sentencing rape². *N* was a case in which the appellant raped his estranged wife at knife-point. What the New Zealand Court of Appeal said was this:

“We are firmly of the view that in cases of this nature no separate regime of sentencing is called for simply because the parties are married or have been in a continuing sexual relationship. To do so would deny to a woman in that position the rights over her body which are accorded to every other woman ... [T]he sense of outrage and violation experienced by a woman in that position can be equally as severe”³.

Secondly, the court in *AM* considered the issue of the extent to which sentencing for rape should be influenced by the views of the victim, particularly where the victim seeks a lenient disposal⁴. The court noted that where sexual offending occurs within a family or social group, victims are often put under pressure not to involve the criminal justice system and that judges often treat victims’ calls for leniency with caution, seeing them as likely to be the result of such illegitimate pressure⁵. On the other hand, the court considered it difficult to see why a sentencer should ignore a claim by a victim that the harm suffered was minimal, at least where he is satisfied that such illegitimate pressure has not been brought to bear on the victim⁶. The court concluded that no general rule could be set out and that judges would have to assess each case individually⁷.

Before it set out the sentencing guidelines, the court emphasised the importance of judgment and judicial discretion in their application; it also stressed the importance of individualised justice in sentencing and of taking account of the effect on the victim:

¹ See the discussion in Chapter IV.

² See the discussion in Chapter III.

³ Page 270.

⁴ Paragraphs [62] – [64].

⁵ Paragraph [63].

⁶ Paragraph [64].

⁷ *Ibid.*

“In considering the culpability of offending in a particular case, we emphasise that what is required is an evaluative exercise of judgment. We see judges as having a reasonable degree of latitude in this exercise ... In assessing the gravity of offending judges must, of course, do this in a fact-specific way focusing on the culpability of the offender and the effect on the victim and, as a corollary, they must not reason by stereotype or seek to turn responsibility for the offending back on the victim, in terms of ‘she asked for it’ or other excuses based on rape myths”¹.

The court’s guidelines followed the same approach as in previous guideline judgments such as *R v Taueki*, [2005] 3 N.Z.L.R. 372² in establishing bands (expressed in terms of imprisonment) within which ranges of starting points were provided³. Four bands were set out: (a) rape band one: six – eight years; (b) rape band two: seven – 13 years; (c) rape band three: 12 – 18 years; and (d) rape band four: 16 – 20 years⁴.

Band one was described as being appropriate for offending at the lower end of the spectrum, where aggravating features are either not present or present only to a limited extent⁵. Band two was said to be appropriate for cases where the scale of offending, levels of violence and premeditation are relatively moderate⁶. It applies to cases which involve a vulnerable victim, an offender acting in concert with others, or some additional violence⁷. Band three applies to offending accompanied by relatively serious aggravating features⁸. It is appropriate for offending which involves two or more of the factors increasing culpability⁹ to a high degree or for offending which features more than three of those factors to a moderate degree¹⁰. The court also stated that “[p]articularly cruel, callous or violent single episodes of offending involving rape” will fall into this band¹¹. Finally, band four applies to cases involving multiple offending over considerable periods of time, rather than single instances of rape¹². The court considered the paradigm example of offending within band four to be the repeated

¹ Paragraph [79].

² Discussed *supra*.

³ Paragraph [88].

⁴ Paragraph [90].

⁵ Paragraph [93].

⁶ Paragraph [98].

⁷ *Ibid.*

⁸ Paragraph [105].

⁹ Discussed *supra*.

¹⁰ Paragraph [105].

¹¹ *Ibid.*

¹² Paragraph [108].

rape of one or more family members over a period of years; gang rape was also said to be an offence which is likely to fall within this band¹.

In describing the types of rape that come within the various bands, the court provided illustrations by reference to several dozen earlier cases, usually decided at first instance, along with brief summaries of the facts². These illustrations were made possible due to the New Zealand practice of transcribing sentencing decisions for most sentences imposed at first instance (see Young and King, 2013: 216).

The court recognised that cases would arise which were so unusual – in the sense of their featuring a combination of mitigating factors and perhaps a comparatively low level of harm – that the judge would require to set a starting point outside of the guideline, below the bottom of band one³. Where a judge departed from the guidelines in this way, the court stated that reasons should be given for the departure⁴. The court also stressed that the bands set out *ranges of starting points* – not final sentences – which were to be adjusted up or down to reflect circumstances personal to the offender⁵. Judges were directed not to diminish the importance of mitigating factors such as youth, mental disability, and prior good character⁶.

An assessment of the AM guidelines

The AM guidelines are criticised by Mathias (2010) who considers the grouping of bands of sexual offending based on the physical details of the offence to comprise a “grotesque” level of analysis. Mathias’s main objection to the guidelines, however, is that they fetter judicial discretion: whilst he accepts that the guidelines are “honest endeavours to promote uniformity [*sic*] in sentencing”, he considers that they are based on the underlying assumption that judges are unable to exercise their sentencing discretion judicially (*ibid.*).

¹ Paragraph [109].

² For illustrative cases in band one and associated commentary, see paragraphs [93] to [97]; for band two, see paragraphs [98] to [104]; for band three, see paragraphs [105] to [107]; and for band four, see paragraphs [109] to [112].

³ Paragraph [83].

⁴ *Ibid.*

⁵ Paragraph [84]. See the discussion above under the heading ‘Sentencing practice, guidance and methodology in New Zealand’.

⁶ *Ibid.*

Although the illustrations of the types of rape that come within the various bands set out by the court¹ make for difficult – and, in some cases, harrowing – reading, they nevertheless serve a useful purpose in illustrating, in narrative form, the application of the guidelines themselves (see O’Malley, 2013c: 661). More importantly, however, Mathias’s criticism is based on a flawed understanding of the nature of the court’s guidelines. Mathias appears to focus purely on the four rape bands; he overlooks the repeated statements of the court throughout the decision in *AM* which stress that the guidelines are provided only to guide judges in imposing sentence², which emphasise that the rape bands set out ranges of starting points, not final sentences³, which stress the need for evaluation of all the circumstances in the particular case, the importance of judgment, the degree of latitude afforded to judges in their application, and which highlight the fact that a mechanistic approach towards the application of the guidelines is inappropriate⁴.

The approach in *AM* is thus an example of the court seeking to achieve what Sir Grant Hammond⁵ describes as “reasonable regularity” in sentencing (Hammond, 2007: 233). The most practicable way to reach this ideal, Hammond observes, is through structured, but not inflexible, guidance, coupled with a decent width of appellate review (*ibid.*).

Similarly, O’Malley commends the approach of the court in combining narrative guidance on the differentiation of offences falling into the same broad legal category with concrete indications of appropriate starting points and sentence ranges (2011: 126). For O’Malley, if one assumes a reasonable level of compliance on the part of trial judges and a reasonable level of vigilance on the part of appeal courts, the approach should produce a fair degree of consistency in sentencing whilst leaving sufficient room for the exercise of judicial discretion (*ibid.*). This appears to be borne out by contemporary sentencing practice for rape in New Zealand, where the guidelines in *AM* have been consistently applied, both at first instance by the High Court⁶ and by the Court of Appeal⁷.

¹ See paragraphs [93] – [112].

² See paragraphs [29], [35], [84] and [88], discussed *supra*.

³ See paragraph [84].

⁴ See paragraphs [36] and [79], discussed *supra*.

⁵ A former judge of the Court of Appeal of New Zealand and President of the New Zealand Law Commission.

⁶ For recent examples, see *R v Toa*, [2014] N.Z.H.C. 2279; *R v Thompson*, [2014] N.Z.H.C. 1157; *R v Hetherington*, [2013] N.Z.H.C. 3393; and *R v Lin*, [2013] N.Z.H.C. 2837.

⁷ For recent examples, see *N v R*, [2014] N.Z.C.A. 150; *K v R*, [2013] N.Z.C.A. 430; *W v R*, [2013] N.Z.C.A. 316; *Dempsey v R*, [2013] N.Z.C.A. 297; and *Pakau v R*, [2012] N.Z.C.A. 522.

The Republic of Ireland

Two distinct forms of rape are currently recognised in the Republic of Ireland: common law rape and “section 4” rape (O’Malley, 2013c: 35)¹. Common law rape – which was given a statutory definition in 1981 – consists of sexual intercourse by a man with a non-consenting woman², whilst “section 4” rape consists of sexual assault involving forms of bodily penetration other than penile-vaginal intercourse³ (*ibid.*; see also Bacik, 2002a: 149 and Carney, 2002: 390). The offences are punishable with a maximum sentence of life imprisonment (O’Malley, 2006: 262; Bacik, *ibid.* 150). The common law exception whereby a man could not be held guilty of raping his wife was abolished in Ireland in 1991⁴ (Carney, *ibid.*). This section considers how the offence of rape is sentenced by the Irish courts. Sentencing methodology in Ireland is examined; current sentencing practice for rape is then considered along with relevant guidance issued by the country’s appellate courts.

Sentencing in Ireland

In common with jurisdictions such as Scotland⁵ and New Zealand⁶, Ireland retains a largely discretionary sentencing system (O’Malley, 2013b: 220; 2006: 16; 2001: 135; Campbell, 2008: 291 – 292; Bacik, 2002b: 351; O’Flaherty, 2002: 375 – 376). Judges have a wide discretion in sentencing individual offenders and may impose any sentence up to the permitted statutory maximum (O’Malley, *ibid.*; Conway et al, 2010: 179). Whilst Kilcommins et al (2004: 145) criticise the judiciary for making sentencing decisions based on a “disjointed ‘instinctive synthesis’ approach”⁷, judicial discretion is not entirely unconstrained as in selecting sentence judges must apply certain general principles established by the superior courts⁸ (O’Malley, 2013b, *ibid.*).

¹ For full discussions of common law and section 4 rape, see O’Malley, 2013c: 35 – 68 and 68 – 69 respectively.

² See section 2 of the Criminal Law (Rape) Act 1981, as amended by section 21 of the Criminal Law (Rape) (Amendment) Act 1990.

³ See section 4(1) of the 1990 Act.

⁴ When section 5 of the 1990 Act came into force.

⁵ See Chapter III.

⁶ See above.

⁷ Although not referred to by Kilcommins et al, the term “instinctive synthesis” was first employed as a description of judicial sentencing methodology by the Victoria Court of Criminal Appeal in *R v Williscroft*, [1975] V.R. 292, a view subsequently approved by the High Court in *Markarian v The Queen*, [2005] H.C.A. 25.

⁸ The Court of Criminal Appeal and the Supreme Court.

These principles typically indicate aggravating and mitigating factors that are either generally applicable or which are considered appropriate in certain circumstances (O'Malley, 2013c: 642). The provision of such appellate guidance results in judges exercising what O'Malley terms "principled discretion" (2011: 5). Under this system, judges retain the discretion they already enjoy, but exercise it in accordance with settled principles. Departure from these principles is, however, permissible when a novel or exceptional aspect of a particular case so requires (O'Malley, 2001: 135). Principled discretion thus results in *informed* judgement (O'Malley, 2011: 5). The principles laid down by the appellate courts "guide courts in navigating their way through the facts in order to arrive at an acceptable sentence" (O'Malley, 2013c: 533). This, in turn, leads to the development of a "sentencing canon" of leading appellate decisions – decisions which are authoritative yet not inflexible (O'Malley, 2006: 66 – 67; 1994: 9 – 10; Charleton and Scott, 2013: 21 – 22).

The Irish system thus produces a discretion underpinned by principles, rather than hemmed in by rules (O'Donnell, 2012: 256; O'Malley, *ibid.*). It allows judges to retain sufficient flexibility to keep justice to the fore whilst injecting enough consistency to make sentencing outcomes more predictable (O'Donnell, *ibid.* 257).

O'Malley explains that the Irish courts traditionally resisted the introduction of sentencing guidelines in any shape or form, preferring to rely on judicial discretion informed by such appellate guidance (2013c: 642; see also 2013b: 221, 223; Campbell, *ibid.* 292; Bacik, *ibid.* 348; and O'Flaherty, *ibid.*). In 1988, for example, the Supreme Court declined a specific invitation from the Attorney General to issue sentencing guidelines for rape in a similar manner to the guideline judgments then issued by the English Court of Appeal¹. The Irish appellate courts also resisted specifying sentencing ranges in the sense of indicating appropriate bands or starting points for variants of particular offences (O'Malley, *ibid.* 644; 2011: 4)². Indeed, in *People (DPP) v Kelly*, [2005] 2 I.R. 321 the Court of Criminal Appeal implicitly disapproved of this approach³ (O'Malley, *ibid.*).

¹ *People (DPP) v Tiernan*, [1988] I.R. 250, considered *infra*. On the format of the guideline judgments issued by the Court of Appeal in England at this time, see Chapter IV.

² Compare the various guideline judgments, including *R v AM*, [2010] 2 N.Z.L.R. 750, issued by the New Zealand Court of Appeal where this approach is followed (discussed *supra*).

³ At page 325 *per* Hardiman J.

A “quiet revolution” – the guideline judgments in Ryan and Fitzgibbon

Whilst there was no change of judicial sentencing policy in the intervening years (O’Malley, 2013c: 642), two recent decisions of the Court of Criminal Appeal indicate a move away from the traditional approach that eschewed either the use of sentencing guidelines or the setting of ranges of sentence towards a system of guideline judgments (Davey, 2014: 31; Ashworth, 2015: 453). On 18 March 2014 the Court of Criminal Appeal handed down its judgments in *DPP v Ryan*, [2014] I.E.C.C.A. 11¹ and *DPP v Fitzgibbon*, [2014] I.E.C.C.A. 12. In disposing of Mr Ryan’s appeal against a sentence of four and a half years’ imprisonment following his pleas of guilty to certain firearms offences, the Court of Criminal Appeal considered the extent to which it had jurisdiction to provide general sentencing guidance².

Although it recognised that sentencing is a complex matter, the court in *Ryan* nevertheless considered it important that sentencers strive to maintain a level of consistency so that, at least in a general way, like cases are treated in a similar fashion³. The court considered it appropriate to establish the broad legal principles by reference to which any sentencing exercise should be conducted, as well as providing, where possible, “some guidance as to the broad range of sentences which should be imposed, all else being equal, across the spectrum of severity applicable to an offence under consideration”⁴. Whilst acknowledging that it was bound by the decision of the Supreme Court in *People (DPP) v Tiernan*, [1988] I.R. 250 which disapproved the use of sentencing guidelines⁵, the court did not read the judgment in *Tiernan* as precluding it from issuing “some broad level of guidance ... as to the range of sentences which may be appropriate for an offence under consideration on an appeal, having regard to the severity of the offence and the culpability of the accused”⁶.

In terms redolent of the approach of the Scottish appeal court towards the provision of sentencing guidance⁷, however, the court was careful to stress the importance of judicial discretion in applying such guidance:

¹ Described by O’Malley (2014) as “one of the most significant and thoughtful sentencing judgments delivered in [Ireland] to date”.

² Paragraph 1.3 *per* Clarke J delivering the judgment of the court.

³ Paragraph 1.1.

⁴ Paragraph 1.2.

⁵ See above.

⁶ Paragraph 2.3. See also paragraph 3.4.

⁷ See Chapter III.

“It clearly remains a matter for the sentencing judge to form a judgment, on all of the relevant facts, as to where on that range the offence for which the accused is to be sentenced lies. It is also clearly a matter for the sentencing judge to decide on the extent to which any aggravating or mitigating factors identified ought to increase or decrease the sentence to be imposed. Thus, *any such range provides broad guidance but does not seek to impose any form of standardisation of penalty*” (emphasis added)¹.

The court proceeded to set out ranges of sentence for offences involving the possession of firearms² and identified the factors which were likely to influence the placing of a particular offence along the relevant scale³. This approach was endorsed by the court in *Fitzgibbon, supra*⁴, in which the court set out broad guidelines for offences of assault causing serious harm⁵. As in *Ryan*, however, the court stressed the importance of judicial discretion in the application of the guidelines⁶.

The decisions in *Ryan* and *Fitzgibbon* amount to a conscious departure by the Court of Criminal Appeal from established sentencing principles (Davey, *ibid.* 33); O’Malley considers them to represent “a quiet revolution” in the Irish criminal justice system (O’Malley, 2014). In the interests of consistency and transparency in sentencing, it is surely only a matter of time before the court issues similar sentencing guidance for the crime of rape.

Sentencing methodology – the staged approach

Following the decision of the Supreme Court in *People (DPP) v M*, [1994] 3 I.R. 306, Irish judges must follow a two-stage approach to sentencing, a methodology expressed in very similar terms to that prescribed by the New Zealand appellate courts in the line of cases following *R v Taueki*, [2005] 3 N.Z.L.R. 372⁷. In the course of his judgment in *M*, in which he considered the impact of mitigating factors in sentencing, Egan J explained:

¹ Paragraph 2.3.

² Paragraph 7.16.

³ Paragraph 7.15.

⁴ Paragraph 7.1.

⁵ Paragraphs 8.10 to 8.14.

⁶ Paragraph 8.11.

⁷ Discussed above under the heading ‘Sentencing practice, guidance and methodology in New Zealand’.

“[A] reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made”¹.

The Irish sentencing methodology set out in *M* thus proceeds on broadly the same basis as that of the New Zealand courts in *Taueki*, except that the New Zealand approach involves making downwards *or* upwards adjustments from the “starting point” sentence to reflect mitigating *and* aggravating circumstances². The Irish approach – at least in the terms articulated by Egan J in *M* – would, however, appear to involve only the making of downwards adjustments from the “presumptively suitable sentence” to reflect mitigating circumstances (see O’Malley, *ibid.*). Aggravating circumstances are presumably factored into the first stage of the Irish approach when the judge locates the particular offence on the overall scale of gravity (*ibid.*; see also O’Malley, 2013b: 224 – 225, *People (DPP) v McC*, [2008] 2 I.R. 92 at page 104, and *DPP v Ryan*, [2014] I.E.C.C.A. 11 at paragraph 3.2). In any event, the central focus of the Irish sentencing methodology is the imposition of sentences that are proportionate not only to the crime but to the offender (Conway et al, *ibid.* 162; 164)³. This is an approach that calls for individualised justice (O’Malley, 2013c: 533 – 535; 2011: 81 and 91; 2006: 19 and 66)⁴.

O’Malley reports that the Irish two-stage approach to sentencing means that it is not unusual to find courts stating that a particular offence is “high on the scale of gravity”, “in the upper reaches of the mid-range”, or “low on the overall scale”, and so forth (O’Malley, 2013c: 644). O’Malley explains that judicial categorisation of types of offence, to the extent that it exists, occurs purely on a case by case basis (*ibid.*).

¹ Page 315, approved in *People (DPP) v Kelly*, *supra*, at pages 324 and 334.

² See *R v AM*, [2010] 2 N.Z.L.R. 750 at paragraphs [13] and [84]; *R v Clifford*, [2012] 1 N.Z.L.R. 23; and Hall, 2007a: 263 – 264, discussed *supra*.

³ See also the decisions in *State (Healy) v Donoghue*, [1976] I.R. 325 *per* Walsh J at page 353 and *People (DPP) v C (W)*, [1994] I.L.R.M. 321 *per* Flood J at page 324, discussed by Conway et al, *ibid.* See also *DPP v Z*, [2014] I.E.C.C.A. 13 at paragraph 4.6.

⁴ See also *Kelly*, *supra*, *per* Hardiman J at pages 333 – 334 and *M*, *supra*, *per* Denham J at pages 316 – 317, approving the comments of Walsh J in *People (Attorney General) v O’Driscoll*, (1972) 1 Frewen 351 at page 359.

Sentencing rape

Until such time as the Court of Criminal Appeal extends the approach it took in *Ryan and Fitzgibbon* (*supra*) to the sentencing of rape, the decision of the Supreme Court in *People (DPP) v Tiernan*, [1988] I.R. 250 remains the leading Irish authority on sentencing for this offence (O'Malley, 2011: 159). The appellant was sentenced to 21 years' imprisonment following his plea of guilty to a vicious abduction and gang rape. Following the refusal of his appeal, the Attorney General certified that the case involved a point of law of exceptional public importance (namely the guidelines which the courts should apply in relation to sentences for rape) and the case was appealed to the Supreme Court¹.

In allowing the appeal and reducing the sentence to 17 years², however, the Supreme Court expressly declined to issue such sentencing guidelines. Although parties made reference in their submissions to a number of decisions of appellate courts in various common law jurisdictions³, the court considered it inappropriate to lay down any "standardisation or tariff of penalty" for sentencing cases of rape⁴. In so doing, the court stressed the "fundamental necessity" for judges to impose sentences which, in their discretion, appropriately met all the particular circumstances of the case and the particular circumstances of the accused⁵. Thus the court refrained from issuing sentencing guidelines for rape as it was clearly opposed in principle to curtailing the sentencing discretion of trial courts (O'Malley, *ibid.* 123; Campbell, 2008: 292).

¹ See page 252 of the report for the full procedural history.

² A majority of four to one holding that inadequate credit had been given for the appellant's guilty plea. Whilst McCarthy J was in broad agreement with the principles articulated by the majority, his Honour would have allowed the 21 year sentence to stand (page 257).

³ Including the decisions of the New Zealand Court of Appeal in *R v Pawa*, [1978] 2 N.Z.L.R. 190 and *R v Pui*, [1978] 2 N.Z.L.R. 193 (discussed *supra*) and the English guideline judgment in *R v Billam and others*, (1986) 8 Cr. App. R. (S.) 48 (discussed in Chapter IV). C.f. parties' submissions to the High Court of Justiciary on appeal in the recent Scottish decision in *HMA v Cooperwhite*, 2013 S.C.C.R. 461 discussed in Chapter III.

⁴ Page 254, *per* Finlay CJ delivering the leading majority judgment. See also the partially dissenting judgment by McCarthy J at page 257.

⁵ Page 254. See also McCarthy J at page 257 ("The trial judge ... should have a true judicial discretion as to the sentence appropriate in any case"). Note, however, that McCarthy J's view of the *Billam* guidelines as setting a "minimum standard" for sentencing rape (page 257) arguably rests upon a misunderstanding of the nature of the Court of Appeal's guideline judgments (see the discussion in Chapter IV).

The court did, however, set out certain fundamental principles applicable to the sentencing of rape offences and listed certain factors which are not to be treated as relevant to sentencing (O'Malley, *ibid.* 119). This, the court stated¹, was done specifically with the intention of assisting sentencing judges:

“The crime of rape must always be viewed as one of the most serious offences contained in our criminal law even when committed without violence beyond that constituting the act of rape itself ... The act of forcible rape not only causes bodily harm but is also inevitably followed by emotional, psychological and psychiatric damage to the victim which can often be of long term, and sometimes of lifelong duration ... Rape is a gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights. As such it must attract very severe legal sanctions”².

The court considered that these features applied even when rape is committed without any aggravating circumstances³. These features were of such a nature as to make the appropriate sentence for rape “a substantial immediate period of detention or imprisonment”⁴. As Finlay CJ went on to explain:

“Whilst in every criminal case a judge must impose a sentence which in his opinion meets the particular circumstances of the case and of the accused person before him, it is not easy to imagine the circumstance which would justify departure from a substantial immediate custodial sentence for rape and I can only express the view that they would probably be wholly exceptional”⁵.

As the Court of Appeal later observed, the important element of this statement is that each case must be considered in light of its own facts and circumstances (*People (DPP) v R.O.D.*, [2000] 4 I.R. 361⁶, cited in O'Malley, 2006: 263; see also Carney, 2002: 387).

The aggravating features in Tiernan's case were listed as the fact that the offence was a gang rape; that the victim was raped multiple times; that the rape was accompanied by acts of sexual perversion; the level of violence used; the abduction aspect of the offence; the

¹ Page 252.

² Page 253.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ At page 365 *per* Geoghegan J.

psychological trauma caused to the victim; and the appellant's previous convictions¹. Although the court declined to approve the *Billam* guidelines then in force in England and Wales, these aggravating factors do in fact broadly follow the corresponding guidance of the Court of Appeal in *Billam*². Similarly, the court in *Tiernan* did approve the propositions set out in *Billam*³ that neither a victim's previous sexual experience nor the fact that she could be considered to have exposed herself to the danger of being raped could conceivably be considered as a mitigating circumstance in any rape⁴. The only mitigating factor in *Tiernan*'s case was said to be his guilty plea⁵.

More recently, in *People (DPP) v Drought*, [2008] 1 I.R. 308, Charleton J (sitting at first instance in the Central Criminal Court) undertook a thorough review of contemporary sentencing practice for rape. This was done not to establish sentencing guidelines, but rather in an attempt to place the sentencing of the particular offender – who had raped the intoxicated victim after meeting her in a nightclub – “within the parameters of the existing law and practice so that the disposal ... can be regarded as being consistent with the penal policy of the Superior Courts in dealing with rape cases”⁶. To that end, Charleton J sought to examine all previous relevant reported and unreported decisions of the superior courts; his Honour also conducted an analysis of the sentences imposed by the High Court between 2005 and 2007⁷. The result was an attempt to ascertain both the relevant sentencing principles and the parameters within which sentences for rape can be imposed for the sake of “consistency and predictability”⁸.

Charleton J prefaced his examination of the case law with certain comments redolent of the Supreme Court's observations in *Tiernan, supra*:

“Rape is an extremely serious offence ... [It] constitutes a savage attack on the bodily and psychological integrity of a woman. It overrides her right to privacy in the most intimate area of human relationships. It discounts her personality by imposing a complete nullification of

¹ Pages 253 – 254.

² See *Billam, supra*, at page 51, discussed in Chapter IV.

³ *Billam, ibid.*

⁴ Page 255.

⁵ Pages 255 – 256. C.f. the modern position in both Scotland and England and Wales whereby the practice of guilty plea discounting derives from the need for the effective administration of justice and *not* as an aspect of mitigation (see the discussions in Chapters III and IV respectively).

⁶ Paragraph [5].

⁷ *Ibid.*

⁸ *Ibid.*

her existence as a sentient person who is entitled to choose where to place her affection ... In rape, affection or sexual recreation is replaced by the opposites of violence and degradation”¹.

His Honour analysed the relevant case law – a total of some 96 cases – in terms of the “emerging pattern of sentencing bands”² and, to this end, grouped the decisions into four categories or bands: (i) lenient punishments³; (ii) ordinary punishments⁴; (iii) severe punishments⁵; and (iv) condign punishments⁶. The review of the case law disclosed that lenient punishment in the form of non-custodial disposals or suspended sentences can only be contemplated where the circumstances of the offence are such as to be “completely exceptional”⁷.

“Ordinary punishment” tended to range from three to eight years’ imprisonment, with the majority of these cases concluding with sentences of five to seven years⁸. Cases where sentences of eight years were imposed were characterised by high levels of violence, particularly serious effects on the victim, multiple offending, and/or where the accused had previous convictions⁹. The case law indicated that where an offender pleads guilty to rape in circumstances which involve no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence, the sentence tends towards being one of five years’ imprisonment¹⁰.

Charleton J’s analysis disclosed that “severe punishment” involved the imposition of sentences between nine and 14 years’ imprisonment¹¹. Sentences of 10 or 11 years appeared to be unusual unless the circumstances disclosed unusual levels of violence or premeditation¹². Sentences towards the upper end of the band were imposed in cases

¹ Paragraphs [6] and [7].

² Paragraph [37].

³ Paragraphs [14] to [25].

⁴ Paragraphs [25] [*sic – the paragraph is erroneously numbered in the case report*] to [36].

⁵ Paragraphs [37] to [41].

⁶ Paragraphs [42] to [48].

⁷ Paragraph [24]. See, for example, O’Malley’s discussions of the decisions in *People (DPP) v C (W)*, [1994] 1 I.L.R.M. 321 and *People (DPP) v Y (N)*, [2002] 4 I.R. 309 (O’Malley, 2013c: 656 – 657).

⁸ Paragraph [28].

⁹ Paragraphs [29] and [36].

¹⁰ Paragraph [36]. Compare the “starting point” of six to eight years’ imprisonment for such instances of rape in New Zealand (*R v AM*, [2010] 2 N.Z.L.R. 750 at paragraph [90], *supra*); four to seven years in England and Wales (Sentencing Council, 2013a: 11); and three and a half years in Scotland (*HMA v Shearer*, 2003 S.C.C.R. 657).

¹¹ Paragraph [37].

¹² Paragraph [40].

involving gross levels of violation, humiliation and degradation of the victim; kidnapping and rape; and burglary and rape¹. Finally, “condign punishments” – *viz.* sentences of between 15 years and life imprisonment – were imposed in cases of gang rape or cases involving multiple incidents, multiple victims, or both². Such cases often featured instances of rape committed against very young or very old victims; the infliction of severe and lasting psychological harm on the victims; particularly severe levels of violence and degradation (often committed over a period of years); abuse of positions of trust; and pursuit of campaigns of rape³.

Charleton J also discussed his findings regarding the typical aggravating and mitigating factors considered by the Irish courts⁴. With regard to aggravating factors, his Honour reported that the courts placed particular emphasis on the following: the harm caused to the victim; where there is “a special violence”, more than usual humiliation, or where the victim is subjected to additional and gratuitous sexual perversions; abuse of a position of trust; abuse of a particularly young or elderly victim; engaging in a campaign of rape (which demonstrated a “particularly remorseless attitude ... not necessarily mitigated by later claims of repentance”); gang rape; the issuing of threats; and use of weapons⁵.

With regard to mitigating factors, his Honour observed that the nature of rape is such as to tend towards a requirement for condign punishment⁶; as such – and in common with sentencing guidance in England and Wales⁷ and New Zealand⁸ – mitigating factors were dealt with in fairly short compass. The strongest mitigating factor in Irish sentencing practice is an early admission of guilt, which may be evidence of a contrite approach to wrongdoing⁹. Additional mitigating factors included the offender’s youth, mental illness, or his having been himself subjected to sexual abuse resulting in psychiatric disorder¹⁰.

¹ Paragraph [41].

² Paragraph [42].

³ Paragraphs [44] and [46] – [48]. See also *DPP v Z*, [2014] I.E.C.C.A. 13.

⁴ Paragraphs [49] – [54].

⁵ Paragraph [49]. These factors were all similarly listed by the Court of Appeal in *R v Billam and others*, (1986) 8 Cr. App. R. (S.) 48 at page 51 (see Chapter IV).

⁶ Paragraph [12].

⁷ See Chapter IV.

⁸ *Supra*.

⁹ Paragraph [51].

¹⁰ *Ibid*.

Charleton J concluded by noting that provocation had no application to the offence of rape¹. The conduct of the victim was irrelevant; his Honour considered that it is only where there has been consent to sexual intercourse which is withdrawn during the act that anything involving the conduct of the victim can be regarded as relevant². His Honour also stressed that, in addition to the above factors, an offender's "background" and previous convictions would all have to be taken into account in imposing sentence³.

Although neither the decisions in *Tiernan* nor *Drought* specifically address the issue of sentencing marital or relationship rape, the observations of the court in *Tiernan* that a victim's previous sexual experience can never be considered as a mitigating circumstance in any rape⁴ and of Charleton J in *Drought* that "[t]he entitlement of a woman to refuse to consent to sexual intercourse is absolute since the presence of consent is what makes the act of sexual intercourse lawful"⁵, could arguably be construed as indicating that a prior or existing sexual relationship between the parties is *not* a mitigating factor. This approach is favoured by O'Malley who considers that the same sentencing principles should apply irrespective of the relationship between the victim and the offender (O'Malley, 2006: 267).

Most recently, O'Malley (2013c) has undertaken a review of sentencing practice for rape. O'Malley's analysis broadly corresponds to that of Charleton J in *Drought, supra*, in identifying the ranges of offence and common aggravating and mitigating factors (O'Malley, *ibid.* 648 – 658)⁶; however, O'Malley also identifies evidence that the offender acted out of character and strong indications that he is unlikely to re-offend as other factors that may justify treating a case as exceptional for sentencing purposes (*ibid.* 658).

¹ Paragraph [52].

² *Ibid.* His Honour thus followed the reasoning in *R v Millberry and others*, [2003] 2 Cr. App. R. (S.) 31 at paragraph [14] (see Chapter IV).

³ Paragraph [54].

⁴ *Tiernan, supra*, at page 255.

⁵ Paragraph [52].

⁶ See also O'Cathaoir (2012) where a similar analysis is undertaken and the same conclusions as to aggravating and mitigating factors are drawn. See also the earlier analysis by O'Malley (2006: 262 – 270) and commentary thereto by Bacik, 2002b: 360 – 361.

Rape sentencing – lessons for Scotland from other common law jurisdictions

As Ormerod (2013: 183) observes, sentencing for sexual offences is a notoriously difficult exercise for judges given the unique nature of the offending, the harm involved and the emotive context. This thesis has shown that the sentencing of those convicted of rape presents particular difficulties for judges in Scotland: there are no sentencing guidelines for the offence and such appellate guidance as does exist is outdated¹. In undertaking the “legal comparativist” approach described by Nelken (2012), the sentencing practice of the courts in England and Wales, New Zealand and the Republic of Ireland has been considered in order to determine how rape sentencing can be improved in Scotland. What can the Scottish courts take from this review and critique?

The comparative study provided in this thesis demonstrates the importance of sentencing guidelines for rape in order to guide judicial sentencing discretion. Guidelines are used by the courts in England and Wales and New Zealand, albeit that the present format of the guidelines differs markedly between the two jurisdictions. Rape sentencing guidelines have been available in both England and Wales and New Zealand for over 30 years; they have been continually developed and refined by the courts and by the statutory bodies charged with promulgating sentencing guidelines. This has ensured that the guidelines reflect both the changing profile of rape and modern societal attitudes towards the offence, in particular through the setting of higher “starting point” sentences than the figure of three and a half years’ imprisonment used by the Scottish courts.

What is common to England and Wales, New Zealand and Ireland is the approach of the courts towards the sentencing of relationship rape. The guidelines in both England and Wales² and New Zealand³ are clear: the rape of a current or former spouse or partner will be sentenced in exactly the same way as the rape of a stranger. Similarly, in the Republic of Ireland the existing appellate guidance has been construed in such a way as to suggest that the same sentencing principles should be applied irrespective of a rapist’s relationship with his victim⁴. When these guidelines and appellate guidance are contrasted with the present position in Scotland – *viz.* that an existing or a pre-existing sexual relationship between the

¹ See Chapter III.

² See the discussion in Chapter IV under the heading ‘The second phase – the *Millberry* guidelines’ *et seq.*

³ See the discussion above under the heading ‘Sentencing guidelines for rape – the decision in *R v AM*’.

⁴ See the discussion above under the heading ‘Sentencing rape’.

parties can be a *mitigating* factor in sentencing¹ – then the case for reform of rape sentencing in that jurisdiction becomes clear.

Conclusion

A review of New Zealand and Irish sentencing jurisprudence for the crime of rape highlights the importance of judicial discretion in both jurisdictions. Whilst neither of the jurisdictions examined in this chapter has followed England and Wales in adopting a system of formal, presumptively binding, numerical sentencing guidelines, judges within these jurisdictions do nevertheless benefit to a greater or lesser degree from appellate guidance.

Ireland operates a largely discretionary-based sentencing system, with judicial discretion being constrained only by the requirement for the sentencer to apply certain general principles – typically indicating aggravating and mitigating factors – established by the appellate courts. This results in the creation of a “sentencing canon” of leading appellate decisions and ensures the exercise of principled sentencing discretion. The Irish courts have traditionally resisted the introduction of sentencing guidelines. They have declined to specify sentencing ranges, bands or starting points, preferring instead to rely on judicial discretion informed by appellate guidance; however, the decisions in *Ryan* and *Fitzgibbon* signal a move towards guideline judgments in this jurisdiction.

General sentencing guidance for rape was provided by the Supreme Court in *Tiernan* which stressed the seriousness of the offence and the requirement for a substantial period of imprisonment in all but wholly exceptional cases. The more recent review of Irish rape sentencing by Charleton J in *Drought*, however, discloses that “ordinary punishment” tends to range from three to eight years’ imprisonment, with sentences of between five to seven years being imposed in the majority of cases. More severe sentences are imposed for particularly violent or premeditated rapes. It is likely that, the precedent having been established by *Ryan* and *Fitzgibbon*, a guideline judgment on sentencing rape will soon be handed down by the Court of Criminal Appeal.

¹ See the discussion in Chapter III under the heading ‘Appellate views on sentencing relationship and acquaintance rape: the decisions in *Ramage* and *Petrie*’.

Although judges in New Zealand are also vested with a wide sentencing discretion, the Court of Appeal has used guideline judgments to develop a measure of consistency without undermining the importance of discretion in the individual case. The court's practice has been influenced by the first and third phases of the development of English sentencing guidelines, namely narrative guidelines issued by the Court of Appeal and, latterly, the approach of the Sentencing Guidelines Council¹. Guideline judgments issued by the New Zealand Court of Appeal prescribe bands of seriousness and sentence ranges within each band. The status of the court's guidelines is similar to those of the appeal court in Scotland: whilst they are to be observed by trial courts, they are not to be slavishly applied and departure may be warranted by the facts of a particular case.

New Zealand judges have benefited from rape sentencing guidelines since 1987 (*R v Clark*). The guidelines have not remained static, however, as the court has developed and updated them to reflect emerging evidence about, and changing societal attitudes towards, the crime of rape and its effect on victims. The decision in *R v AM* is a particularly good example of this approach. The court in *AM* was unequivocal in reiterating that – in accordance with practice in England and Ireland, and in contrast to the Scottish position – a current or prior sexual relationship between the parties is *not* a mitigating factor. In common with the present English guidelines, the court also stressed the importance of taking account of the effect of the offence on the victim.

As with all other New Zealand guideline judgments, the *AM* guidelines steer a course between seeking to ensure consistency of approach whilst recognising the importance of individualised justice and of judicial discretion. This allows judges to impose sentences which take proper account of the circumstances both of the particular offence and of the individual offender (*Fisheries Inspector v Turner*).

In the concluding chapter to this thesis it will be argued that the New Zealand approach of setting out such structured, but not inflexible, sentencing guidance provides a suitable template for the Scottish appeal court to follow in issuing its own sentencing guidance. In *HMA v Cooperwhite*, the Scottish appeal court expressed its intention to issue sentencing

¹ See Chapter IV.

guidelines for rape¹. It will be argued that such guidelines should be based upon the decision in *R v AM*.

¹ See Chapter III.

CHAPTER VI

CONCLUSION

What is wrong with rape sentencing in Scotland?

“An appeal court *should* say, ‘Listen. If you rape someone here, in this country, the starting point’s so many years. If it’s a really bad rape, it’ll be much higher. If there are some mitigating features then it may be a bit less’. But we’re *not* getting that spelled out. You couldn’t tell me what the going sentence for rape is at the moment ... It is *very, very hard* to get guidance because many of the sentences that are right aren’t appealed ... In truth, the best you can say is that there is a *right range*. For consistency purposes, you need the senior judges for the time being who are in post to set the tariff, to tell you where in the band you should be going. *That’s* what you need. That’s a system of *law*. And that’s what sentencing is – it’s part of a system of law” (Sheriff, emphasis *per original*).

The above quote¹ is taken from an interview with an experienced sheriff and former advocate², conducted as part of my Ph.D. research at the University of Edinburgh³. It encapsulates much of what is wrong with contemporary sentencing practice for the crime of rape in Scotland. Judges in other common law jurisdictions have the benefit of sentencing guidelines (or at least sentencing guidance) for rape and there is a clear need for such guidance in Scotland; however, the appeal court has yet to provide it, and indeed on one occasion the court expressly declined to issue sentencing guidelines (see *HMA v Shearer*, 2003 S.C.C.R. 657). As this thesis has demonstrated, however, the problems go deeper.

Sentencing relationship/acquaintance rape – a flawed approach

This thesis has argued that such appellate guidance (rather than guidelines) that does exist for sentencing rape in Scotland is based on a flawed and outdated understanding of the typical effects (particularly the psychological effects) of rape upon the victim. It was held in

¹ Although the High Court has exclusive jurisdiction in cases of rape (see section 3(6) of the Criminal Procedure (Scotland) Act 1995, as amended by Schedule 5, paragraph 2 of the Sexual Offences (Scotland) Act 2009) and, as such, those charged with rape do not appear in the sheriff court, the excerpt quoted above formed part of a general discussion with the respondent on the sentencing of sexual offences.

² A member of the Scots bar.

³ The interview, which took place in January 2010, was one of 25 conducted with judges and sheriffs in Scotland. The resulting thesis (*Practical Wisdom? A Reconstruction of the Sentencing Task*) was passed without corrections in August 2014 (see Brown, 2014a).

Ramage v HMA, 1999 S.C.C.R. 592 that an existing or pre-existing sexual relationship between an offender and his victim is a mitigating factor in sentencing. This view was later affirmed in *Petrie v HMA*, 2012 J.C. 1 in which the appeal court also rejected the view of the sentencing judge that the existence of such a relationship should be regarded as an *aggravating* factor due to the breach of trust involved. The appeal court thus appears to regard sexual violence by an intimate partner as less serious than stranger rape.

This, I have argued, is at odds with modern societal views on the nature of the offence. Recent empirical studies have reported a higher incidence of physical violence in sexual assaults committed by partners or acquaintances (Möller et al, 2012; McLean et al, 2011; Maguire et al, 2009; Hilden et al, 2009). The current Scottish approach to sentencing relationship rape also fails to appreciate the profound emotional impact on the victim, principally due to the abuse of trust involved in the offence (Temkin, 2002); neither does contemporary Scottish sentencing practice recognise that victims of relationship rape appear to suffer even more serious psychological consequences than do victims of stranger rape (Mason and Lodrick, 2013; McFarlane et al, 2005a; Rumney, 2003).

This thesis has shown that Scotland is alone in treating a sexual relationship between the parties as a mitigating factor in sentencing. Although the English courts similarly adhered to this view through the 1980s and 1990s, in *R v Millberry and others*, [2003] 2 Cr. App. R. (S.) 31 the Court of Appeal accepted the advice of the Sentencing Advisory Panel that the same starting point sentence should apply to cases of relationship rape and stranger rape. In Ireland, O'Malley argues that the decisions in *People (DPP) v Tiernan*, [1988] I.R. 250 and *People (DPP) v Drought*, [2008] 1 I.R. 308 can be construed as indicating that the same sentencing principles should apply irrespective of the relationship between the victim and the offender (O'Malley, 2006: 267). As far back as 1987 the New Zealand courts held that the same sentencing regime applied to cases of stranger and relationship rape (*R v N*, [1987] 2 N.Z.L.R. 268), a view subsequently endorsed in the guideline judgment in *R v AM*, [2010] 2 N.Z.L.R. 750.

On Bottoms' (2010) account, discussed in Chapter II, the appeal court in *Ramage* and *Petrie* arguably failed in its "duty to understand" in allowing the appeals and in making observations regarding the supposedly mitigating effect of a prior sexual relationship between a rapist and his victim which do not accord with the realities of the offence. It appears that in neither case

was the appeal court provided with the requisite *individual appreciative description* regarding the impact of the offence on the victims. These failures by the Crown adversely affected the quality of the court's subsequent decisions. It resulted, again on Bottoms' account, in the appeal court misreading the evidence before it: what should have been either an aggravating factor (due to breach of trust) or, at the very least, a neutral factor was turned by the appeal court into a mitigating factor. The implication for Scottish sentencing practice is that, in the appeal court's view, stranger rape is perceived as the paradigm of real rape. There is thus a clear and urgent need for the appeal court in Scotland to overrule the decisions in *Ramage* and *Petrie*.

A disproportionality low starting point

Following the decision in *HMA v Shearer, supra*, the Scottish starting point for sentencing rape in a case without any aggravating or mitigating features – or, as the Lord Justice Clerk described it in *HMA v Cooperwhite*, 2013 S.C.C.R. 461, “the benchmark”¹ – is currently three and a half years' imprisonment. This is a figure far below the starting points set by either the appellate courts or by the bodies which promulgate sentencing guidelines in many other common law jurisdictions.

In England and Wales, for example, the equivalent starting point sentence was initially set at five years' imprisonment (*R v Billam and others*, (1986) 8 Cr. App. R. (S.) 48). The later *Millberry* guidelines retained this starting point whilst also setting a general starting point of eight years where certain aggravating factors were present. These starting points were in turn retained by the Sentencing Guidelines Council's Definitive Guideline on the Sexual Offences Act 2003 (SGC, 2007a), although the relevant sentencing ranges were set by the SGC at between four and eight years and six and 11 years respectively. Most recently, as a result of the Sentencing Council's Sexual Offences Definitive Guideline (Sentencing Council, 2013a) starting points for rape sentencing have been set at five years (with a range of four to seven years) in cases of lesser culpability and at seven years (with a range of six to nine years) in cases of greater culpability.

¹ Paragraph [19].

The equivalent starting points in New Zealand are set at between six and eight years, in cases at the lower end of the spectrum, and seven to 13 years in cases where the scale of offending is relatively moderate (*R v AM, supra*). Whilst no such sentencing guidelines currently exist in the Republic of Ireland, the analysis of contemporary sentencing practice by Charleton J in *People v Drought* indicates that “ordinary punishment” in the majority of cases tends to comprise sentences of between five and seven years’ imprisonment (see also O’Malley, 2013c)¹. The current Scottish starting point of three and a half years’ imprisonment does not adequately reflect the seriousness of the offence of rape.

The format of the proposed Scottish guidelines

Given the seriousness of rape, the potentially severe physical and psychological effects of the offence on the victim (see Chapter II), and particularly the principled manner in which other jurisdictions have approached the issue of sentencing for this offence (see Chapters IV and V), this thesis has argued that the judges of the High Court of Justiciary are entitled to more appellate guidance for sentencing the offence of rape than is currently available. As O’Malley observes, whilst courts can operate without sentencing guidelines they cannot, in the modern world, function without appellate sentencing guidance (O’Malley, 2013b: 234). Having examined and critiqued sentencing practice in other common law jurisdictions (see Chapters IV and V) the discussion now turns to the format that the Scottish guidance should take.

In considering the source of sentencing guidance, its style, and the authority by which it should be promulgated, the traditions and legal culture of the jurisdiction will be a significant factor (Padfield, 2013: 32; O’Malley, 2013b: 226 – 227; Roberts, 2009: 232; Ashworth, 1998: 215 – 216; Freed, 1992: 1683). Different styles of sentencing guidance vary in the extent to which they reduce judicial discretion but, as both Roberts and Ashworth note, it would be wrong to assume that the pursuit of principled sentencing means that the most constraining approach is necessarily the best:

¹ See also the starting point of seven years’ imprisonment for offences of rape adopted by the courts in Northern Ireland (see the discussion by McFarland, 2010: 1217 discussed in Chapter IV).

“[T]here will inevitably be questions of detailed application that can be answered differently by different sentencers, so that, even if all sentencers were conscientiously pursuing the same aim or set of aims, inconsistencies could result ... Much will depend, in practice, on what is deemed appropriate in the context of the legal and political culture of the jurisdiction” (Roberts, *ibid.* 233; Ashworth, *ibid.* 216 – 217).

We have seen in Chapter III that Scottish judges have traditionally enjoyed a very wide sentencing discretion. The Scottish courts have adopted an individualised approach to sentencing. The appeal court has conceptualised the sentencing task as involving an “instinctive synthesis” of the particular facts and circumstances (including all relevant aggravating and mitigating factors) of the particular case (see *Gemmell v HMA*, 2012 J.C. 223). We have also seen that in recent years the appeal court has become increasingly prepared both to issue guideline judgments and to address issues of principle in its sentencing judgments. The appeal court has, however, been careful to emphasise the discretionary nature of such guidelines: unlike in England and Wales, sentencing guidelines in Scotland are not presumptively binding; they provide a structure for, but do not remove, the sentencer’s discretion (see *HMA v Graham*, 2011 J.C. 1).

Thus, as O’Malley notes of practice in Ireland, sentencing reform measures are unlikely to succeed unless they leave adequate scope for the continued exercise of judicial discretion where it is needed and unless they are respectful of judicial skills and wisdom (O’Malley, *ibid.* 229). O’Malley concludes:

“An abrupt transition from barely constrained discretion to a system of prescriptive guidelines would probably be unwise, at least until judges, lawyers, and other key actors within the system become more accustomed to the notion that a greater measure of consistency can be achieved without sacrificing justice” (*ibid.* 235).

As judicial discretion has traditionally been the hallmark of sentencing in both the Republic of Ireland and Scotland (see Chapters III and V), O’Malley’s observations can arguably be applied equally to the development of sentencing guidelines in Scotland. This is borne out by a series of recent decisions of the appeal court. In issuing its own sentencing guidance, the appeal court has on occasion adopted or expanded upon certain guidelines issued by the SGC

in England¹. The appeal court has not, however, shown itself receptive to the new format of sentencing guidelines issued by the Sentencing Council and has specifically disapproved judicial recourse to the new Drugs Offences Definitive Guideline².

We have seen in Chapter IV that the new format of guidelines issued by the Sentencing Council has been criticised by academics and by practitioners as too mechanistic and restrictive, resulting in an artificial method of calculating sentence which in many cases arguably hinders the judge's ability to do justice (Harris and Gerry, 2013). The new guidelines are also regarded as less easy to apply and more difficult to use than the guidelines issued by the SGC (Padfield, 2013)³. The current English system of formal, prescriptive, heavily structured, numerical and presumptively binding sentencing guidelines is inimical to the traditional, discretionary-based Scottish approach; they are an anathema to systems such as Scotland which prioritise judicial discretion in order to achieve particularised justice. For these reasons, I consider that it would not be appropriate for the appeal court in Scotland to adopt, even in a modified form, the rape guidelines set out in the Sentencing Council's Sexual Offences Definitive Guideline (Sentencing Council, 2013a).

What is required is a set of sentencing guidelines for rape that are not to be interpreted and applied in a mechanistic way (*Neill v HMA*, [2014] HCJAC 67), which assist the sentencer in the exercise of his discretion (*Jakovlev v HMA*, 2012 J.C. 120) and which, as Harris and Gerry (*ibid.* 241 – 242) argue, take a fact and behaviour-based approach to sentencing. Offences of rape should, on Harris and Gerry's account, be categorised not by reference to an arbitrary list of tabulated factors, but by reference to the true character of the offending in question (*ibid.*).

I consider that this could be achieved by the appeal court in Scotland adopting the guidelines issued by the New Zealand Court of Appeal in *R v AM*, [2010] 2 N.Z.L.R. 750. As we have seen in Chapter V the decision in *AM* was influenced by the work of the SGC in England, whose guidelines have previously been adopted by the appeal court in Scotland. The decision in *AM* also drew on the draft sexual offence guideline prepared by the New Zealand

¹ See, for example, the decisions in *HMA v Graham*, 2011 J.C. 1 and *Spence v HMA*, 2008 J.C. 174.

² See *Murray v HMA*, 17 February 2015, unreported, and the discussion in Chapter III under the heading 'Judicial discretion "soundly exercised"? Lord Eassie's partial dissent in *Cooperwhite*'.

³ See Chapter IV.

Sentencing Establishment Unit which had been the subject of considerable consultation with criminal justice stakeholders.

In accordance with practice in Scotland, the court in *AM* emphasised that application of the guidelines involved “an evaluative exercise of judgment”¹. The court stressed that the guidelines were not designed to “impose a straitjacket on sentencing judges”², that they provided only guidance for sentencers³, and that a mechanistic approach was not appropriate⁴. A full list of aggravating and mitigating factors is set out in *AM*⁵ and the decision reiterates that the same sentencing regime is to be applied to relationship and stranger rape⁶. The four bands of seriousness set out by the court – (a) six to eight years’ imprisonment; (b) seven to 13 years; (c) 12 to 18 years; and (d) 16 to 20 years⁷ – adequately reflects the seriousness of the offence, the offender’s culpability, and the harm caused to the victim. The sentencer is able to tailor the sentence to the individual case by adjusting the starting point up or down to reflect circumstances personal to the offender⁸: the bands are thus *starting points* and *not* final sentences⁹.

The *AM* guidelines provide structured, but not inflexible, guidance. They produce a fair degree of consistency in rape sentencing whilst, importantly, leaving sufficient room for the exercise of judicial discretion (see O’Malley, 2011: 126). I thus consider the New Zealand guidelines in *AM* to be eminently suitable for use in Scotland. The appeal court should give careful consideration to issuing a guideline judgment under section 118(7) of the Criminal Procedure (Scotland) Act 1995 which adopts the *AM* guidelines.

Victim statements and the guilty plea discount in rape sentencing

A victim personal statement (or, in Scotland, a victim statement) provides the sentencing judge with an account of how the particular victim has been affected physically, emotionally and financially by the offence. By considering the work of Bottoms (2010) this thesis has

¹ Paragraph [79].

² Paragraph [84].

³ Paragraphs [29] and [88].

⁴ *Ibid.*

⁵ Paragraphs [37] to [59].

⁶ Paragraph [61].

⁷ Paragraph [90].

⁸ Paragraph [84].

⁹ *Ibid.*

shown why such statements are particularly important in sentencing rape: they provide an individualised, victim-orientated appreciative description of how the offence has impacted on the victim, completing the picture of the offence and assisting the judge in the task of imposing a sentence that fully reflects the harm caused and the offender's culpability. For this reason I consider that the appeal court in Scotland should follow the practice of the Court of Appeal (Criminal Division), as set out in *R v Ismail*, [2005] 2 Cr. App. R. (S.) 88, and issue guidance to the effect that victim statements should routinely be obtained in cases of rape and made available to the sentencing judge.

The issue of the guilty plea discount is particularly problematic in sentencing rape: various tensions surround the practice in such serious and morally repugnant cases (Leverick, 2013 and 2014). On one view, a significant discount in sentence *may* be warranted for an offender's guilty plea as the victim and other witnesses will be spared the often distressing ordeal of having to give evidence at trial¹; however, the harm caused by the offence, the offender's culpability, the perceptions of injustice that may arise, and the possibility that the allowance of substantial sentence discounts in such serious cases may cause the sentencing decisions of the criminal courts to lose credibility, thus eroding the authority of the courts generally², all indicate that the judge's discretion to allow a discount should be exercised sparingly³.

As Leverick acknowledges, it is close to impossible to find a way to balance the competing public interest concerns in applying guilty plea discounts in cases of rape (Leverick, 2013: 264). Following the decisions in *Gemmell*, *supra*, and *Murray v HMA*, 2013 S.C.C.R. 88, judges in Scotland have more discretion in the application of guilty plea discounts than their counterparts in England and Wales, where practice is governed by a guideline issued by the Sentencing Guidelines Council (SGC, 2007b) and where the decisions in *R v Wilson*, [2012] 2 Cr. App. R. (S.) 77 and *R v Caley*, [2013] 2 Cr. App. R. (S.) 47 have made it clear that those who plead guilty to morally reprehensible crimes are entitled to credit for their guilty pleas in the same way as any other offender.

¹ Albeit that some victims might wish to go through the ordeal of giving evidence as it gives them the opportunity to be heard within the criminal justice system (Leverick, 2004: 373); because it may lead to their learning more about the offence and the offender (Sanders et al, 2010: 494 – 495); or because they feel that, given the choice, they would rather undergo the pains of giving evidence if it meant that the offender received no discount and thus a longer sentence (Ashworth, 2015: 181; Henham, 2012: 157; Dawes et al, 2011: 19; Fenwick, 1997: 327; see also *Gemmell v HMA*, 2012 J.C. 223 at paragraph [45]).

² See the observations of Lord Gill in *Gemmell v HMA*, 2012 J.C. 223 at paragraphs [74] and [76].

³ See the observations of Lord Gill in *Gemmell*, *ibid.* at paragraph [77].

One option for reform that could be incorporated into any guideline judgment on rape sentencing would be for the appeal court to “cap” the maximum permissible discount for the offence at a lower level than the one third that is routinely granted for a plea tendered at the first opportunity. As the Supreme Court of South Australia held in *R v Shannon*, (1979) 21 S.A.S.R. 442¹, the level of discount should be such as to amount to no more than a “moderate encouragement to plead”². A maximum discount of 10 per cent might be sufficient to provide a small incentive for an accused to plead guilty (Ashworth, 1983: 314; see also JUSTICE, 1993: 11; Mack and Roach Anleu, 1997: 142 and Ashworth and Zedner, 2008: 47). It would also have the advantage of addressing the issue of public confidence discussed by Lord Gill in *Gemmell*, allowing judges to assess a proportionate sentence reduction in light of the specific circumstances of the individual case.

Conclusion

In advocating reform of rape sentencing law in Scotland, this thesis has demonstrated that current Scottish sentencing practice does not reflect modern societal attitudes to the offence. There is a need for the appeal court to issue sentencing guidelines that take account of emerging evidence about the nature of rape and of evolving social attitudes to the offence.

Having undertaken a thorough analysis of the development of sentencing guidance for the offence in several common law jurisdictions, this thesis has argued that the best way of implementing effective sentencing guidance that remains compatible with the traditional, discretionary-based system of sentencing in Scotland is for the appeal court to adopt the guidelines issued by the New Zealand Court of Appeal in *R v AM*, [2010] 2 N.Z.L.R. 750. By issuing a guideline judgment in the same terms as the decision in *AM*, the appeal court would ensure that those who commit rape in Scotland – whether against strangers, acquaintances, partners, or spouses – receive a sentence proportionate to the gravity of the offence; an offence that amounts to a gross attack on the victim’s human dignity and bodily integrity.

¹ One of first Australian decisions to examine the principles of guilty plea discounting.

² *Per* King CJ at page 449.

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R v Wilson, [2012] 2 Cr. App. R. (S.) 77

Northern Ireland

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R v Molloy, [1997] N.I.J.B. 241

Republic of Ireland

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Fisheries Inspector v Turner, [1978] 2 N.Z.L.R. 233

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K v R, [2013] N.Z.C.A. 430

N v R, [2014] N.Z.C.A. 150

Pakau v R, [2012] N.Z.C.A. 522

R v A, [1994] 2 N.Z.L.R. 129

R v AM, [2010] 2 N.Z.L.R. 750

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R v H, CA 488/05, 4 September 2006, unreported

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Australia

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