

AGGRAVATING OR MITIGATING? COMPARING JUDGES' AND JURORS' VIEWS ON FOUR AMBIGUOUS SENTENCING FACTORS

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Mental disorder, intellectual disability, intoxication and drug addiction are factors that are often raised in sentencing hearings, but the effect that these four conditions can have on an offender's sentence is rarely studied. This article fills two gaps in our understanding of the relevance of these ambiguous sentencing factors: first, by analysing how judges in the County Court of Victoria responded to these factors in 122 sentencing cases relating to 140 sentenced offenders; and secondly, by comparing the views of the judges with those of 426 jurors who had tried those cases and who participated in the Victorian Jury Sentencing Study. It concludes that lay opinion of the relevance of these factors does not always align with judicial practice and discusses the implications of these findings.

INTRODUCTION

Most sentencing factors can be classified as either aggravating (eg, use of a weapon) or mitigating (eg, a guilty plea). They may not always be relevant in any particular case, but when they are given weight, they are reliably known to weigh in one direction only. Some factors, however, if given weight, are potentially either aggravating or mitigating, depending upon the circumstances. These factors, which we term ambiguous sentencing factors, include mental disorder, intellectual disability, intoxication and drug addiction. This article focuses on these four factors, which are linked not only by their ambiguous role in sentencing, but also the fact that they relate to mental capacity.

Furthermore, they are all conditions which are more prevalent among offenders than in the general community and are commonly raised in sentencing hearings.

There appears to be no recent empirical research in Australia, and little elsewhere, analysing how sentencing factors are used in practice by judges.¹ This article reports on how these four ambiguous sentencing factors were used in sentencing decisions by judges in 122 criminal trials in the Victorian County Court which were included in the Victorian Jury Sentencing Study. With the exception of this current study, there has been little research to date on how the Australian public view sentencing factors. Consequently, this article also aims to fill a gap in the literature by asking whether the approach taken by the judges aligns with lay views of the relevance of these ambiguous sentencing factors.

One of the aims of the Victorian Jury Sentencing Study was to examine how judges handle specific sentencing factors in practice and to compare the judges' approaches with jurors' views. This article builds on an earlier article which explored jurors' views of common aggravating and mitigating factors and compared their views with those of judges.² Ascertaining jurors' attitudes to the relevance of sentencing factors can shed

¹ See Roger Douglas, *Guilty, Your Worship: A Study of Victoria's Magistrates Courts* (La Trobe University, Occasional Monograph, 1980) 62, where 292 relevant sentencing factors are identified; Victorian Sentencing Advisory Council, *Aggravated Burglary: Current Sentencing Practices* (2011) provides data on the sentencing factors referred to in sentencing remarks but does not report whether these factors were aggravating or mitigating; Nina Butrus, 'Judicial Sentencing Considerations in Cases of Violent Offenders Versus Sexual Offenders' (2018) *Psychiatry, Psychology and Law* doi.org/10.1080/13218719.2018.1473175 identified aggravating and mitigating factors in sentencing remarks in 37 cases heard in the Supreme and District Courts in South Australia. The Crown Court Sentencing Survey run by the Sentencing Council for England and Wales between October 2010 and March 2015 collected data on aggravating and mitigating factors from sentencing judges when they imposed sentence, see Sentencing Council, *Crown Court Sentencing Survey Annual Publication, January to December 2014* (2015). For a study using this data to explore whether intoxication is aggravating or mitigating in assault cases, see: Carly Lightflowers and Jose Pina-Sánchez, 'Intoxication and Assault: An Analysis of Crown Court Sentencing Practices in England and Wales' (2018) 58 *British Journal of Criminology* 132.

² Cite article** (after refereeing). A separate article explored the relevance of delay as a sentencing factor. Cite second article** (after refereeing).

light on how the wider public views such factors. As Julian Roberts and Mike Hough have explained, lay opinion is relevant in two ways. First, it aids in identifying any gaps between sentencing practice and public views and can highlight those sentencing factors which require clear explanations of their relevance and weight by judges. Secondly, these gaps inform debate about the relevance of sentencing factors in reviewing and formulating sentencing guidance. It is possible that the intuitive lay perspective on a factor could be accommodated if, after consideration, it is appropriate to do so.³ It is argued that ‘a sentencing system which attempts to convey censure must by definition reflect community beliefs about the factors which enhance or reduce crime seriousness and culpability’.⁴

These aims are particularly pertinent in the case of factors where sentencing guidance is unclear or ambiguous and where opinion is divided, as it is in relation to drug addiction and intoxication. One view is that substance abuse should not be considered;⁵ another is that guidelines should be more specific about when intoxication is aggravating and mitigating.⁶ A third view holds that existing appellate guidance is adequate⁷ and that sentencers should have a broad discretion to allow substance abuse

³ Julian Roberts and Mike Hough, Exploring Public Attitudes to Sentencing Factors in England and Wales’ in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing*, (Cambridge University Press, 2011) 168, 185.

⁴ Roberts and Hough, n 3, 170.

⁵ Mirko Bagaric and Sandeep Gopalan, ‘A Sober Assessment of the Link between Substance Abuse and Crime-Eliminating Drug and Alcohol Use from the Sentencing Calculus’ (2016) 56 *Santa Clara Law Review* 243.

⁶ Julian Roberts, ‘Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing’ in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 1, 2; Julian Roberts, Michael Hough and Andrew Ashworth, ‘Personal Mitigation, Public Opinion and Sentencing Guidelines in England and Wales’ [2011] *Criminal Law Journal* 524, 529–30; Lightflowers and Pina-Sánchez, n 1, 146. Ivan Potas and Donna Spears, *Alcohol as a Sentencing Factor: A Survey of Attitudes of Judicial Officers* (Monograph Series, No 8, Judicial Commission of New South Wales (NSW), 1994) 22 argued for greater consistency in approach, acknowledging the difficulty of devising a satisfactory formula.

⁷ NSW Sentencing Council, *Sentencing for Alcohol-Related Violence* (2009) 95; NSW Sentencing Council, *Sentencing Alcohol and Drug-Fuelled Violence* (2015) 50.

to be mitigating for those offenders considered ‘ready to change’.⁸ Yet another perspective suggests that, in order to curb alcohol- and drug-related violence, intoxication should be made a mandatory aggravating factor for a range of violent offences.⁹

The article begins with a short review of the appellate guidance in relation to mental disorder, intellectual disability, drug addiction and intoxication. It outlines the previous research on public views of these sentencing factors before moving on to discuss the approach taken in the Victorian Jury Sentencing Study to explore sentencing factors. The results are then described and followed by a discussion of the implications of the findings.

APPELLATE GUIDANCE

Mental Disorder and Intellectual Disability

Mental disorder and intellectual disability are both governed by the same sentencing principles.¹⁰ Some Australian jurisdictions briefly advert to the relevance of these two factors in sentencing legislation;¹¹ while the Victorian sentencing legislation does not do so, the common law in relation to the relevance of mental impairment is well-developed. The first point to note is that mental impairment does not always mitigate

⁸ Nicola Padfield, ‘Intoxication as a Sentencing Factor: Mitigation or Aggravation?’ in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 81, 99.

⁹ For example, as recommended by the Thomas Kelly Youth Foundation, see NSW Sentencing Council (2015) above n 7, 3.

¹⁰ See Judicial College of Victoria, *Victorian Sentencing Manual*, ‘Mental Impairment’ [10.9] <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#6135.htm>.

¹¹ For example, the *Penalties and Sentences Act 1992* (Qld) s 19(2)(f) refers to the offender’s ‘intellectual capacity’.

the sentence. Where it suggests that the offender may be a risk to society because of the condition, it may operate as an aggravating factor.¹²

The leading Victorian decision on the relevance of mental impairment to sentence is the Court of Appeal's decision in *R v Verdins* ('*Verdins*').¹³ It explained that impaired mental functioning may be relevant to sentence in at least six ways:

1. The condition may reduce the moral culpability of the offending conduct, which then affects what is appropriate in terms of a just punishment and denunciation.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. The condition may indicate that general deterrence should be moderated or eliminated because a mentally impaired offender is an inappropriate vehicle for general deterrence.
4. It may indicate that specific deterrence should be moderated or eliminated. As with Principle 3, this depends on the nature and severity of the symptoms, either at the time of offending, or at the time of sentence, or at both.
5. The existence of the condition at the date of sentencing may mean that a given sentence will weigh more heavily on the offender than it would be on a person of normal health.

¹² Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 287, citing *Channon The Queen* (1978) 20 ALR 1, 4–5; *Veen The Queen (No 2)* (1988) 164 CLR 465; *DPP Sokaluk* [2013] VSCA 48.

¹³ (2007) 16 VR 269 [32].

6. Where there is a serious risk of imprisonment having a significant effect on the offender's mental health, this will be a factor tending to mitigate punishment.

Notably, a broad view of mental impairment applies and it is the symptomology of the condition rather than the diagnostic label that is important. Since the decision was delivered in 2007, *Verdins* has been cited more than 1200 times by Australian courts.¹⁴

Addiction and Intoxication

There are no clear common law principles regarding the relevance of substance abuse (either drug or alcohol addiction or intoxication due to alcohol or drugs) to sentencing in Australia.¹⁵ A lack of clarity in sentencing guidance in relation to intoxication has also been observed in England and Wales¹⁶ and in the United States.¹⁷

Two propositions can be drawn from the Australian appellate guidance. First, that the relevance of substance abuse depends upon the circumstances. Secondly, in general, neither condition is mitigating *per se*.¹⁸ Beyond this, Australian authorities seem to support every possible outcome regarding the impact of substance abuse: it has been found to be neutral (ie, of no relevance) and sometimes (although less often)

¹⁴ As at 25 June 2018, LawCite indicated that *Verdins* had been cited 1222 times.

¹⁵ For a recent analysis of legislative references to intoxication, including in the context of sentencing, see Julia Quilter et al, 'Criminal Law and the Effects of Alcohol and Other Drugs: A National Study of the Significance of "Intoxication" in Australian Legislation' (2016) 39 *University of NSW Law Journal* 913.

¹⁶ Padfield, n 8.

¹⁷ Bagaric and Gopalan, n 5.

¹⁸ Statutory provisions in NSW and Queensland prohibit reliance on self-induced intoxication as a mitigating factor: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (5AA); *Penalties and Sentences Act 1992* (Qld) s 9(9A). However, it still could be indirectly mitigating.

aggravating or mitigating.¹⁹ In *R v Henry*,²⁰ a guideline judgment for armed robbery, a majority of the New South Wales (NSW) Court of Criminal Appeal held that drug addiction of itself did not justify a reduced (or increased) sentence. In other words, it is a neutral fact. Circumstances where intoxication can be aggravating include where the offender had knowledge of the likely effects of taking drugs based on experience (reckless intoxication),²¹ or where it made the offender more frightening to the victim.²² In cases of alcohol- or drug-fuelled street violence, the courts have indicated that there is a greater need for denunciation and specific and general deterrence.²³ The degree of intoxication can also be an aggravating factor in cases of culpable or dangerous driving,²⁴ while drug abuse is regarded as aggravating when it increases the risk of recidivism.²⁵

On the other hand, some degree of mitigation may be appropriate when the addiction originated from medical prescription of a drug.²⁶ And where addiction occurred at an early age, this may be mitigating, although the courts have not been consistent in recognising early addiction as a result of trauma as mitigating.²⁷ Intoxication may also

¹⁹ Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Lawbook Co, 5th ed 2017) 390. This is supported with respect to intoxication by a recent study of all Australian appellate court decisions from 2010 to 2014: Luke McNamara et al, 'Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects' (2017) 43 *Monash Law Review* 148. See also *R Coleman* (1990) 47 A Crim R 306, 327 (Hunt J). See generally Judicial College of Victoria, n 8, 'Addiction and Drug-affected Offending' [10.10] <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#6184.htm>.

²⁰ (1999) 46 NSWLR 346 [171]–[274]; *R Koumis* (2008) 14 VR 434 [53].

²¹ *Martin The Queen* (2007) 20 VR 14 [66]; *Currie* (1988) 33 A Crim R 7.

²² *R Groom* [1999] 2 VR 159 [24]; *R Sewell* (1981) 29 SASR 12, 15.

²³ McNamara et al, n 19, 183–184 citing e.g. *Hards The Queen* [2013] VSCA 119 and *R Loveridge* [2014] NSWCCA 120. See also Julia Quilter, 'Judicial Responses to Alcohol-fuelled Public Violence: the Loveridge Effect' (2017) 6 *International Journal for Crime, Justice and Social Democracy* 123.

²⁴ *R Whyte* (2002) 55 NSWLR 252 [216]; *DPP (Vic) Neethling* (2009) 22 VR 466 [31]–[32].

²⁵ *R Henry* (1999) 46 NSWLR 346 [273]; *R McKee* [2003] VSCA 16 [94].

²⁶ *Talbot The Queen* (1992) 34 FCR 105, 105–6, cited in *R Henry* (1999) 46 NSWLR 346 [185].

²⁷ Bagaric et al, n 19, 398–9.

be mitigating where it bears upon another mitigating factor, for example, where it suggests that the offence is out of character (good character),²⁸ where it supports the characterisation of the offender's conduct as spontaneous or unplanned,²⁹ where it is located in the context of Indigenous community disadvantage,³⁰ or where the offending was associated with drug abuse and there is evidence of progress towards rehabilitation (good prospects of rehabilitation).³¹ An additional mitigating category has been tentatively suggested by Quilter and colleagues' analysis of appellate decisions, namely when intoxication is said to 'explain' but not 'excuse' an offence, which they contend suggests an implied reduction in the offender's culpability.³²

PREVIOUS PUBLIC OPINION RESEARCH ON AMBIGUOUS FACTORS

A research study using a representative sample of the British public conducted for the Sentencing Advisory Panel in the United Kingdom found that public views in relation to intoxication were ambivalent: 24% said it always made the crime more serious; 26% said that it often did; 20% said that it sometimes did and 29% indicated that it made no difference (they were not asked if it was ever mitigating). Mental disorder and intellectual disability were not included in the list of mitigating factors put to survey participants; however, they were asked whether being treated for depression at the time of sentence justified a more lenient sentence. The responses were that 15% said it

²⁸ *R Sewell* (1981) 29 SASR 12, 15.

²⁹ McNamara et al, n 19, 178, citing *R YS* [2014] NSWCCA 226.

³⁰ McNamara et al, n 19, 181–182, citing *Bugmy The Queen* (2013) 249 CLR 571; *Munda Western Australia* (2013) 249 CLR 600.

³¹ *R McKee* [2003] VSCA 16 [12]–[13]; *R Koumis* (2008) 14 VR 434 [53]–[59]; *Brown The Queen* [2014] NSWCCA 335 [29].

³² McNamara et al, n 19, 176.

should result in a more lenient sentence in all or most cases, 61% felt it should do so in some cases and 23% indicated that it should never do so.³³

Learning disability and mental health were identified as potentially mitigating factors by focus group participants in a study of attitudes to sexual offences carried out for the UK Sentencing Council.³⁴ Underpinning this view was acceptance that the offender was unaware the act committed was an offence. However, this acceptance did not change the respondents' views on the length of the sentence; rather, it was seen as relevant only to the setting for serving it (for example, in a secure care facility instead of prison).

In Lovegrove's Melbourne Criminology Sentencing Study, conducted between 2004 and 2006, a convenience sample of members of the public were presented with four detailed scenarios based on real cases.³⁵ Some of the participants in discussion groups identified a number of mitigating factors, including intoxication, drug addiction, intellectual capacity and psychiatric disorder, but it is not clear how much support there was for these individual factors.³⁶

³³ Julian Roberts et al, 'Public Attitudes to Sentencing Purposes and Sentencing Factors: An Empirical Analysis' [2009] *Criminal Law Review* 771.

³⁴ Carol McNaughton Nicholls et al, *Attitudes to Sentencing Sexual Offences* (Sentencing Council Research Series 01/12, 2012) 54.

³⁵ Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting with the Community' [2007] *Criminal Law Review* 769, 778; Austin Lovegrove, 'Putting the Offender back into Sentencing: An Empirical Study of the Public's Understanding of Personal Mitigation' (2011) 11(1) *Criminology & Criminal Justice* 35, 46–47.

³⁶ The focus in the discussion groups was on mitigation. Some participants argued against giving any weight to some of the mitigating factors discussed, but the identity of those particular factors is unclear: see Lovegrove (2011), n 35, 54.

METHOD, RESPONSE AND ANALYSIS

The Victorian Jury Sentencing Study is a mixed method, multi-phased study which combines juror surveys and in-depth interviews with analysis of sentencing remarks to yield both quantitative and qualitative data.³⁷ It covered 124 trials³⁸ in the Victorian County Court between May 2013 and November 2015. Stage 1 surveys were completed by jurors after a guilty verdict and before the sentence was imposed. After sentencing, judges were asked to complete a form to determine which factors they had relied upon as mitigating or aggravating when imposing the sentence.

The Stage 2 survey was then sent to jurors, along with the judge's sentencing remarks and a short sentencing information booklet, which included some general information about sentencing factors. Survey 2 included the same questions about sentencing factors as those answered by the judges. These questions listed eight common aggravating factors and ten mitigating factors. A separate question related to the four ambiguous sentencing factors discussed in this paper. Judges and jurors were asked both a general theoretical question in relation to these factors and a specific question relating to their relevance in their particular case. A third follow-up survey was conducted but is not relevant to this article.

Fifty jurors were selected for interview from the Stage 2 respondents who expressed a willingness to be interviewed. The semi-structured interviews included questions about the relevance and weight given to the sentencing factors identified as relevant by the juror and judge. The sentencing remarks themselves were also an independent

³⁷ Cite article** (after refereeing).

³⁸ For two trials, we had the sentence but no sentencing remarks.

qualitative data source. Together with the interviews, they contextualised and brought to life the bare figures from Survey 2 and the forms completed by the judges.

Sentencing remarks were received from 122 trials relating to 140 sentenced offenders. We received 426 juror responses to the Stage 2 survey. Only 39 sentencing factor forms were received from 17 out of a possible 46 judges who tried the 122 cases included in the study. This poor response rate from judges was addressed by allocating each of the cases to two researchers who individually used the sentencing remarks for the remaining sentenced offenders to complete a form on behalf of the judge. Responses were cross-checked and compared with an N-Vivo analysis of the sentencing remarks and then adjusted where necessary.³⁹ Using researcher-generated forms was an imperfect replica of how judges would have recorded their weighting decisions, but it was strengthened by checking with the N-Vivo analysis of the sentencing remarks.

The comparison between the views of judges and jurors was complicated by the fact that there is a degree of subjectivity as to whether each of these factors arose. For example, the respondents (both jurors and judges) could have different interpretations of what constitutes a mental disorder, of the circumstances in which low intelligence amounts to an intellectual disability, or of the level at which drinking or drug consumption qualifies as intoxication. For two reasons, the choice was made to report on the cases where the judge said the factor arose. First, because we found that some jurors conflated various factors, for example, mental disorder with intellectual disability or intoxication with drug addiction, while some indicated that the factor arose when there were no facts in the sentencing reasons suggesting this. The second reason is that using the judge's perspective revealed how often jurors responded that the factor

³⁹ N-Vivo was also used to analyse the interviews with jurors.

did not arise in the cases where the judge identified it as arising. As discussed further below, the contrasts we observed between judges and jurors on whether each factor arose suggests that community awareness of mental issues continues to be limited.⁴⁰

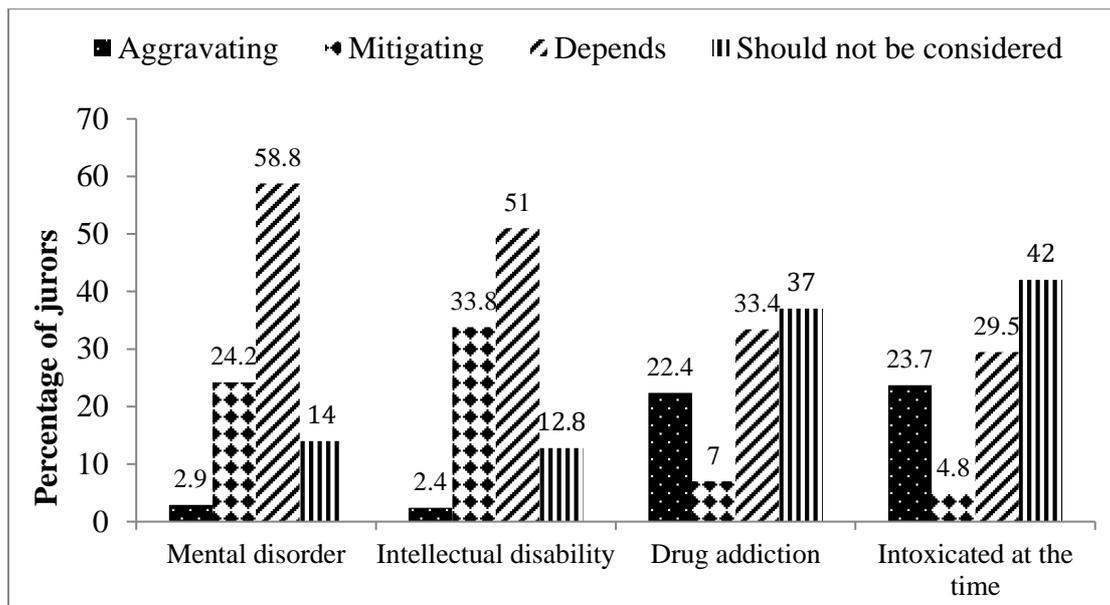
RESULTS

Views on Each Factor's General Relevance

Stage 2 Survey Responses

The wording of the general question was: 'In your personal view, would you say the following factors should be considered aggravating or mitigating in general?' Response options were: 'aggravating', 'mitigating', 'depends on the circumstances' and 'should not be taken into consideration'. Figure 1 displays the jurors' responses. It shows that the responses were similar for mental and cognitive impairment (ie, mental disorder and intellectual disability) and for substance abuse (ie, intoxication and drug addiction).

Figure 1: Views of jurors on how certain factors should be treated in general



Notes:

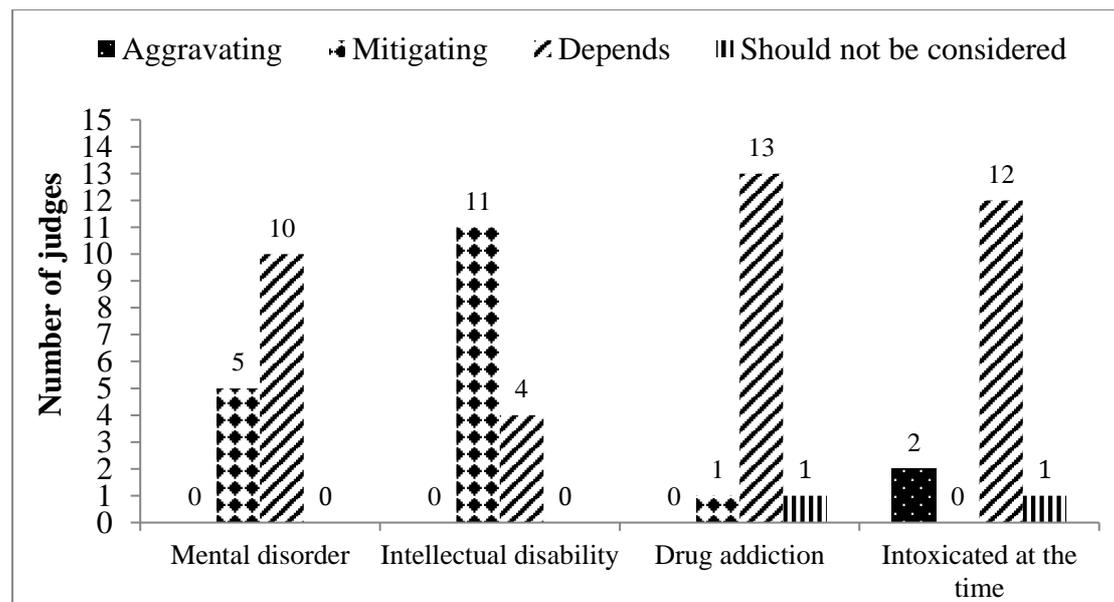
- The offender has a mental disorder (N=413)
- The offender has an intellectual disability (N=414)
- The offender has a drug addiction (N=416)
- The offender was intoxicated at the time of the offence (N=417)

A majority responded that the relevance of mental disorder and intellectual disability ‘depends on the circumstances’ (59% and 51% respectively). A significant proportion said that these two factors were ‘mitigating’ (24% and 34% respectively) and a small proportion said they were ‘aggravating’ (3% and 2% respectively). For drug addiction and intoxication, the most common response was that it ‘should not be taken into consideration’ (37% and 42% respectively), followed by ‘depends on the circumstances’ (33% and 30%). In contrast with the response on mental and cognitive impairment, 22% and 24% of respondents respectively indicated that drug addiction and intoxication were ‘aggravating’, while only a small proportion responded that they were ‘mitigating’ (7% and 5% respectively).

Only 15 judges responded to the general question (some did so for more than one offender sentenced and these duplicate responses were removed). The low number of responses raises questions about what inferences can be drawn from them. However,

the 15 judges represent one third of the judges presiding in this study's trials and, given the paucity of empirical evidence about how sentencers deal with sentencing factors, it is important to report the findings. Moreover, Figure 2 shows that clear patterns emerge from the judges' responses, with a majority responding that intellectual disability is in general 'mitigating', but for mental disorder, drug addiction and intoxication it 'depends on the circumstances'. Notably, no judicial officers indicated that mental disorder or intellectual disability should not be considered, while only one respondent took this approach in relation to substance abuse.

Figure 2: Views of judges on how certain factors should be treated in general



Comparing the judges' responses in Figure 2 with the jurors' responses in Figure 1 shows that, for mental disorder, the responses of the judges and jurors were quite similar, with 59% of jurors and 67% of judges responding that it 'depends on the circumstances' and 24% of jurors and 33% of judges responding that it is 'mitigating'. In contrast, for intellectual disability, judges were more than twice as likely as jurors to say it was mitigating (73% vs 34%). For drug addiction and intoxication, the jurors' most common response was that this should generally not be taken into consideration (37% and 42%), but judges most commonly responded that it 'depends on the circumstances' in such cases.

Jurors were also more likely than judges to regard all of these factors as aggravating; although this only accounted for 2-3% of responses for mental and cognitive impairment, it represented nearly a quarter (22% and 24%) of responses for substance abuse. By contrast, no judges indicated that mental or cognitive impairment or drug addiction were aggravating, while only two (13%) indicated that intoxication at the time of the offence was generally aggravating. This suggests a clear disparity in the extent to which the public and the judiciary appear to regard substance abuse as generally aggravating.

Stage 3 Interview Responses

Responses to the survey question about the relevance of mental disorder in general were discussed with some of the interviewees. Their responses indicate that jurors instinctively favoured the view that mitigation should be confined to cases where there was a causal link between impairment and the offending (e.g. Jurors 6, 290 and 882), such as an inability to appreciate the wrongfulness of the act (e.g. Juror 184) or 'the ability make a cognitive decision' (Juror 63). Juror 882 considered that a diagnosis of

depression should not be mitigating because ‘that does not make people commit crimes. And I think too often it’s used as an excuse’.

The interviewed jurors’ responses to the general question about substance abuse represented a cross-section of jurors’ general views about the relevance of addiction and intoxication displayed in Figure 1. Juror 458 is an example of a juror who thought that, in general, substance abuse was aggravating. For him, taking the risk of acting uncontrollably made such behaviour aggravating: ‘to let yourself – to take the active choice to take that step to make yourself less controllable to me is an aggravating circumstance’.

The view that abusing alcohol or drugs was a matter of choice was also given for jurors’ response that intoxication and addiction should not be considered. In contrast, the response that drug addiction was or could be mitigating, depending on the circumstances, was explained in terms of the belief it was a medical problem that could be treated, including by those who had the experience of a family member with addiction and (e.g. Jurors 568 and 415).

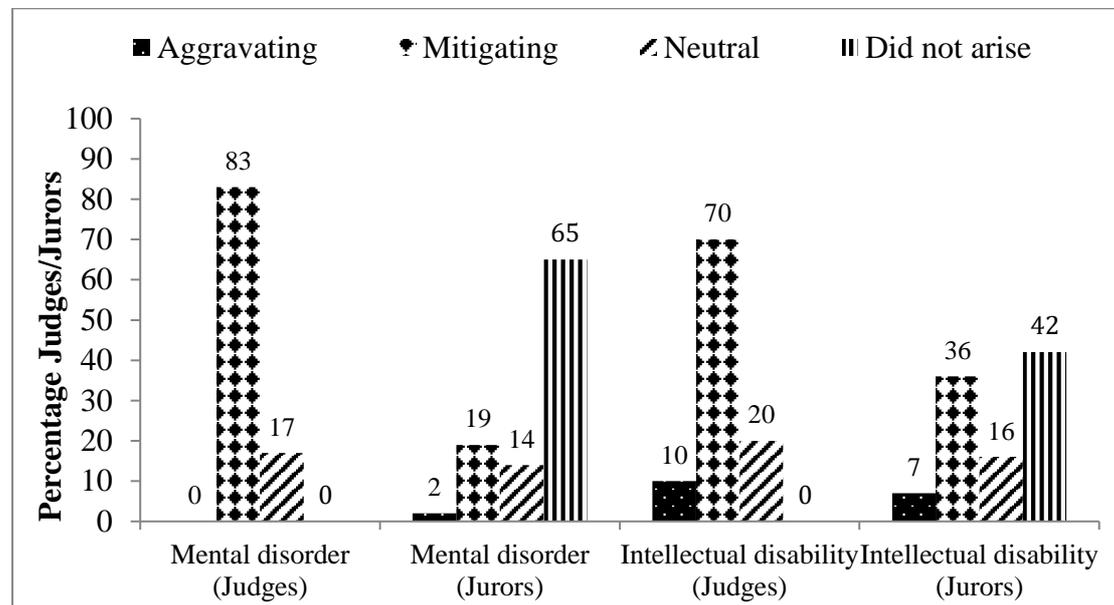
Views in the Offender’s Specific Case

Judges and jurors were also asked about the relevance of these factors in their particular case. Response options were that this was ‘aggravating’, ‘mitigating’, ‘neutral’ or ‘did not arise’. It should be noted that the sentencing remarks indicated that many offenders presented with mixed profiles of mental or cognitive impairment and substance abuse, which means that an offender could have more than one of the four conditions.

Mental and Cognitive Impairment

(a) Stage 2 Results

Figure 3. Views of judges and jurors as to the relevance of mental and cognitive impairment to the offender's sentence



Notes:

- Mental disorder: Judges (N=30); Jurors (N=105)
- Intellectual disability: Judges (N=10); Jurors (N=31)

Figure 3 shows the responses of judges and jurors in relation to mental disorder and intellectual disability in those cases where, according to the judge, these conditions arose. It shows that both groups responded similarly to these two factors. However, while a majority of judges found mental disorder and intellectual disability to be mitigating in the specific case under consideration (83% and 70% respectively), this was so only for a minority of jurors (19% and 36% respectively). Instead, jurors' most common response in relation to these offenders was that this 'did not arise' (65% of jurors for mental disorder and 42% for intellectual disability).

(b) Sentencing Remarks

Analysis of the sentencing remarks casts light upon the types of mental disorder diagnosed and the relevance of the *Verdins* principles to the sentences imposed. As

displayed in Figure 3, judges indicated that mental disorder arose in the cases of 30 offenders. The sentencing remarks indicated that in half of the 26 cases where the judge treated mental disorder as mitigating, the diagnosis was depression, usually ‘a major depressive disorder’. Other diagnoses included schizophrenia, bipolar disorder, schizotypal personality disorder,⁴¹ persistent complex bereavement disorder, post-traumatic stress disorder (PTSD), adjustment disorder, acquired brain injury from alcohol abuse, and autism spectrum disorder. Judges consistently applied the *Verdins* principles. Principle 5 (that, because of the mental condition, the sentence would be more onerous) was the most often engaged and was relied upon in more than half of the cases in which mental disorder was mitigating. In about half of these cases, at least one of the other principles was also relevant. The second most common principle was Principle 6, namely, that there was a significant risk that imprisonment would have an adverse effect on the offender’s mental health. Principle 1 (that the mental condition reduced the offender’s moral culpability) was relied upon in a fifth of the cases. Two cases attracted all six principles.

Offenders identified by the judge as having an intellectual disability (N=10) included those with a ‘mild intellectual disability’ and those with borderline intellectual impairment or functioning. The *Verdins* principles engaged were most commonly Principle 5, but included Principles 1, 2, 3 and 4.

There were no cases in our study where judges considered mental disorder to be an aggravating factor and just one where intellectual disability was aggravating. This offender was convicted of multiple charges of sexually assaulting an eight-year-old girl and had committed subsequent sexual offences. The judge found that his impaired

⁴¹ Shortly after the data collection period for this study finished, the Victorian Court of Appeal held that *Verdins* doesn’t apply to personality disorders: see *O’Neill* (2015) 47 VR 395.

intellectual functioning, coupled with a diagnosis of paedophilic sexual interest, indicated a need for community protection and specific deterrence.

(c) Interviews with Jurors

This section reports on interviews and other Survey 2 responses from the interviewee's particular trial. When considered in the context of the facts of the cases and other Stage 2 juror responses, the interviews with jurors shed light on why they were less likely to find mental disorder mitigating than judges. We interviewed three jurors who disagreed with the judge in their trial that mental disorder was mitigating and three who had responded in Survey 2 that mental disorder was mitigating.

In the three cases where the interviewed jurors did not agree with the judge that mental disorder was mitigating, it emerged that the jurors did not consider that the offender had a 'mental disorder'. Juror 63 from A's case is an example of this. A, who was convicted of money laundering, was diagnosed with 'bipolar depression'. Noting this, the judge applied *Verdins* and said that suffering 'a serious mental condition that makes prison more onerous' was relevant to sentence and that 'some moderation of general deterrence' was also required. Juror 63 disagreed. While he agreed that a condition like schizophrenia, which reduces an offender's 'ability to make a cognitive decision', could be mitigating, he disputed that bipolar disorder was a mitigating factor. Specifically, in relation to the judge's point that a mental disorder makes prison more onerous, he said that 'the fact that you know, you're going to have a rough time in prison is not exactly a winning argument. Prison is not meant to be pleasant'. The other six Stage 2 jurors in A's case were divided as to the relevance of mental disorder, with two responding that it 'did not arise', two indicating that it was 'mitigating' and two suggesting that it was 'neutral'.

B and C were the other two cases where interviewed jurors responded that a mental disorder did not arise. For B, who had a diagnosis of severe depression and borderline personality disorder, the judge found that *Verdins* Principles 1, 3, 4 and 5 were activated. For C, diagnosed with ‘persistent complex bereavement disorder’ in the context of a history of significant emotional difficulties following the break-down of intimate relationships, *Verdins* Principles 1 and 3 were found to be engaged.

Juror 184 (from B’s case) explained that, in his view, a mental disorder should only mitigate if it impaired an offender’s ability to understand that the conduct was wrong. Juror 599 was sceptical of a diagnosis of persistent complex bereavement disorder in C’s case; in his view, the offender had narcissistic personality disorder.

Examining the responses from the cases where the judge found a mental disorder to be mitigating revealed inconsistencies among the jurors. In C’s case, the four Stage 2 respondents were divided: two said that mental disorder did not arise, one said that it was a neutral fact, and one (Juror 589) resiled from the view that mental disorder was mitigating in the interview, saying:

Yeah, well, if that’s what it is [inability to cope with a break-up] then to me it’s like, ‘Dude, get over it. Learn how to deal with real life’.

There were two interviewed jurors who confirmed their Stage 2 response that the offender’s mental disorder was mitigating. The diagnoses in these cases were major depressive disorder (D’s case), engaging *Verdins* Principle 5, and complex PTSD (E’s case). However, again, there was no consistency among the jurors, as six of the eight Stage 2 jurors in E’s case had responded that a mental disorder ‘did not arise’.

Only two jurors were interviewed from trials where the judge indicated that the offender had an intellectual disability, too few to be able to shed much light on the reasons why

jurors were less likely than judges to find intellectual disability mitigating. Juror 207 from F's case (and four of the five Stage 2 jurors from that case) agreed with the judge that the offender's mild intellectual disability was mitigating. The judge imposed a community correction order with conditions of supervision, treatment and rehabilitation and a justice plan.⁴² (F also had a history of alcohol abuse). In this case, his disability was clearly relevant to the kind of the sentence imposed and its conditions (*Verdins* Principle 2). By contrast, Offender G did not meet the criteria for 'mild intellectual disability', nor did the judge consider that his borderline intellectual functioning was such that it reduced his culpability for the offences of sexually assaulting two young boys. However, the length of the sentence was reduced because the offender's intellectual functioning, coupled with depression and isolation, would make imprisonment more difficult (*Verdins* Principle 5). Juror 522's response in the Stage 2 survey (along with another of the three Stage 2 jurors) was that an intellectual disability did not arise. In the interview, this juror disagreed with the judge that intellectual impairment was mitigating, stating:

it was just lower intelligence, he's not intellectually disabled or, so you'd think they still know right from wrong, absolutely know right from wrong.

This case suggests that jurors may be less likely to find intellectual disability mitigating than judges because they take a narrower view of what amounts to 'intellectual disability' and may not accept *Verdins* Principle 5.

⁴² A justice plan is a condition that the defendant agrees to participate in the services provided for intellectually disabled offenders by the Department of Health and Human Services: Freiberg, n 12, 713; *Sentencing Act 1991* (Vic) s 80; *Disability Act 2006* (Vic).

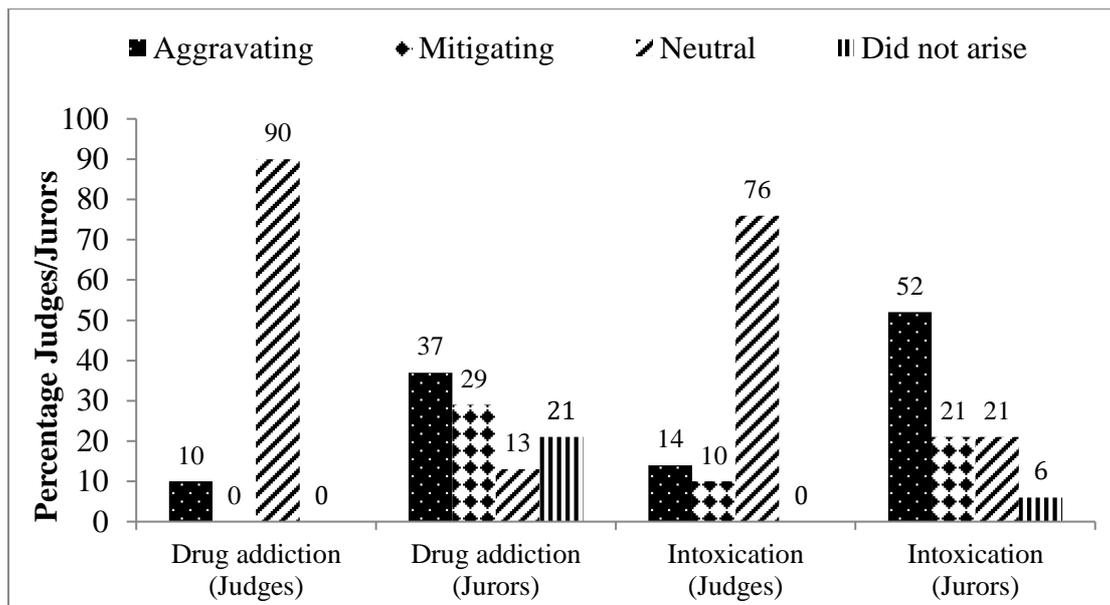
Substance Abuse

(a) Stage 2 Results

Figure 4 shows the responses of judges and jurors to the relevance of drug addiction and intoxication in those cases where the judge identified these factors as arising. There were 29 cases in which the offender was said to have an addiction issue (alcohol or drugs) and 21 cases in which the judge's sentencing remarks identified intoxication as a factor.

Figure 4 shows that judges considered substance abuse to be a neutral fact in most cases (including almost all the cases of drug addiction). Jurors were most likely to find these conditions aggravating (in 37% of cases involving addiction and 52% of cases involving intoxication), whereas judges rarely found them so (in 10% of cases involving addiction and 14% of cases involving intoxication). Jurors were also more likely than judges to find intoxication and drug addiction to be mitigating. There were no cases in which the judge indicated drug addiction was mitigating and two cases (10%) in which intoxication was, while jurors indicated that they regarded these factors as mitigating in 29% and 21% of cases respectively.

Figure 4: Views of judges and jurors as to the relevance of substance abuse to the offender's sentence



Notes:

- Drug addiction: Judges: (N=29) Judges, N=62 Jurors)
- Intoxication: Judges (N=21 Judges); Jurors (N=66)

(b) *Sentencing Remarks*

Analysis of the sentencing remarks indicated that the cases where drug addiction was aggravating included one case of culpable driving (intoxication was also aggravating in this case) and two cases involving arson and armed robbery where the offenders were long-term addicts and this had an adverse bearing on their prospects of rehabilitation. In the armed robbery case, the judge also explained that armed robbery and other offences ‘fuelled by an ice habit attract the principle of general deterrence’.

The three cases where intoxication appeared to be aggravating included two cases of culpable driving⁴³ and one case of marital rape. There were two cases where it was mitigating. In each of these two cases, the offender had an alcohol problem, had been drinking at the time of the offence and there was evidence of abstinence since.

⁴³ When the verdict is based on culpable negligence under s 318(2)(b) of the *Crimes Act 1958* (Vic), the *degree* of intoxication can be aggravating without infringing the rules on double punishment.

(c) Interviews with Jurors

We interviewed three jurors for whom intoxication was an aggravating factor at Stage 2, and two for whom it was a neutral fact. In the three cases where the jurors had responded it was aggravating, a majority of the Stage 2 jurors were also of this view, contrary to the view of the three judges.

H was convicted of marital rape. The judge appeared to regard his intoxication as a neutral fact. Juror 537 explained why she considered it an aggravating factor:

I suppose I thought if he's drunk he's got less self-control. And I believe that she was telling him 'no' and that he was still proceeding. And perhaps if he wasn't as drunk that then he might have heeded what she said.

The other two cases involved indecent assault where both the complainant and the offender had been drinking heavily and a case where the offender was under the influence of cocaine at the time he committed aggravated burglary of his estranged partner's house and took her hostage. Juror 599 from the latter trial said:

[E]ven though it can be deemed by some members of the community, that, okay, he was under the influence, therefore, less liable, but it was his choice to use drugs, and obviously he's not making the right choices, but it's still his choice.

The two jurors who had responded that intoxication was a neutral choice also explained this on the basis that alcohol or drug consumption is a choice.

Our results included interviews from five trials where drug addiction had been identified as an issue and this issue was discussed during the interviews. In three of the trials, the jurors had responded that drug addiction was mitigating, whereas the judge treated it as a neutral fact. In the other two trials, both the judge and interviewed jurors considered it aggravating. However, the interviews indicated that the initial responses

that drug addiction was mitigating or aggravating were not necessarily firm responses and only two jurors adhered to their Stage 2 views. Juror 568 affirmed his view that drug addiction was mitigating and indicated that his response was influenced by the fact that there were people in his extended family who had been affected by drug addiction and had undergone treatment for it. Juror 184 reiterated his response that it was aggravating and explained that this was because drug-taking is a matter of choice, adding: 'If you're taking drugs you know that things can go wrong'.

Examining Stage 2 juror responses for each of these trials showed that jurors were divided about whether drug addiction was aggravating or mitigating. For example, in Juror 568's trial (a case of aggravated burglary and armed robbery), eight jurors completed Survey 2. Five responded that drug addiction was aggravating, two (including Juror 568) felt that it was mitigating and one said it did not arise.

DISCUSSION

Four key findings emerge from our research: two relate to mental and cognitive impairment and two relate to substance abuse. Each pair discussed below deals first with the judges' application of the law and is followed by a comparison between judges and jurors. The implications of these findings will be discussed, keeping in mind the purpose of such a comparison is to reveal any mismatch between lay and judicial views. Such divergences should form part of the evidence base for academic and policy debate and law reform proposals. Additionally, when the views of jurors are not well aligned with sentencing practice, it alerts judges to factors which require more explanation for the rationale for finding them aggravating or mitigating.⁴⁴

⁴⁴ Roberts and Hough, n 3.

Mental and Cognitive Impairment

1. In practice, judges generally treat mental disorder and intellectual disability as mitigating and use the Verdins principles to explain the basis for mitigation

Analysis of the sentencing remarks showed that both mental disorder and intellectual disability were mitigating in the majority of cases and only very rarely aggravating. The appellate guidance in relation to mental and cognitive impairment appeared to be at the forefront of judges' sentencing reasons. Judges almost invariably referred specifically to the *Verdins* principles in explaining why the mental condition was mitigating. Principle 5, which mitigates on the basis of the more onerous effect of imprisonment on the offender, was the most commonly engaged, with fewer cases attracting Principle 1, which requires a connection between the mental condition and offending to reduce culpability.

A variety of conditions, not merely serious psychiatric illnesses, attracted the operation of the principles, as approved in *Verdins* and endorsed in *Charles*.⁴⁵ These conditions included 'complex bereavement disorder' in the context of a failed relationship, a condition not included in an earlier list of conditions which have attracted *Verdins* principles.⁴⁶

The consistency in responses between appellate guidance and sentencing practice suggests that judges apply appellate guidance in relation to these factors in a consistent

⁴⁵ (2011) 34 VR 41 [141].

⁴⁶ Jamie Walvisch, 'Sentencing Offenders with Impaired Mental Functioning: Developing Australia's "Most Sophisticated and Subtle" Analysis' (2014) 17 *Psychiatry, Psychology and Law* 187, 189.

fashion. The analysis of sentencing remarks also provides an interesting snapshot of how judges apply the appellate sentencing guidance from *Verdins*.

2. Jurors are less likely than judges to treat mental disorder and intellectual disability as mitigating

The comparison between judges and jurors showed that jurors were much less likely to find mental or cognitive impairment mitigating, particularly in the case of mental disorder, where 83% of judges found it mitigating, compared with 19% of jurors. Judges were also twice as likely as jurors to find intellectual disability mitigating. The jurors' most common response to these factors was that they 'did not arise'. This suggests that they took a different and narrower view than judges of what amounts to a mental disorder or intellectual disability. This inference is supported by the interviews and the responses of other jurors in the interviewees' cases. For at least some jurors, none of the following conditions were considered to be a mental disorder: bipolar depression, major depressive disorder, complex PTSD and 'complex bereavement disorder'.

Another reason why jurors were less likely to find a mental condition mitigating is because of their reluctance to find a link between the mental condition and the offence. This suggestion is supported by the interviews with Juror 81 and Juror 599. Broader grounds for reduced culpability such as impaired ability to exercise judgement⁴⁷ were not readily accepted by jurors. And some were not persuaded that the sentence should be mitigated by the fact that prison was made more onerous by the mental condition (Juror 63 and Juror 184, but see Juror 415), suggesting Principle 5 did not resonate with jurors.

⁴⁷ *R v Verdins* (2007) 16 VR 269 [26].

What are the implications of this misalignment? Whether or not a person is suffering from a ‘mental disorder’ or ‘intellectual disability’ is clearly a matter for expert opinion. Lay views and uninformed intuition should have no role in determining which mental conditions are eligible for consideration in sentencing. However, the finding that many jurors were reluctant to recognise conditions such as severe depression and PTSD has worrying implications for mental health literacy. While national surveys have indicated some improvement in community understanding of mental disorders, there remains a significant proportion of the Australian population who believes that even well-known conditions such as depression or PTSD are conditions that a ‘person could snap out’ of.⁴⁸ It is also possible that, in the context of the commission of criminal offences, there is even less sympathy for those suffering from such a condition.

The other divergence between judicial and juror approaches to mental and cognitive impairment relates to the reasons why it can be mitigating. As explained earlier in this article, from a legal perspective, this is governed by the *Verdins* principles. All of the six *Verdins* principles are theoretically sound, in the sense of being related to one of the purposes of punishment or another general sentencing principle. This suggests that sentencing practice in relation to mental and cognitive impairment is unlikely to be modified to accommodate public views that are at odds with it. The most commonly used of these principles, Principle 5 (that suffering a mental disorder or intellectual disability is likely to make serving the sentence harder to bear) can be justified by the higher-level principle of equal impact.⁴⁹ But this justification for reducing an offender’s sentence did not seem to resonate with many jurors. Significantly, this finding is

⁴⁸ Nicola Reavley, Tiffany Too and Michelle Zhao, *National Surveys of Mental Health Literacy and Stigma and National Survey of Discrimination and Positive Treatment: A Report for the Mental Health Commission of NSW* (2015) 106.

⁴⁹ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 105, 194.

consistent with an earlier finding that other factors that judges consider mitigating on the basis of the impact of incarceration, namely, old age, physical illness, and family hardship, do not sit well with many jurors.⁵⁰

Given the principled foundation for each of the limbs of *Verdins*, it is not suggested here that the disjunction between judicial practice and lay views about the relevance of mental disorder should lead to a change in the law.⁵¹ However, it is possible that the reasons for mitigation would be more persuasive and less cryptic for a lay audience if judges briefly spelt out the rationale for the principle, rather than just saying words to the effect that ‘all six principles in *Verdins* applied to your case’, as occurred in O’s case. Reducing the complexity of remarks would also assist, although this does involve imposing an additional burden on judges.

Substance Abuse

3. Judges generally treat drug addiction and intoxication as neutral facts but the circumstances in which they are aggravating or mitigating would benefit from clearer appellate guidance

The primary purpose of soliciting judges’ responses to the relevance of substance abuse was to provide data for the comparison with jurors’ responses. However, the results also provide insights into first-instance sentencing practice which complement other doctrinal analysis of appellate decisions.⁵² Despite the low response rate and small

⁵⁰ Reference removed to preserve anonymity.

⁵¹ The *Verdins* principles have gained approval from lawyers and forensic psychologists alike: Ian Freckelton, ‘Sentencing Offenders with Impaired Mental Functioning: *R Verdins Buckley and Vo* [2007] VSCA 102’ (2007) 14 *Psychiatry, Psychology and Law* 359; Dion Gee and James Ogloff, ‘Sentencing Offenders with Impaired Mental Functioning: *R v Verdins, Buckley and Vo* [2007] at the Clinical Coalface’ (2014) 21 *Psychiatry, Psychology and Law* 46.

⁵² Bagaric et al, n 19; Julia Quilter et al, ‘The Significance of “Intoxication” in Australian Criminal Law’ (Trends & Issues in Crime and Criminal Justice No 546, Australian Institute of Criminology, 2018). See also Julian Roberts, ‘Punishing, More or Less: Exploring Aggravating and Mitigation at

number of cases, the results are nevertheless of value and support the view that legal guidance on the relevance of substance abuse is marked by ‘a high degree of uncertainty’,⁵³ rather than it is ‘sufficiently settled and appropriate’.⁵⁴

Our findings indicate that a systematic review of a much larger sample of first-instance decisions is warranted. First, in the light of the earlier analysis of appellate decisions, it would be expected that judges’ response to the general question would be that the relevance of intoxication and drug addiction ‘depends on the circumstances’ or perhaps that it ‘should not be considered’. But, surprisingly, two out of 15 judges responded that, in general, intoxication is ‘aggravating’ and one asserted that that drug addiction is ‘mitigating’.

Secondly, the judges’ ranking forms and analysis of sentencing remarks produced two cases which did not seem to fit neatly within the appellate guidance. In one, a case of marital rape, the sentencing judge ticked intoxication as an aggravating factor, but did not explain why, having stated that, in general terms, the relevance of this depends on the circumstances. It is conceivable that intoxication could have made the offender more frightening to the victim, in line with the authority discussed earlier in this article, although this was not explicitly stated. This was not the only case of marital or acquaintance/date rape where the offender was intoxicated, but it was the only case where the judge indicated that intoxication was aggravating. The second case was a case of armed robbery committed to finance an ice habit. The sentencing judge stated that offences fuelled by an ice habit attract the principle of general deterrence, suggesting that this was an aggravating factor, rather than a neutral one. These findings

Sentencing’ in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing*, (Cambridge University Press, 2011) 1, 1 (referring to England and Wales).

⁵³ Bagaric et al, n 19.

⁵⁴ NSW Sentencing Council, n 7, 95.

have significance in the light of other research. A now-dated survey of judicial officers by the Judicial Commission of NSW using three vignettes found that, in the domestic violence and glassing scenarios, more respondents found intoxication (from alcohol) to be aggravating, rather than mitigating or neutral; in the armed robbery scenario, by contrast a majority of respondents indicated that intoxication was neutral, but at least a fifth considered it aggravating and a fifth found it mitigating.⁵⁵ More recently, a survey of judges in England and Wales on the impact of various aggravating and mitigating factors in Crown Court cases showed that being under the influence of alcohol or drugs was in the top three aggravating factors for four classes of offences: assault and other public order offences; burglary; arson and criminal damage; and driving offences.⁵⁶ Furthermore, Quilter and colleagues' analysis of appellate sentencing decisions identified a number of problems with the appellate guidance, including that 'intoxication' is poorly defined; there is possible inconsistency between intoxication supporting a claim that the offence was unplanned and therefore mitigating in some contexts (such as sexual assault), but aggravating in others (such as random street violence); and a lack of clarity as to whether intoxication as an 'explanation' – rather than an excuse – implies it is mitigating.⁵⁷

4. Jurors are more likely than judges to find substance abuse salient in specific cases

Jurors were more likely than judges to find addiction and intoxication both aggravating and mitigating. This emerged not only from a comparison of general views, but much

⁵⁵ Potas and Spears, n 6, 14-15.

⁵⁶ Sentencing Council, *Crown Court Sentencing Survey, Annual Publication 2012* (2013) 28; see also *Crown Court Sentencing Survey, Annual Publication 2014* (2015) 29 (burglary only reported). Note that the Sentencing Council's definitive guidelines include intoxication as an aggravating factor for many offences, including assaults and burglary.

⁵⁷ McNamara et al, n 19; Quilter et al, n 51.

more strongly in relation to their attitudes in the context of the cases in the study, where 52% of jurors said intoxication was aggravating, contrasted with 14% of judges. Qualitative data from the interviews revealed that a majority of jurors found substance abuse to be aggravating in cases where the judge had found these conditions neutral or mitigating. One of the grounds for treating intoxication as aggravating suggested by jurors was that it made the offenders more culpable, because they knew, or should have realised, that intoxication could lead to uninhibited or dangerous behaviour.

As well as being more likely to find substance abuse aggravating, jurors were more likely to find it mitigating, at least in the context of individual cases, although the interviews showed these views were not always firmly held and some jurors had difficulty explaining the basis for mitigation. Judges found substance abuse mitigating when there was some evidence that the offender was ready to change. Such mitigation can be justified on principled grounds, although, rather than relating it to favourable prospects of rehabilitation, some academic writers now argue that it is relevant because it supports and increases desistance.⁵⁸

What are the implications of this misalignment between lay and judicial views in relation to substance issues? Should the intuitive views of lay respondents have a role in debates about the relevance of this to sentence? In particular, do the intuitive views of most jurors that being under the influence of alcohol or drugs makes the offence objectively more serious support making this factor aggravating? Or should such views be dismissed as unprincipled populism? One of the objections to treating drug addiction or intoxication as an aggravating feature of public violence is that it provides endorsement for the view that such violence is more serious than intoxicated violence

⁵⁸ Joanna Shapland, 'Personal Mitigation and Assumptions about Offending and Desistance' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 60, 75.

that occurs in private settings.⁵⁹ The views of most jurors that substance abuse should be aggravating in cases such as domestic violence and sexual assault overcomes this. Being intoxicated when the offence was committed is an aggravating factor in the UK Sentencing Council's guidelines for a range of offences, including assaults, sexual offence, robbery and burglary and there is evidence that intoxication is the most common form of aggravation in assault offences.⁶⁰ However, strong objections to making intoxication aggravating in cases of personal violence have been raised, such as the practical difficulties of identifying a particular level of 'intoxication'; that intoxicated violence should not be objectively more serious than sober and deliberately inflicted violence; and the disproportionate effect it would have on disadvantaged members of the community.⁶¹ Some commentators also object to intoxication being treated as aggravating without proof of foresight that it would lead to the possibility of offending⁶² and problems with assuming that intoxication is causally implicated in offending at the individual level, as distinct from an epidemiological level.⁶³ These are contentious issues. However, we suggest that lay views about the objective seriousness of the offence in cases where substance abuse is a factor should not be ignored when the legal relevance of substance abuse to sentence is being clarified. Furthermore, we argue that such clarification is overdue.

⁵⁹ Quilter, n 23, 143.

⁶⁰ Lightflowers and Pina-Sánchez, n 1.

⁶¹ NSW Sentencing Council (2009), n 7, 96-97; NSW Sentencing Council (2015), n 7, 9-13.

⁶² Gavin Dingwall and Laurence Koffman, 'Determining the Impact of Intoxication in a Desert-based Sentencing Framework' (2008) 8 *Criminology & Criminal Justice* 335.

⁶³ NSW Sentencing Council (2015) above n 7, 9-10; Quilter et al, n 51, 2.

CONCLUSION

The aim of this paper was to compare judicial views of the relevance of four ambiguous sentencing factors with the views of the community, using jurors as a subset of the general public. A secondary aim was to determine how judges responded to the four ambiguous factors in the cases included in the study. This was necessary to provide data for the comparison but incidentally provided insights into first-instance sentencing practice in relation to mental and cognitive impairment and substance abuse.

Two points stand out from the examination of sentencing practice. The first is that judges invariably explained mitigation for mental and cognitive impairment in line with the *Verdins* principles and, significantly for the purposes of the comparison with jurors' views, the two most common principles were Principle 5 and 6. The second point is that judges' responses to the general question about the relevance of substance abuse and the analysis of the sentencing remarks showed a lack of consistency in approach to intoxication, which supports the view expressed by some commentators that this particular ambiguous sentencing factor would benefit from clearer sentencing guidance.

As explained in the introduction and discussion, identifying any mismatch between community views and sentencing practice in relation to sentencing factors has a dual purpose. First, it provides part of the evidence base for debates and law reform proposals, with the possibility of modifying sentencing guidance if 'a sound principle is found in the community reaction'.⁶⁴ Secondly, this alerts the judiciary to the need to clearly explain why certain factors are treated as they are.

⁶⁴ Roberts and Hough, n 3, 185.

Despite the methodological problems encountered, including a less-than-optimal response from judges, subjectivity of the factors (e.g. what amounts to ‘intoxication’ or ‘intellectual disability’) and the relatively small number of cases in which the factors arose, a number of useful findings emerge from the comparisons. The three most salient will be highlighted.

The finding that many jurors denied that a ‘mental disorder’ arose in cases where there was a diagnosis of mental disorder has implications for mental health literacy in Australia.⁶⁵ Clearly, more needs to be done to improve public understanding of mental disorder and intellectual disability and their effects on behaviour generally and in the specific context of criminal behaviour.

Secondly, the qualitative analysis of the interviews and Stage 2 juror responses in the interview cases suggested that many of the *Verdins* principles did not resonate with most jurors. In particular, Principle 5, the principle most often invoked by judges, did not appear to be convincing. This is in line with our earlier reported findings in relation to impact mitigation. We found jurors were generally not impressed by the argument that a factor, such as old age or physical illness, is mitigating because it would make a sentence of imprisonment more onerous.⁶⁶ In the case of mental impairment, most jurors required a nexus between the condition and the offending. The concept of impact mitigation raises interesting arguments about the extent to which an individual’s sensibilities should be accommodated in assessing a proportionate sentence. However, in the case of mental and cognitive impairment, it not suggested that there should be any change to the *Verdins* principles that make sentence impact mitigating (Principles

⁶⁵ See Reavley et al, n 47.

⁶⁶ Cite article** (after refereeing).

5 and 6). Instead, this mismatch should alert judges of the need to succinctly and clearly explain the rationale for these grounds of mitigation.

Thirdly, the misalignment between the views of judges and jurors in relation to substance abuse provides relevant material for ongoing debates about the relevance of this issue to sentence. Jurors, we found, were more likely than judges to find addiction and particularly intoxication aggravating. It is not suggested that intoxication should never mitigate or always aggravate. However, in developing clearer guidance to achieve a more consistent approach, it should be recognised that it is a common intuitive response that intoxication should be aggravating because making the choice to consume alcohol or drugs involves an increased risk offending. The principled reasons for rejecting making intoxication an aggravating factor for crimes of violence have been adverted to. For this reason, it makes sense to let this mismatch remain, leaving it to judges and sentencing authorities to explain the reasons why it is or is not a situation where substance abuse is an aggravating factor.