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DOING HARDER TIME: THE EFFECTS OF IMPRISONMENT AS A FACTOR IN SENTENCING

A strong link between the offender's ill-health and the likely adverse effects of imprisonment needs to be made if the court is to be persuaded that this should be a mitigating factor in sentencing.

By Richard Edney

Despite optimism to the contrary,[1] immediate imprisonment as a punishment is concerned with the production of painful consequences.[2] It involves deliberate infliction of unwanted consequences to achieve what are perceived to be desirable social ends. The purposes of an immediate term of imprisonment include retribution, deterrence, rehabilitation or some combination of these.[3]

But what of the offender's expected subjective experience of imprisonment? What, if any, weight ought to be given to that experience in determining not only whether a court should proceed to impose an immediate term of imprisonment, but the duration of that term and any non-parole period?

In the recent decisions of *R v Boyes*[4] and *R v Van Boxtel*,[5] the Victorian Court of Criminal Appeal was required to consider precisely that issue in two appeals against sentence. The decision in *Boyes* is useful for practitioners as it presents a warning about ways of dealing with this issue and the need to satisfy certain matters in the plea in mitigation. *Boyes* also consolidates a number of authorities and elaborates on the criteria for determining when, and in what circumstances, imprisonment becomes, paradoxically, so "hard" that it is a potentially mitigating factor. Arguably the decision in *Van Boxtel* goes further than *Boyes*. Moreover, the decision in *Boyes* was not followed.

THE FACTS OF *BOYES* AND *VAN BOXTEL*

Boyes was concerned with an appeal against sentence of five years and three months imprisonment with a non-parole period of three years and nine months. The appellant at trial pleaded guilty to 37 offences of dishonesty. A key ground of appeal was that the trial judge had erred in not adequately treating the appellant's medical condition and its alleged negative impact on him should he be required to serve an immediate term of imprisonment. Those matters were relevant because of the appellant's pre-existing medical condition. Prior to the commission of the offences, the appellant had been involved in a workplace accident resulting in spinal injuries. Medical reports diagnosed "incomplete paraplegia".[6]

In *Van Boxtel* a similar ground was agitated in relation to an appeal against sentence of eight and a half years with a non-parole period of six for offences of violence and dishonesty. In contrast to the appellant in *Boyes*, the appellant in *Van Boxtel* had been injured in a prison assault prior to being sentenced, but the extent of the injury had only become apparent *after* he was sentenced. However, the issue in respect of both appellants remained the same: what impact would or should such injuries have as a mitigating factor in sentencing?

THE PLEAS

During the plea in mitigation in *Boyes*, a medical report from a neurologist who had examined the appellant was tendered. The medical report described the appellant's injuries and also his need for "ongoing medication, supervision and attention".[7] The report noted that the appellant suffered from ongoing problems of pain and mobility as well as requiring "walking sticks, and often a wheelchair, to move about".[8]

As part of the plea, the appellant himself gave evidence. The trial judge and Court of Appeal were critical of that evidence to the extent that the appellant appeared more concerned with "attempting to excuse his fraudulent conduct"[9] than with articulating a link between his medical condition and the difficulties that would be presented by the custodial environment. Critically, for the trial judge as well as the Court of Appeal, what was missing from the appellant's evidence was noted in the judgment of Chernov J:

"Almost no mention was made of the state of his health or of his concern that imprisonment will or might have an adverse effect on it or that it will or might be a greater burden on him by reason of his injuries".[10]

Nor did the appellant's medical evidence adequately address the interaction between the offender and the prison environment and how they might coalesce to produce a situation that had the potential to make the experience of imprisonment more onerous, or result in the deterioration of his health.

This is significant for practitioners because it makes clear that relevant and cogent proof is required to achieve forensic persuasion in a manner most favourable to the offender in any attempt to rely on the client's medical condition. It is simply not sufficient to state the existence of the medical condition, without demonstrating its effect in the context of the particular offender and the way he or she will experience a term of

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imprisonment. Without that level of persuasion, a sentencing court is unlikely to accept such a submission.

In such a scenario, the burden clearly rests on the offender to demonstrate by relevant and admissible evidence that certain consequences will arise for him or her should an immediate term of imprisonment be imposed. The standard for discharging that burden is on the balance of probabilities as it is a matter directed toward mitigation.[11] The Crown will naturally be permitted to lead rebuttal evidence as well as to cross-examine any witness called on behalf of the offender.

In contrast, the evidence presented by the appellant in *Van Boxtel* suggests a preferred approach to discharge the legal and evidentiary onus on the offender. In that case, evidence that was presented by way of affidavit included the Director of Medical Services at St Vincent's Health Correctional Service, the appellant himself and a medical specialist who was able to quantify the appellant's impairment in percentile terms of 5 to 15 per cent.

USE OF APPELLANT'S MEDICAL CONDITION IN THE PLEA

In submissions to the trial judge at the *Boyes* sentencing hearing it was contended, relying primarily on the medical report, that "there should be a mitigation of the sentence on the basis of the appellant's poor health".[12] In short, it was submitted that the appellant "will be doing it hard" while in prison.[13] It was this aspect of *Boyes* that is most important for our purposes. In particular, the ground agitated by the appellant, to which the Court devoted the majority of its judgment, was that the trial judge had failed to treat the appellant's incomplete paraplegia as a mitigating factor for sentencing purposes.

In contrast, a specific ground of the appellant's argument in *Van Boxtel* was that there was "fresh evidence" that should entitle the offender to be resentenced.

THE AUTHORITIES

In the lead judgment in *Boyes*, Chernov J noted that counsel for the appellant relied on the dicta of King CJ of South Australia in *Smith.*[14] The two arms of *Smith* and the way illness may be treated as a mitigating factor in sentencing are as follows.

Generally speaking, ill-health will be a factor tending to mitigate punishment only when:

- it appears that imprisonment will be a greater burden on the offender by reason of his or her state of health; and
- there is a serious risk of imprisonment having a greatly adverse effect on the offender's health.

Thus the test envisages two situations. First, where the burden on the offender's health would be greater because he or she has a pre-existing medical condition, this may be a mitigating factor. Second – and this applies only to the second limb – the court is required to make a prediction about the impact of imprisonment and postulate that imprisonment

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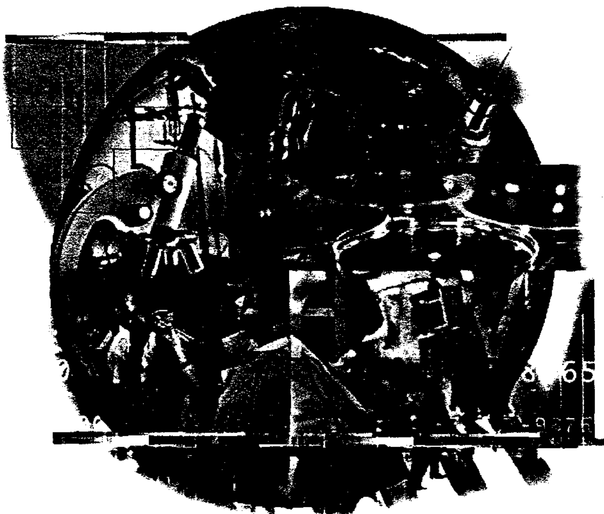

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itself will have negative consequences.

In *Boyes* it was submitted that the appellant's incomplete paraplegia in and of itself satisfied the first limb of the test in *Smith*, and the trial judge had fallen into appealable error by ignoring that matter. In rejecting this argument, Chernov J noted:

"... whether imprisonment will be more difficult for the appellant than for the ordinary inmate is not the relevant criteria for determining the first part of the test in *Smith* has operation. Without seeking to treat... the judgment of King CJ as if it were a piece of legislation, it is nevertheless clear from its terms that the first limb is concerned with whether the burden of imprisonment on the offender will be increased because of his disability. Thus the analysis focuses on the impact that the offender's disability has on his ability to cope with the prison system in light of his disability. Consequently, before the disability can be treated as a mitigating factor under the first limb, the offender must establish that it will result in imprisonment being a greater burden on him. Thus the relevant question for present purposes is whether the appellant's incomplete paraplegia will make imprisonment more difficult due to his disability than an ordinary prisoner".[15]

This is a significant aspect of the judgment and Chernov J's interpretation of *Smith* represents a careful analysis and application of that case to the facts in *Boyes*. In that sense *Boyes* represents a further elucidation of *Smith*. What the dicta of Chernov J emphasises is that it is not sufficient for an offender to raise his or her illness or disability as a matter determinative in mitigating an otherwise just and proportionate sentence. What is required is an articulation of a link, on the balance of probabilities, between the offender's medical illness or other disability and the correctional environment, and the production of negative consequences.

As Chernov J stated:

"Whether imprisonment will be a greater burden on an offender because of his disability will depend on the applicable circumstances. In some cases it may be obvious enough that the impairment is such that it will cause the burden of imprisonment on the offender to be greater. In other cases, however, in order to determine if that is the case, it may be necessary, for example, to compare the advantages of the prison system, in so far as they relate to the disability, with corresponding disadvantages to the offender to see if, on balance, the burden of imprisonment will be increased by his disability".[16]

To demonstrate the soundness of this argument, Chernov J provided a hypothetical example of an offender suffering a disability, and the interaction between the disability of the offender and the custodial environment. I will set out the reasoning of his Honour in full because it provides practitioners with a way of refining their arguments as well as indicating the type of evidence that may be necessary. Chernov J held:

"It may be that, in most cases, the fact that it will be more difficult for such an offender to serve his sentence than for an

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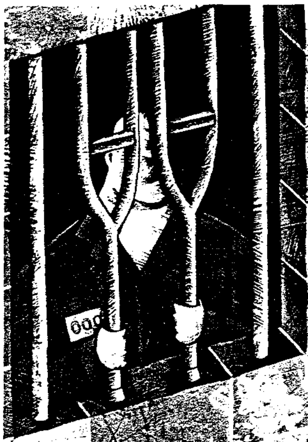

ordinary prisoner will also demonstrate that the first limb of the test in *Smith* operates. But that will not necessarily be so in every case. For example, an offender who has lost one arm may find that, because of this, it is more burdensome for him to cope with prison than for an inmate with two arms. Yet such an offender may have no more difficulty in coping with the consequences of his impairment in prison than outside it, so that his disability would not cause the burden of imprisonment to be greater from his perspective. Relevantly, he could cope with prison life in much the same way as he coped with life outside prison".[17]

His Honour goes on to spell out the implications of this chain of reasoning:

"Compared with ordinary inmates, of course, his burden of imprisonment would be greater, just like his burden of coping with life outside prison with only one arm would be greater by comparison with able bodied people. In the context of this example, therefore, it does not follow that imprisonment will be a greater burden for him because of his loss of one arm and thus, it would be inappropriate to treat his disability as a mitigating factor".[18]

In *Van Boxtel*, the reasoning adopted by Chernov J – and in particular the hypothetical one-armed prisoner – was not followed. In the lead judgment Callaway J held:

"In my respectful opinion, the interpretation of the first alternative in King CJ's judgment in *R v Smith* should not be followed. The first alternative contemplates not that imprisonment will make the offender's ill health a greater burden but that the offender's ill health will make imprisonment a great burden. The additional burden of imprisonment is then taken into account as a mitigating factor. That is part and parcel of equality before the law. If a one-armed person will, for that reason, find prison more difficult than a person with both arms, he or she is more severely punished than an able-bodied co-offender if they are given the same sentence".

This division of opinion between the lead judgments in *Boyes* and *Van Boxtel* on this point will need to be clarified by the Court of Criminal Appeal. The difference between the approaches may be conceptualised as follows.

The test in *Boyes* places great emphasis on the offender establishing that particular negative consequences will follow from imprisonment above and beyond what the offender would normally expect in a non-custodial setting.

In contrast, in *Van Boxtel* the test is arguably lower as it focuses strictly on the burden to be imposed by the disability or injury because of imprisonment and not by a comparison with a hypothetical standard.

Importantly from the perspective of the offender and his or her advisers, the interpretation of the first limb in *Smith* by Callaway J in *Van Boxtel* is more likely to result in such an injury or disability being a mitigating factor in sentencing than in *Boyes*. Of course, as Callaway J opined, the finding that such a matter is a mitigating factor in sentencing is independent of the *weight* that such a factor may have in the sentencing process.

Finally, the dicta of Callaway J is important in that his Honour explicitly makes clear that "ill health" as understood in *Smith* "applies to both physical and psychiatric illnesses and disabilities". Thus depression and other categories of mental disorder are clearly germane in this context. By example, his Honour notes the potential application of the principle in *R v Tsiaras* as well the principle that a parent may find the burden of imprisonment greater than a non-parent.

EVALUATING A SUBJECTIVE EXPERIENCE

A term of imprisonment is a clumsy and blunt instrument. Prior to sentencing, little consideration is given to whether imprisonment will have a particular impact on the offender, and a court imposing that punishment will not know the extent of its impact. Any imposition of punishment assumes that it will be painful.

However, it remains problematic to determine whether imprisonment will be worse for this particular offender. In short, a court cannot know, because imprisonment is experienced differently by different prisoners. Furthermore, the court will have little influence on the way a term of imprisonment will actually be served. Separation of powers and the complex and unique nature of the custodial environment militate against significant involvement by the courts save for recommendations on treatment and regimes in reasons for sentence.[19] Nevertheless, as made clear in *Boyes* and *Van Boxtel*, the effects of imprisonment on an offender can be of such moment that they may become mitigating.

IMPLICATIONS

The importance of *Boyes* and *Van Boxtel* lies not in their articulation of a new and distinct method of treating the effects of imprisonment on an offender as potentially relevant to the exercise of the sentencing discretion, but in the clarification of the way the existing authorities, particularly the decision in *Smith*, may be applied in a particular fact situation.

For practitioners this means consideration must be given to demonstrating the offender's particular condition with verifiable and cogent evidence that will lay a foundation for the sentencing court to find that the offender's experience of imprisonment will be so onerous, or likely to lead to a deterioration of the offender's health to such a degree, that the court should avoid imposing an immediate term of imprisonment. Of course, if the offending is so serious that immediate imprisonment is the only proper disposition,[20] then such evidence will also be of benefit in reducing the length of imprisonment and will also be relevant to the setting of the non-parole period.

The nature of the evidence required will also turn on the particular facts of the offender's condition. To be persuasive, and thereby discharge the evidentiary burden on the offender, such evidence must be more than a mere description of the offender's medical condition or disability. It must make the necessary connection between the offender's condition and the possible experience of imprisonment from the view of that particular offender.

Evidence of a medical or psychological nature will obviously be important, although such evidence should be prepared on the basis that a connection can be made between the medical condition or disability and imprisonment and the likely negative impact that imprisonment would have. Evidence from social workers, occupational therapists and other allied health professionals would be of significant assistance. Other potential sources of evidence include the offender and his or her family. Evidence of prior institutional history would also be relevant and, for an offender held on remand, evidence from correctional authorities on the way the offender has coped while in custody.

Van Boxtel provides practitioners with guidance as to how to establish the nexus between those matters, while *Boyes* offers a cautionary lesson of what may occur if the offender's legal and evidentiary burden is not discharged.

Practitioners should also be aware that if such a submission is made, the prosecution may challenge the evidence by calling their own expert witnesses, including those who may testify as to the current state of medical treatment and services available in the prison system.

An offender has only one shot at establishing such matters to the requisite standard, as all such matters ought to be ventilated at the plea in mitigation. The actual experience of imprisonment, however disastrous or painful, will not be a relevant consideration at the appellate level unless it falls within the scope of "fresh evidence". Allowing such evidence on appeal is extremely rare, and will be only done if the evidence shows "the true significance of facts which were in existence at the time of sentence, but not then fully appreciated or understood".[21] ●

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1. See generally Cohen, S, *Visions of Social Control*, 1985, Polity Press.
2. Christie, N, *Limits of Pain*, 1981, Martin Robertson, pp5–6.
3. See for instance s5 *Sentencing Act* 1991 (Vic).
4. (2004) 8 VR 230. Note that an application for special leave to the High Court was refused in this case on 11 February 2005: see *Boyes v The Queen* [2005] HCA Trans 55 (11 February 2005).
5. [2005] VSCA 175. Note that *Boyes* was not overruled or distinguished. Given the division that now exists, the Court of Criminal Appeal may need to clarify this situation.
6. Note 4 above, at 234 per Chernov J.
7. Note 4 above, at 234 per Chernov J.
8. Note 4 above, at 234 per Chernov J.
9. Note 4 above, at 235 per Chernov J.
10. Note 4 above, at 235 per Chernov J.
11. *R v Storey* (1998) 1 VR 359 at 368-369. This decision was expressly approved by the High Court in *R v Olbrich* (1999) 199 CLR 270 at 281 per Gleeson CJ, Gaudron, Hayne and Callinan JJ.
12. Note 4 above, at 235 per Chernov J.
13. Note 4 above, at 236 per Chernov J.
14. *R v Smith* (1987) 44 SASR 587, at 589 per King CJ.
15. Note 4 above, at 237 per Chernov J.
16. Note 4 above, at 238 per Chernov J.
17. Note 4 above, at 237 per Chernov J.
18. Note 4 above, at 237 per Chernov J.
19. Edney, R, "Hard time, less time: prison conditions and the sentencing process" (2002) 26 *Criminal Law Journal* 139 at 146-8.
20. See for instance *R v Cumberbatch* (2004) 8 VR 9 at 11, per Chernov J.
21. *R v RFD* [2001] VSCA 198 at [23] per Winneke P.

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