AN CHÚIRT UACHTARACH

THE SUPREME COURT

Record No.:2022/36
[2023] IESC 1

Dunne J.
Charleton J.
O'Malley J.
Woulfe J.
Murray J.

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

STEPHEN DUFFY

APPELLANT

Judgment of Ms. Justice Iseult O'Malley delivered the 19th of January 2023

Introduction

1. The Court heard this appeal on the 27th July 2022. The parties were informed orally on that date that the appeal would be dismissed. The reasons for that decision are now set out.

2. The appellant pleaded guilty in the Dublin Circuit Court to one charge of causing serious harm (contrary to s.4 of the Non-Fatal Offences Against the Person Act 1997). He was sentenced to four years imprisonment, with the entirety of the sentence being suspended on certain conditions including payment of compensation to the injured party. The respondent ("the Director") applied to the Court of Appeal for a review of the sentence on grounds of undue leniency. The Court of Appeal quashed the sentence, and imposed instead a sentence of four years with the last three years suspended (see *People (DPP) v. Duffy* [2022] IECA 53). The issues raised in the appeal concern the relevance of, and weight to be attached to, firstly, the views of the victim of an offence as to sentence and, secondly, an offer of financial compensation by the accused.

3. The circumstances of the offence are set out in full in the judgment of the Court of Appeal, and only a brief summary of the facts is necessary here.

4. Shortly after midnight on the 29th August 2016, the appellant encountered the victim, Mr. Darley, in a public area. After a brief exchange, during which there was no sign of aggression on either side, he struck him a single blow with his fist. The two men did not know each other, and it appears that the assault was entirely unprovoked. Mr. Darley

was rendered unconscious. The appellant left the scene, then came back, put the victim into the recovery position, and left again.

5. The victim was very seriously injured by the assault. He suffered a bleed in his brain, required life-saving surgery and was in a coma for about a fortnight. He was left with permanent loss of his senses of taste and smell, and with chronic headaches, blackouts and dizzy spells. He fell down a flight of stairs due to a blackout and injured both ankles. Because of the risk of seizures he was unable to drive, or travel in an aeroplane, for two years. He became nervous in public places. He had memory difficulties and was unable to maintain regular employment. This resulted in financial difficulties and he became homeless for two years, staying in hostels and shelters. His family relationships were badly affected.

6. The incident was captured on CCTV. The appellant had been wearing distinctive clothing and was traced through CCTV footage which, amongst other things, showed him withdrawing money from an ATM. When arrested and interviewed by Gardaí in September 2016 he accepted that the figure in the footage looked like him, but he did not make any admissions. He said that he had a poor memory of the night in question.

7. When returned for trial to the Circuit Court, the appellant brought a preliminary application to have the charge dismissed on the basis of two arguments – that the prosecution would not be able to prove in a trial that the blow was not lawfully struck, and that it would not be able to prove that he acted intentionally or recklessly. This application was heard in February 2019. The application was dismissed, with the judge finding that there was no merit in the first argument and that, while there might be a difficulty showing intention, a finding of recklessness would be open on the evidence. A trial date was fixed. The case was not reached on the date fixed and it was relisted for

the 20th April 2021. At some point, described by the prosecution as an early stage, the appellant offered a plea to assault causing harm, contrary to s.3 of the Act. This was not accepted by the Director. The appellant pleaded guilty to the more serious s.4 charge on the trial date, and was sentenced on the 15th July 2021. It was accepted by the prosecution that the plea was on the basis of recklessness rather than intention.

8. At the sentence hearing, the trial judge had available to her the medical evidence and the victim impact report, summarised above. She heard that the appellant was a young man of 24 years old (20 at the time of the assault) who was a qualified welder. He had family support, was in a stable relationship and had a child. He had no previous convictions and had not come to adverse attention in the intervening years. He was said to have had a habit of binge drinking and cocaine use at the relevant period, and to have changed his life for the better since. A probation report assessed him as being at low risk of reoffending. A number of written testimonials from family, work and others were presented. He had communicated his remorse in a letter of apology to the injured party, and had offered him a sum of €5,000 which had been accepted. He was offering to pay a further sum of €10,000 over the coming 12 months, if left at liberty to earn it. The prosecuting garda confirmed that the appellant had expressed a willingness to engage in a restorative justice process, but that the injured party, after some changes of mind, had ultimately decided against it. However, he was described by the garda as "not looking for blood", as bearing no sense of ill will towards the appellant, and as "not pushing for any particular result one way or the other". His attitude was that the penalty was a matter entirely for the judge.

9. The trial judge considered that the far-reaching and lasting consequences of the assault placed it in the mid-range of seriousness for the offence of assault causing serious harm.

She set a headline sentence of six and a half years. She accepted that the appellant was genuinely remorseful and gave him credit for an early plea (on the basis that there had been a previous offer of a plea to the less serious charge of assault causing harm (under s.3 of the Act of 1997) and that ultimately the prosecution had accepted that the relevant *mens rea* was recklessness. She took into account his age, the absence of any previous or subsequent convictions, the assessment by the probation service and the testimonials offered on his behalf and concluded that there was a "very high" level of mitigation in the case. The sentence imposed was four years imprisonment, suspended for four years on conditions including a requirement that the appellant pay the sum of €10,000 within two years.

10. The trial judge then addressed Mr. Darley, who responded that he thought that everyone was "against" him. However, later that day he contacted the appellant via social media. He said that he had been upset in court, not because of the suspended sentence, but because he felt that the prosecution had made light of his injuries. He had lost the ability to taste and smell for life, his short term memory was "awful", and he was still repairing his relationship with a family member. "*They all seemed to think that €10 [000] over 10 months will help when it won't*". The message went on:

> *"Anyway from one dad to another embrace the chance you have been given and be a good dad to your child, I am happy to hear you have not done anything like this since and learn from this and make your kid proud. I genuinely hold no hatred towards you if you have learned from this and will never do it again. It has messed my life up but if you have learned your lesson and it sounds like you have I am. Glad your not going to prison. Have a good future."*

11. The appellant replied, repeating his apologies and saying that he wished he could do more. Mr. Darley responded that, for what it was worth, he had hoped that a custodial sentence would not be imposed as he knew that his injuries were not inflicted intentionally and were probably the result of a moment of madness. Thereafter, the appellant was advised by his family that there should not be ongoing contact, and he blocked Mr. Darley from sending further messages,

The Court of Appeal

12. The Director sought a review of the sentence on grounds of undue leniency. The matter was heard on the 11th and 12th January 2022, by which date the appellant had paid the sum of €10,000 as required by the Circuit Court order. The messages between the appellant and the injured party were the subject of some dispute between the parties. Counsel for the Director appears to have had instructions, based on communications from the injured party, that were at odds with the content of the messages. However, the Director accepted that the messages had indeed been sent by the injured party. Screen-shots of the messages were provided to the court.

13. In the Court of Appeal, both parties accepted that the headline sentence of six and a half years was correct. The Director argued that the sentencing judge had erred in determining that a wholly suspended sentence was appropriate, having regard to sentences imposed by the Courts in similar cases.

14. Reference was made by counsel to *People (DPP) v. (Anne Marie) Byrne* [2017] IECA 97, a case in which a serious injury leaving permanent scarring and other damage had been caused by a bite to the face of the victim. A headline figure of seven years had been set by the trial judge but after consideration of the mitigatory factors a suspended

sentence had been imposed. The Court of Appeal had observed that some offences are so serious that they "*effectively carry a presumption against the suspension of a sentence in its entirety*". It had gone on to say that, nonetheless, even in such cases, the case law indicated that a wholly suspended sentence could be imposed in cases where there were "*special reasons of a substantial nature and particularly exceptional circumstances*". In Ms. Byrne's case, such reasons were found to be present. The conclusion there was that the sentence was very lenient but not unduly so.

15. Counsel also referred to *People (DPP) v. Smith* [2019] IECA 1, a case of an assault causing serious harm with a knife. The trial judge in that case set the headline figure at five years and ultimately imposed a suspended sentence of three years. The Court of Appeal found that the sentence was not unduly lenient, having regard to the fact that the accused had been 18 years old at the time, with no previous convictions and no adverse attention in the four years prior to the matter being considered by the Court of Appeal. He had addressed his alcohol and substance misuse, was in stable employment and had a child in a stable relationship. The probation report was positive. It may be noted here that the respondent in that case had pleaded guilty at the first opportunity and had offered €1,000 to the victim.

16. In the instant case, the Director submitted to the Court of Appeal that there were no special reasons or exceptional circumstances of the nature described in *Byrne*. In particular, the period of time taken before entry of the guilty plea was stressed as diminishing the credit otherwise due in respect of a plea. The appellant had absconded from the scene, had not surrendered himself and did not make full admissions. The Director also submitted that the trial judge had attributed excessive weight to the

compensation. Having regard to the injuries sustained, the amount offered, even by a person of limited means, could not be considered a very substantial factor.

17. Counsel for the appellant submitted that where there was a rational basis for a finding by a trial judge that there were exceptional circumstances justifying a fully suspended sentence then, even where lenient, the sentence would not meet the standard for a finding of undue leniency. Responding to queries from the court, he accepted that there was a difficulty in this case with regard to the timing of the plea, and having regard to the history of the case, but he relied upon the fact that the plea finally offered had been accepted on the basis of recklessness.

18. Counsel stressed the evidence given in the sentence hearing that the injured party had accepted the apology and was willing to accept a further expression of remorse, in the form of further compensation, that would involve the appellant continuing to work.

19. The decision of the Court was delivered by McCarthy J. on the 8th March 2022. He summarised the submissions made on behalf of the appellant, and the view of the Court thereon, in the following terms:

> "*The tenor, in substance, of the submissions made here on behalf of the respondent was that the facts that the injured party was of a forgiving nature, did not seek vengeance and was inferred to be content with the sentence, were relevant; further, we were informed that in the immediate aftermath of sentencing the victim communicated with the respondent in sympathetic terms and wished him well. It was contended that the victim did not want to see the respondent imprisoned; the very limited extent to which the views of the victim can be relevant (and the general rule is that they are not) is dealt with in DPP*

v. R. O'D. [2000] 4 I.R. 361. We need not elaborate on this issue here as, whatever else, there is no clear or coherent evidence as to his present view; criminal proceedings are between the prosecutor and the accused. The respondent should be dealt with in accordance with legally relevant principles and we do not think that such factors can be relied upon in mitigation, at least in the present case."

20. In *R. O'D.*, the appellant had pleaded guilty to several counts of sexual assault against his two sisters. There was a particularly troubled family history and both sisters requested the sentencing judge not to imprison their brother. He imposed custodial sentences on each count but suspended all of some and most of others, while certifying a ground of appeal as to whether, having regard to the strong representations by the victims, it was mandatory to impose custodial sentences. The Director also made an undue leniency review application.

21. In the judgment (delivered by Geoghegan J.), the following passage occurs:

"There is no doubt that the whole question of the effect of a victim expressing a view as to sentence is of the utmost importance and needs to be considered carefully. Before dealing with the actual situation which arose in this case it would seem important to the court so as not to create confusion in other cases, first to consider what might be described as the opposite situation that is to say where the victim personally suggests to the judge what he or she thinks is a severe sentence. This can easily arise in a particular statutory context. Under the provision of s.5 of the Criminal Justice Act, 1993, a sentencing court is obliged to take into account any effect (whether long term or otherwise) of the

offence on the victim. The section permits evidence to be given by or on behalf of the victim in this regard. From time to time victims in that situation express views as to sentence such as for instance 'he should be locked up for life'. It has never been the practice in this jurisdiction for the victims of an offence to be permitted to express views in that sense as to what a proper sentence might be. In the opinion of the court, s.5 makes no change in that regard. While a victim or a relative of a victim or a relative of an accused would not be entitled to express an opinion in court as to what was an appropriate sentence, they are always entitled to put forward an ad misericordiam plea. As has been pointed out before by this court, the trial court is under an obligation to administer justice rather than mercy but very often the reasons given for the plea of mercy are reasons which are relevant to the assessment of a just sentence."

22. On the facts of *R. O'D.*, the Court of Criminal Appeal observed that the accused was engaged in treatment that appeared to be effective. There was a clear public interest in its continuing, while a custodial sentence would seem to achieve no purpose. It was stated that normally such factors would have to be balanced against the public outrage at the serious offences against the sisters, but they themselves had "solid and sensible" reasons for their wish that the appellant should not be sent to prison.

23. Returning to the instant case, the Court of Appeal accepted that the payment of a sum of money by the accused can be indicative of remorse. However, it was stated that the Court must always be mindful of the principle that an accused person cannot, by payment of money alone, trigger some entitlement to a reduced sentence. The fact that the victim in this case accepted the sum in question could not be relied upon as a

mitigating factor, since in the present case it might be regarded as trifling in terms of the level of damages he might in principle recover if he were to sue his assailant.

24. The Court of Appeal concluded that while it had been legitimate to suspend a portion of the sentence, the sentencing judge fell into an error of principle in wholly suspending it. The sentence was quashed, and the Court instead imposed a sentence of four years, with the last three years suspended on the normal terms as to good behaviour.

Submissions in this Appeal

25. The appellant submits that the views of victims to the effect that they do not wish a defendant to be imprisoned may be highly relevant, depending on the circumstances, and that there is no general rule that such views are irrelevant. It is argued that where there is clear evidence at a sentence hearing that the victim does not wish an accused person to be imprisoned, that evidence and that wish will not be rendered irrelevant either because of a subsequent change of mind, or uncertainty as to whether there has been a change of mind, or because he is otherwise unhappy with the process. It is said that it would be unfair to determine appeals on the basis of such changes.

26. The appellant relies upon s.5 of the Criminal Justice Act 1993, which obliges a sentencing court to take into account any effect (whether long term or otherwise) of certain offences on the victim, and permits evidence to be given by or on behalf of the victim in this regard. It is submitted that a victim is entitled to put forward an *ad misericordiam* plea, and, while a trial court is under an obligation to administer justice rather than mercy, the Court of Criminal Appeal had said in *R.O'D.* that any reasons given for such a view would be relevant to an assessment of a just sentence for the

particular case. *R. O'D.* is also cited as authority for the proposition that there is no absolute rule that, for certain type of offences, a custodial sentence is mandatory.

27. The appellant refers to a number of judgments where the attitude of the victim was considered to be relevant in the decision of a court to impose a wholly suspended sentence. In *People (DPP) v. McCormack* [2000] 4 I.R. 356 the Court of Criminal Appeal fully suspended a sentence for sexual assault and attempted rape by a seventeen year old offender, with one of the relevant factors being the statement of the victim that she did not want the appellant to go to prison. She had some level of personal knowledge of him, and her view was that he would not repeat his behaviour and was too young to go to prison. The Court of Criminal Appeal agreed with her and found that it was not a case for a custodial sentence. In *People (DPP) v. J.R.* (Unreported, Court of Criminal Appeal, 23rd May, 2001) a plea was made by the complainant's sister not to imprison her brother for sexual offences against her. The Court of Criminal Appeal replaced a partially suspended sentence with a fully suspended one.

28. In *People (DPP) v. F.E.* [2020] 1 ILRM 517 Charleton J. cited *R. O'D.* and *McCormack* as cases in which the wholly exceptional step of a fully suspended sentence might be justified because the victim had convincing reasons for having a forgiving attitude. It is noted, also, that in *The People (DPP) v. W.D.* [2008] 1 I.R. 308 the same judge stated that a forgiving attitude by the victim towards the perpetrator could be a factor in sentencing. He went on to say, however, that a forgiving attitude by the victim could never be determinative because a crime is an attack on society and not simply a private wrong.

29. The Director submits that the contents of the text messages sent by the injured party were a private conversation between the injured party and the appellant. They did not

constitute a request to the court for leniency and cannot be considered as such. She submits that the judgment of the Court of Appeal touching on the views of the victim is a correct interpretation of the law. It is agreed that the views of an injured party are a matter that can be taken into consideration by a sentencing judge, but, as was held in *R. O'D.*, such views (whether tending to favour a lenient sentence or a harsh sentence) have a limited role in the sentencing process, and cannot compel a sentencing judge to depart from the appropriate sentencing principles.

30. The appellant challenges the finding of the Court of Appeal that the fact that the victim in this case accepted sums of money was not relevant as a mitigating factor. It is submitted that the acceptance of money as compensation, or as an expression of remorse, is a factor to be taken into consideration by a sentencing judge. In *People (DPP) v. McLaughlin* [2005] 3 I.R. 198, a sentence of three years imprisonment for rape was suspended in full, where a sum of €10,000 had been made available by the respondent by way of compensation. The Court of Criminal Appeal in that case referred to s. 6 of the Criminal Justice Act 1993, which permits a sentencing judge to make a compensation order instead of, or in addition to, dealing with a convicted person in any other way. The Court held that it had never been a principle that a custodial sentence was to be excluded where compensation had been paid. However, the fact that such compensation was offered and accepted was considered to be a factor which the Court must take into account in arriving at a sentence which was fair and proportionate.

31. In *People (DPP) v. Lyons* [2014] IECCA 27, a €75,000 compensation order was made by the trial judge under the provisions of s.6 of the Act of 1993. The case, therefore, was not one where payment was offered by the accused, and accepted by the victim, as an expression of remorse. In delivering judgment on behalf of the Court of Criminal

Appeal, Murray J. stated that where serious indictable offences were concerned it would seem, in principle, that if a compensation order was being made, it should be made only in addition to the appropriate sentence, including imprisonment, that met the gravity of the case. The appellant seeks to distinguish *Lyons*, submitting that distinct factors arise for consideration where a compensation order is not involved, but a substantial payment is made and accepted as an expression of remorse.

32. The appellant also cites *People (DPP) v. McCabe* [2005] IECCA 90. In that case a sentence of four years imprisonment for aggravated sexual assault was suspended after the trial judge was told that the victim was prepared to accept a sum of €15,000 as compensation. (The circumstances in which the Court of Criminal Appeal considered that outcome to be permissible are discussed in greater detail below.)

33. The Director accepts that the payment of compensation is a significant feature in this particular appeal, given that the appellant appears to be a man of modest means. In cases such as this, it is therefore a sign of remorse, and in the circumstances is to be considered a mitigating factor. However, she submits that the Court of Appeal correctly addressed the role of compensation as a mitigating factor, and says that its decision is consistent with other decisions on the issue. Acceptance of compensation by the victim does not preclude a sentencing judge from imposing a custodial sentence, particularly in the more serious cases. It cannot be categorised as "*special reasons of a substantial nature and particularly exceptional circumstances*" (in the words of the judgment in *People (DPP) v. (Anne Marie) Byrne*).

34. The Director also relies on the decisions in *McCabe* and *Lyons*. As regards *Lyons*, it is submitted that the Court of Criminal Appeal found, in effect, that the payment of

compensation should have little or no bearing on the sentence imposed for a related criminal offence. It is submitted that the analysis of the Court of Appeal was correct in relation to this issue, and that its judgment was consistent with precedent.

Discussion

35. I proposed to commence by setting out the test by which the Court of Appeal assesses applications for review on grounds of undue leniency. That test was formulated in the case of *People (DPP) v (Christopher) Byrne* and is as follows:

> "*In the first place, since the Director of Public Prosecutions brings the appeal the onus of proof clearly rests on him to show that the sentence called in question was 'unduly lenient'.*
>
> *Secondly, the court should always afford great weight to the trial judge's reasons for imposing the sentence that is called in question. He is the one who receives the evidence at first hand; even where the victims chose not to come to court as in this case — both women were very adamant that they did not want to come to court — he may detect nuances in the evidence that may not be as readily discernible to an appellate court. In particular, if the trial judge has kept a balance between the particular circumstances of the commission of the offence and the relevant personal circumstances of the person sentenced: what Flood J has termed the 'constitutional principle of proportionality' (see People (DPP) v. W.C. [1994] 1 ILRM 321), his decision should not be disturbed.*

Thirdly, it is in the view of the court unlikely to be of help to ask if there had been imposed a more severe sentence, would it be upheld on appeal by an appellant as being right in principle? And that is because, as submitted by Mr Grogan SC, the test to be applied under the section is not the converse of the enquiry the court makes where there is an appeal by an appellant. The inquiry the court makes in this form of appeal is to determine whether the sentence was 'unduly lenient'.

Finally, it is clear from the wording of the section that, since the finding must be one of undue leniency, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of this Court."

36. In *People (DPP) v McCormack* [2000] 4 I.R. 356 the Court said:

"*In the view of the court, undue leniency connotes a clear divergence by the court of trial from the norm and would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.*

Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent

upon those two factors. It is only when the penalty is below the range as determined on this basis that the question of undue leniency may be considered."

37. The question for the appellate court in a leniency review, therefore, is not whether (as proposed by the appellant) there was a rational basis for the sentence imposed by the trial court but whether the sentence reflected a substantial divergence from what would be considered the appropriate sentence, taking into account the particular features of the crime and of the accused. I would add that the answer to that question will normally involve consideration of any relevant guideline judgments concerning the offence before the court.

38. Next, I think it necessary to state here the basic principle underlying the task of a sentencing court, as identified by Denham J. in *People (DPP) v. M.* [1994] 3 I.R. 306. The court must take into account both the nature of the crime and the personal circumstances of the accused. That principle is implemented in the sentencing process by firstly considering the "nature of the crime", a phrase which includes any relevant aggravating or mitigating factors relevant to the offending conduct under consideration and clearly includes the gravity of any consequences for the victim. That leads to the identification of the appropriate headline sentence. Next, the personal circumstances of the accused are taken into account in deciding on the appropriate reduction, if any, from that headline figure.

39. The two issues primarily under consideration here – the significance of the attitude of a victim and the significance of an offer of compensation – can clearly be closely related in many cases. It is possible that a victim's attitude could be influenced in either

direction by such an offer. It may be seen by the victim as a genuine gesture of remorse and acknowledgment of responsibility, but it may, alternatively, be seen as an attempt on the part of the accused to buy his way out of trouble with an amount of money that does not in fact reflect the seriousness of the impact of the offence.

The attitude of the victim to sentence

40. The variability of the potential views of victims to what they may perceive as the appropriate outcome of the sentencing outcome is one important reason why the law in general could not allow those views to be a dominant feature in the administration of justice by the sentencing judge. The statement by Geoghegan J. in *R. O'D.* is clear -the court cannot take into account the belief of a victim that the offender should be dealt with harshly. By the same token, it could not be swayed by a victim who believes that no offender should be imprisoned. However, a victim may put forward an *ad misericordiam* plea for leniency, which will be taken into account if based on appropriate grounds.

41. The statutory basis for receiving evidence of the impact of a crime involving violence is s.5 of the Criminal Justice Act 1993, as amended. The section applies where the victim has suffered "harm", including physical, mental or emotional harm, or economic loss, which was directly caused by the offence. Section 5(2)(a), inserted by s.4 of the Criminal Procedure Act 2010, requires a sentencing court to take into account and, where necessary, receive evidence or submissions concerning, any effect on the person in respect of whom the offence was committed. This process, clearly, is not intended as a method of conveying the victim's view as to what an appropriate sentence would be. The point is that the victim has a right to participate in the process, to ensure that the court is fully informed about the gravity of any consequences for the victim of the

accused person's conduct. The court will then be in a position to carry out its task more effectively.

42. The instances where the courts have been prepared to accept the view of a victim as a factor in favour of leniency have been cases where the victim has made an *ad misericordiam* plea to the court, giving a reason specific to the accused for so doing. So, in *R. O'D.*, the sisters made such a plea in court on behalf of their brother, in circumstances where they had a greater appreciation of the family background than the court, and were in a position to express a view as to his history and his prospects of rehabilitation. In *McCormack*, the victim made her request on the basis of her own assessment of the relative immaturity of the accused and the likelihood that he would not reoffend.

Payment of compensation on a voluntary basis and orders under s.6

43. Offers of financial reparation are undoubtedly a traditional feature of the sentencing process in this jurisdiction. In the past, they were probably mostly associated with cases where the sentencing court imposed a suspended sentence in recognition of the payment of compensation to a victim. Section 6(1) of the Criminal Justice Act 1993 provides a mechanism that puts the making of compensation orders on a more formal footing, but not all orders involving a payment by the accused to the victim have to be made in accordance with its terms. Scope remains for a voluntary offer. It is important, in my view, that the distinction between the two procedures is kept in mind.

44. The subsection provides as follows:

> ***6.***—*(1) Subject to the provisions of this section, on conviction of any person of an offence, the court, instead of or in addition to dealing with him in any other way, may, unless it sees reason to the contrary, make (on application or otherwise) an order (in this Act referred to as a "compensation order") requiring him to pay compensation in respect of any personal injury or loss resulting from that offence (or any other offence that is taken into consideration by the court in determining sentence) to any person (in this Act referred to as the "injured party") who has suffered such injury or loss.*

45. The section goes on to provide that the amount ordered to be paid must not exceed the amount that, in the opinion of the court, the injured party would be entitled to recover in a civil action. In a case dealt with in the District Court, the amount cannot exceed the jurisdiction of that court in ordinary tort actions. The court is obliged to take account of the means of the convicted person. Payments, which are administered through District Court offices, may be made payable by instalments, which either the convicted person or the injured party can seek to vary. An attachment of earnings mechanism is available in a case of default, as in the case of maintenance payments in family law cases.

46. The impact of this provision on the actual practice of the courts is uncertain. It seems clear that in many cases where an offer is made by an accused person and accepted by a victim, the courts continue to include the making of the payment as part of the sentence without resorting to the statute. However, the extent to which this practice may be seen as resulting in reduced sentences cannot be stated with any clarity.

47. The Court of Criminal Appeal delivered two judgments of significance on the 13th July 2005, 12 years after the enactment of s.6. In *People (DPP) v. McLaughlin*, already referred to above, the accused man had pleaded guilty to rape. The victim was left

severely traumatised and with a sexually transmitted disease. The accused offered the sum of €10,000 by way of compensation. In *People (DPP) v. McCabe*, a case of aggravated sexual assault, the accused offered €15,000. He was a farmer, and had sold his herd of cattle to raise this sum.

48. Both cases were dealt with in the Central Criminal Court by the late Carney J., who had very considerable experience both as a practitioner and as a judge in the criminal courts. In each case, Carney J. referred to his view that the jurisprudence leaned against combining imprisonment with the payment of money. Although he accepted that s. 6 of the Act of 1993 envisaged precisely such a combination, he considered that the section also permitted him to follow what he saw as a long-established practice. He required confirmation in each case before him that the injured party understood that he would not imprison the accused if the money was accepted. On receiving such confirmation, he imposed a suspended sentence. In *McCabe* he stated that in the absence of the offer he would have imposed a sentence of four or five years.

49. I think it appropriate to note here that at that time many practitioners and judges did consider that there was a practice as described by Carney J., although it has to be said that there does not appear to have been any written judgment from the appellate courts to this effect. In fact, in *People (DPP) v. C.* (unrep., Court of Criminal Appeal, 18th February 2002) the Court of Criminal Appeal stated that it did not accept that there was a universal practice that the imposition of a custodial sentence was excluded by payment and acceptance of compensation. That Court took the view that s. 6(1) of the Act of 1993 was a clarification of the existing law – the payment of compensation was just one of the factors to be taken into account by a sentencing court. It also stated that the attitude of the victim was not a relevant factor in this context.

50. In the subsequent leniency review applications in *McLaughlin* and *McCabe*, the Director argued that it was an error in principle, and contrary to public policy, to draw the victim into the sentencing process in the way that they had been in those cases. It was pointed out that an impecunious victim might feel constrained to accept a payment they might otherwise have refused, that pressure could be brought to bear upon them (perhaps by members of their own family) to accept the money, and that discrimination between rich and poor offenders would be highly objectionable.

51. In its judgments (both delivered by Kearns J.) the Court of Criminal Appeal noted the judgment in *C.* and agreed that there was no jurisprudence, principle or practice that rendered the payment of compensation to a rape victim inconsistent with the imposition of a custodial sentence. Implementation of such a proposed principle would contradict the express wording of s.6.

52. Kearns J. also stated that the Court was strongly of the view that victims should not be drawn into any form of proactive role in determining or negotiating the amount of any compensation that might be offered. The extent of a victim's involvement should be to indicate acceptance or refusal. Thereafter, it was entirely a matter for the court to determine the appropriate sentence.

53. However, in both of the cases before it the Court of Criminal Appeal accepted that the circumstances in which the offer and acceptance had in fact occurred had led the accused to believe that payment might result in a non-custodial sentence. In *McCabe* it stressed that the fact that the victim had freely accepted the compensation of her own volition was undoubtedly a factor which the Court could, and must, take into account in deciding what the appropriate sentence should be. It may well also have been

relevant that in each of the two cases, counsel for the Director had not objected in any way to the views expressed by Carney J.

54. *The People (DPP) v Lyons* [2014] IECCA 27 is unusual in that it appears to be one of a very small number of cases to come before an appellate court where the statutory compensation procedure was utilised in the trial court. This fact is discussed in the judgment (delivered by Murray J.) Referring to the section, the Court said:

> *"Leaving aside minor offences, such as those dealt with in the District Court, where different considerations may arise, it does not appear to be used extensively where persons are convicted on indictment. This may be because the vast majority of those who are charged with serious criminal offences are on legal aid and of little or no means, so an order under the section might serve no useful purpose. Whatever be the case, the Oireachtas clearly envisaged that a "compensation order", as they are described in the section, should be made in appropriate cases, having regard to a person's means, "instead of or in addition to" any other punishment. Clearly the Oireachtas intended that compensation orders should be available to compensate victims where that could be done to some degree in the light of the means of a convicted person. Whatever the intent of the Oireachtas, the trial judge retains his or her discretion as to the just and appropriate punishment to be imposed in a particular case. The application of the section should never mean that there is one law for the rich and another law for the poor, in the sense that a rich offender may buy himself or herself out of prison, or get some similar advantage. Of course, the risk of any such misconception arising could be completely avoided by never applying the law provided for in that section, and never providing for any compensation orders*

to victims, contrary to what the section envisages. Such a blanket policy would be incompatible with the duty of the court to give effect to a law passed by the Oireachtas. Nevertheless, any application of the [section] necessarily involves a sentencing judge in a careful and sensitive assessment of the facts in the particular case. It would be difficult to lay down any exhaustive rule as to how the section should be exercised, because the facts, both as regards the offence and the offender, will almost invariably be materially different in every case."

55. The offence before the Court on that occasion was one of sexual assault by a man with no previous convictions, who owned his own business and was described as being "a man of means". The sentence in the trial court was six years, of which five and a half were suspended, coupled with a compensation order in the sum of €75,000. It is clear that in making the compensation order the trial judge was motivated by a wish to do something for the benefit of the injured party in the case, and that it was in no sense to be seen as "buying off" any element of the custodial part of the sentence, but the judge did consider that it should be taken into account as a relevant mitigatory factor in coming to his decision on sentence.

56. Judgment was reserved in the Court of Criminal Appeal, and before it was delivered the Court was informed by the parties that the accused had also settled a civil action brought by the complainant, with a total payment of just under €200,000. Commenting on this, Murray J said:

"It is almost axiomatic that a person who, through criminal wrongdoing, inflicts injury or loss on another person, that he or she is separately and distinctly liable

to pay full compensation in civil proceedings. It represents a civil liability independent of the criminal liability of the convicted person."

57. The judgment goes on to note that if a civil action is dealt with after conviction and sentence, rather than before, the payment of damages could not affect the sentence already imposed. Thus, the Court did not consider that payment of the civil damages was automatically to be seen as even a marginal mitigation factor.

58. The Court found the sentence to have been unduly lenient. It therefore went on the re-sentence the accused. For this purpose, both parties agreed that the making of the compensation order could be relevant although only as a marginal factor. Counsel for the Director argued that, for the order to be given even that marginal status, the payment would have to involve special hardship for the accused (with reference to the fact that in *McCabe* the accused had sold all his cattle to raise the money). The Court agreed, considering that this approach would avoid any special treatment for an accused who happened to be particularly well off. Since there was no evidence to this effect in the case, the Court did not consider that the compensation order should affect the sentence.

59. In its concluding remarks on this aspect the Court said:

"*Finally, the Court would observe that compensation orders provided for in s.6 of the Act of 1993 apply where a person has been convicted of a criminal offence, whether for minor offences in the District Court, or for more serious offences on indictment. The application of s.6 for minor offences before the District Court gives rise, as pointed out earlier in this judgment, to different considerations. The Court here is referring to the application of s.6 to serious*

indictable offences. Section 6 provides for the making of compensation orders "instead of or in addition" to any other punishment. In appropriate circumstances, as for a minor offence before the District Court, a compensation order may well, as the Oireachtas envisaged, be something which could be made instead of some other order being made by that court. However, where serious indictable offences are concerned it would seem that, in principle, if a compensation order is being made it should be made only in addition to the appropriate sentence, including imprisonment, that meets the gravity of the case. Of course, the making of a compensation order may arise also in a case where a court, for reasons wholly independent of a compensation order, considers that a non-custodial sentence, such as a suspended sentence, should apply."

60. In the recent case of *People (DPP) v Doherty* [2022] IECA 201 the Court of Appeal has said that it considers it inappropriate to make the payment of compensation a term of a suspended sentence. There, the primary offence was a particularly brutal assault causing serious harm. The trial judge identified a headline sentence of eight years, reduced to six by mitigatory factors. The sentence imposed a sentence was six years, with three years suspended for ten years, on condition that the accused paid €5,000 per year to the victim for five years after his release from prison. The purpose of this aspect of the order was to encourage the rehabilitation of the accused and to make some provision for recompense to the victim.

61. In the course of its judgment on a leniency review the Court said:

"*While the objective of facilitating some restitution was an understandable one, it was not appropriate to promote it through the mechanism of a substantial part suspension of the sentence, in circumstances where doing so would result in a final custodial sentence to be served that was disproportionately low, especially when there is a separate statutory mechanism for the making of financial compensation orders contained in section 6 of the Criminal Procedure Act 1993* [sic]. *We suspect that the sentencing judge may have felt that the section 6 procedure to some extent lacks teeth, in that the section makes no provision for any further sanction or come back should there be wilful default or culpable neglect in complying with a compensation order, and he may have felt that this might be overcome by making the payment of compensation by instalments a condition of a suspended sentence, breach of which could lead to revocation of all or part of the suspension in the event of a re-entry pursuant to section 99 of the Criminal Justice Act 2006. If that was indeed his thinking, his concern was an understandable one, but it was not one that he could seek to allay at the cost of a sentence that was going to be disproportionately low in terms of the actual custodial period that the offender would be required to serve…*

…We should say that we think that it is inappropriate in any event to impose as a term of suspension of a sentence in whole or in part an obligation to pay sums of money. We reiterate an observation made at the sentencing hearing that in some circumstances the imposition of such a requirement might be optically uncomfortable. The practice is open to the objection, notwithstanding that the objective may be the worthy one of facilitating restitution, that the offender is being afforded the opportunity to buy his way out of all (or as in this case a

substantial part) of a custodial term that he would otherwise be required to serve, and which a person in the same position as him, but without means, would have to serve. We think that the more appropriate course where the judge wishes to make provision for compensation is to make a compensation order within the meaning of section 6 of the Criminal Procedure Act 1993 [sic]*, as amended without specific linkage to the period of custody that a person may have to serve. A realistic expression of willingness to co-operate in providing restitution proffered by the accused in evidence, or by his legal representative in presenting a plea in mitigation, can always be taken account of as evidence of true remorse in any discounting for general mitigation.*"

62. In re-sentencing the accused, the Court suspended only one year of the six, and made an order under s.6 of the Act of 1993 for the payment of the same instalments as envisaged by the trial judge.

63. In a consultation paper on the topic of compensating victims of crime (published in February 2022), the Law Reform Commission describes compensation orders made under s.6 of the Act of 1993 as a hybrid of criminal and civil law, with one question being whether they should be seen as obviating the necessity to take civil proceedings or as part of the punishment ordered by the court. It notes the doubts expressed by the Court of Criminal Appeal in *Lyons* and in *McLaughlin*, and points out that if an offer were to be made in civil proceedings the victim would obviously have a role in negotiating a settlement. However, the criminal courts have made it clear that such negotiation has no part in the sentence process. The Commission was not able to obtain detailed information about the use of s.6 orders, but it notes that academic commentary suggests that they are not frequently used. It considers, as did Murray J. in *Lyons*, that

one reason may be the likelihood that most persons appearing before the courts come from backgrounds of socio-economic disadvantage. Other reasons mooted include the necessity to pursue the offender if payment is not made, and the fact that an order might give the impression that an offender with means can "buy" themselves out of a longer sentence.

64. Looking at compensation in the context of the criminal sentencing process, the Commission refers to a number of studies that indicate that, although compensation from the offender is likely to be limited, victims prefer it to compensation from the State because it represents acknowledgment and recognition by the offender of the harm done. It describes the purpose of financial compensation as both symbolic (an acknowledgment of the harm caused to the individual and to society by crime) and practical (in that it is at least a partial attempt to restore the victim to the financial position they would have been in if the crime had never been committed).

The Criminal Injuries Compensation Scheme, the Compensation Directive, the Victims' Directive and the Criminal Justice (Victims of Crime) Act 2017

65. The Scheme of Compensation for Personal Injuries Criminally Inflicted, to give it its full title, has operated on a non-statutory basis since the mid-1970s. It has been significantly amended over that time, most recently in 2021. In some respects, it is more accessible to victims of crime than the possibility of compensation through either the criminal or civil court processes, in that the perpetrator need not have been identified or brought to justice and there is no need to go through court processes. However, it has definite limitations. Applications must be made within a time limit, whether or not

criminal proceedings have been instituted. (There is currently litigation in being concerning the effect of the limitation period and accordingly I will not comment on this aspect). Awards are generally limited to payment of losses and expenses incurred by the victim, with general damages payable only in respect of fatal injuries. If the victim receives any compensation from the perpetrator, that amount must be deducted from any award under the Scheme. Deductions may also be made on the basis of *inter alia* the applicant's conduct, character or way of life.

66. In its analysis of the Criminal Injuries Scheme, the Law Reform Commission refers to the potential impact of the Compensation Directive and the Victims' Directive. The effect of these measures, in very brief summary, is that European Union law requires the State to operate both a national state-funded compensation system and a process to receive a decision on compensation to be paid by an offender.

67. The Compensation Directive – Council Directive 2004/80/EC of 29 April 2004 – requires EU Member States to provide for a scheme of "fair and appropriate" compensation for "victims of violent intentional crimes" committed in their respective territories. The Court of Justice of the European Union has held (in Case C-129/19 *Presidenza del Consiglio dei Ministri v BV*) that this applies regardless of the nationality or place of residence of a victim, and that a State could be liable for failure to transpose the Directive. The Court also said that "fair and appropriate" compensation for victims of crime did not necessarily have to be the same amount that an offender might be ordered to pay in full reparation. It was, rather, a contribution to the reparation of material and non-material losses suffered. Further, States were entitled to ensure that their schemes were financially viable. However, compensation awards must have regard

to the seriousness of the consequences of the crime for the victim and could not be "purely symbolic or manifestly insufficient".

68. In *Doyle v. Criminal Injuries Compensation Tribunal* and *Kelly v. Criminal Injuries Compensation Tribunal* [2020] IECA 342 the Court of Appeal held that the judgment in *B.V.* had significant implications for the operation of the Criminal Injuries Scheme. This had hitherto been seen, in accordance with its own express terms, as providing for *ex gratia* compensation only. The issues before the Court concerning the operation of the Scheme therefore required to be assessed in the light of European Union law, including the Charter, and the closely-associated jurisprudence of the European Convention on Human Rights.

69. It is noteworthy that the 2021 iteration of the Scheme, introduced after these judgments, does not use the term "ex gratia".

70. The Victims' Directive – Directive 2012/29/EU – deals with the rights of victims in criminal proceedings and in particular the right to relevant information about, and to be heard in, the proceedings. Articles 9(1)(a) provide for a right to receive information about compensation. Article 12 deals with restorative justice and obliges States to ensure that a victim is not subjected to secondary and repeat victimisation, intimidation or retaliation within a restorative justice process. Restorative justice services are to be used only if they are in the interests of the victim and must be based on the victim's free and informed consent, which may be withdrawn at any time. Full and unbiased information must be provided about the process.

71. Article 16 provides that Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender

within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings. States shall promote measures to encourage offenders to provide adequate compensation to victims.

72. This Directive is implemented in this jurisdiction by the Criminal Justice (Victims of Crime) Act 2017. Amongst the matters concerning which a victim is to be given information are "any scheme relating to compensation for injuries suffered as a result of crime" and also the power of the court to make an order under s.6 of the Act of 1993.

73. Victims are also to be given information about restorative justice schemes, where available. Section 26 of the Act provides, in some detail, that the "free and informed consent" of the victim, given after receipt of "full and unbiased" information, is necessary to the process and that such consent can be withdrawn at any stage.

Conclusions

The attitude of the victim

74. Since this is a sentence appeal, it is essential to bear in mind that the primary function of the sentencing court, is, as already stated, to administer justice by imposing a sentence that appropriately reflects both the nature of the crime and the circumstances of the accused. The role played by the injured party features strongly in respect of the first of these two central matters, since the impact of the offence on the injured party is an intrinsic part of the gravity of the offence. On the other hand, in many (though by no means all) cases the injured party will not have insight into, or an informed view of, the offender's personal circumstances and accordingly will generally not be in a position to assist the court in this regard.

75. I have referred above to the principle that the views of a victim as to the sentence that should be imposed cannot sway the sentencing court, but that an *ad misericordiam* plea based on appropriate grounds may be taken into account. However, this factor does not in truth arise in the instant case. The injured party did not seek to put any view, of a kind that could be described as an *ad misericordiam* plea or otherwise, either before the trial court or the Court of Appeal. The evidence before the trial court was that he was not feeling personally vengeful and that he accepted that the sentence to be imposed was a matter for the court. It seems clear from his subsequent messages that he had not known anything particularly relevant about the appellant or his circumstances before hearing about them in court. What he was doing, in an extremely generous way, was expressing a hope that the appellant had learned his lesson, and extending his good wishes for the future. It seems clear that, arising from his own experiences, he saw the father-child relationship as very important. However, the messages were personal, and were sent after the hearing. Further, they were sent well before the Director's instruction to lodge a leniency review application could have been given. They could not, in those circumstances, be taken as having been intended to be put before a court. I would add that, even if they had been so intended, they were not based on any information or analysis that could have been capable of affecting the outcome.

76. It appears to me that the most that could be made of the situation presented to the Court of Appeal was that the victim had not been unhappy with a non-custodial sentence *per se*, but had been unhappy with a process that (as he seems to have perceived it) did not take sufficient account of his situation. He also felt that the sentencing court had too readily assumed that financial compensation would help him. These feelings are not mutually contradictory, but they do not amount to a plea to a court on behalf of the

appellant. In these circumstances, I do not consider that the Court of Appeal erred in declining to accept the content of the messages as a significant factor in the appeal.

Compensation

77. My purpose in giving consideration to the operation of s. 6 of the Act of 1993, as well as to the Criminal Injuries Compensation Scheme, the two Directives and the Act of 2017, none of which were in issue in this case, is to attempt to put the question of payment by an offender into the broader context of financial compensation for victims of crime. In this context, it will be seen that victims may, depending on the circumstances of a case, have a number of different options. Two of these are outside the criminal justice system. Two *arise* within the sentencing process but one of these, depending on the choices made, may or may not be seen as *part of* that process.

78. Independently of any prosecution or conviction, a victim can of course sue the perpetrator for damages if that person is identified and is thought to be a potential mark. An award by a court exercising civil jurisdiction will reflect the full liability of the wrongdoer for the injuries suffered. Alternatively, the victim can (provided the relevant criteria are met) seek an award under the Criminal Injuries Scheme. Either way, the point of the process will be to provide an appropriate level of compensation to the victim.

79. The payment of money by an offender to a victim within the sentencing process gives rise to different issues. It is apparent that the *voluntary* payment of compensation by offenders has long been a feature of the Irish sentencing process. Practical experience shows that such payments will rarely afford full compensation, particularly in cases of

serious injury, but they are nonetheless seen as relevant to the outcome of the process. The court will, firstly, consider the gravity of the harm done but that will not necessarily involve consideration of the value, in financial terms, of the injuries suffered. The relevance of the voluntary offer of compensation lies in its relevance to the assessment by the court of the personal circumstances of the offender. It represents a full acceptance by the offender, not only that he or she has committed a criminal offence, but that he or she is responsible for the harm done by that offence. It is usually beneficial to the injured party to know that responsibility is accepted and that some personal effort at reparation is being made. I would, further, accept that a voluntary offer should be seen as more significant if it is pitched at a level that will have a tangible effect on the lifestyle of the accused. That may be implicit even if, for example, the money has been raised by family and friends, since they may be in a position to exert pressure on the accused to change his ways. The offer can still be seen as evidence that the offender is remorseful and is willing to attempt to undo the harm to some extent. This is clearly relevant to the question of rehabilitation.

80. A voluntary offer is, therefore, a relevant mitigatory factor in all cases, to be considered as part of the relevant personal circumstances of the offender. However, it is essential to realise that acceptance of compensation does not preclude the imposition of a custodial sentence. Otherwise, there is a risk of undermining the constitutional principle of equality before the law by implying that a person with means can "buy" a lighter sentence. It must therefore be accepted that some cases are simply too serious, in that the gravity of the harm caused is so significant, that the acceptance of responsibility, remorse and rehabilitation cannot outweigh the need for a sentence of imprisonment.

81. The legislature has provided an additional mechanism for ordering payment, capable of use in the absence of the consent of the offender. That mechanism may result in order being made "instead of or in addition to" dealing with the accused in any other way. I think that it is important to be clear about the difference between a voluntary offer of compensation and an order under s.6 of the Criminal Justice Act 1993, and also the difference between an order made instead of another order, and one made in addition to another sentence.

82. The structure of the provision is such as to make it clear that the reparation envisaged is intended for the benefit of the injured party and must to at least some extent relate to the damage caused to that party. It does not depend on the attitude of the accused and can be made without his or her consent. However, its availability depends largely on the court's objective assessment of the accused's means.

83. The structure and wording of the Act do not make it entirely clear whether a compensation order should be seen as primarily punitive or compensatory. If an order is made, as the Act permits, "instead of" dealing with the convicted person in any other way, then in my view it can only be seen as the sentence of punishment for the offence. However, the making of an order "instead of" a different sentence may raise the possibility that a compensation order might have been made "instead of" the imposition of a custodial sentence. That would, again, raise a question as to whether the accused has "bought off" a prison sentence, and has therefore been treated more leniently than a person who does not have the means to pay compensation.

84. If the order is "in addition to" dealing with the offender in any other way, it appears that it should **not** to be seen as part of the punishment imposed by the court. Rather, it is in those circumstances simply a mechanism by which the sentencing court can to some

extent exercise a civil jurisdiction, to make an order purely for the benefit of the victim. The view of the Court of Criminal Appeal in *Lyons* would lead to the conclusion that the making of such an order is not, of itself, a mitigatory factor unless it causes unusual hardship and, even then, cannot be more than marginally relevant to the sentence imposed. I would agree with this view. If the offender has the means to pay the full value of the injury, then he or she is liable to do so in any event if ordered by a court exercising civil jurisdiction. Further, as Murray J. pointed out, the date on which an order for civil damages is made, or complied with, will not necessarily predate the sentence and cannot therefore be seen as having more than a marginal effect on the appropriateness of the sentence.

85. I accept the point made by Murray J. in *Lyons* to the effect that the courts have an obligation to consider the application of an available statutory mechanism established by the legislature. There is now the additional fact that information about the powers of the courts under s.6 must be provided to victims under the 2017 Act referred to above. However, it seems clear that without careful consideration, the making of a compensation order under s.6 of the Act of 1993 may give rise to unintended difficulties of both principle and practicality.

86. The section is problematic insofar as it implicitly blends the criminal jurisdiction of the sentencing court with the civil jurisdiction of a court considering a claim for damages. It brings the added dimension that a sentencing judge must consider, within the sentencing process, matters that are irrelevant to that process such as a calculation of what the outcome of a civil claim might be. The figure arrived at in the s.6 process will not necessarily be the same as, or even close to, that value although it obviously should not exceed it. Account must be taken of the means of the offender, which would be

irrelevant in a civil claim. Presumably, where a custodial sentence is being imposed, some regard will have to be had to the question whether those means will still be available while, or after, a sentence is served. A final figure must be determined, and appropriate instalments set out if the total is not to be paid as a lump sum. Separately, the court must determine the appropriate criminal sanction, without reference to the anticipated payments as a mitigatory factor.

87. Allowing for the inherent power of the court to make appropriate enquiries and receive necessary information, all of this must be decided without the benefit of the procedural machinery available in a civil claim, such as particulars and discovery, and with little or no oral evidence and cross-examination. A sentencing court can, in some circumstances, hold what is known as a *Newton* hearing where an accused person disputes the exact level of criminality attributed to him or her by the prosecution, but there seems little scope within the sentencing process for the type of dispute about financial loss that is characteristic of civil litigation. It goes without saying that it would be highly undesirable to delay finalisation of a criminal sentence to any appreciable extent for this purpose. It is also difficult to be sure what the role of the victim might be in the process.

88. In cases where a custodial sentence is warranted, there must I think be a significant risk that dealing with all of these aspects together may result in a blurring of the various decisions that fall to be made regarding the choice of an appropriate punishment and the fixing of figures for civil compensation. If that happens, it is possible that the court will not fully achieve the purposes of either the civil law (the provision of appropriate compensation, and therefore a conclusion to any dispute between the individuals concerned) or the purposes of the sentencing process (the imposition of a just sentence

that takes account of the nature of the crime and the personal circumstances of the offender).

89. I would take the view, therefore, that a s.6 order is best made in cases where both the quantum of damage and the means of the offender are reasonably ascertainable. The procedure is of obvious utility where the court can properly take the view that a non-custodial sentence is open. This might occur where, for example, the judge is in any event considering options such as community service, a suspended sentence or probation supervision. The important point, I think, is that the choice between custodial and non-custodial sentences should never depend on the payment of money by the accused. It seems to me that in more serious cases it will generally only be practicable if the offender's means are such that a s.6 order can be seen simply as a swifter method for ensuring that the victim receives at least some of the damages that they would in any event receive in a civil action. In those circumstances, the order can be seen as separate from the sentencing outcome, relevant only where some exceptional level of hardship is identified.

90. In my view, it follows from the foregoing that, if an accused person makes an offer of compensation and the sentencing court finds that there are realistic grounds for thinking that the offer does indeed reflect acceptance of responsibility, remorse and a prospect for rehabilitation, such a voluntary offer should not be converted into a s.6 order. To do so would mean depriving the accused of the mitigatory element. Further, if a suspended or part-suspended sentence is in any event appropriate in the circumstances of a particular case, I do not see a difficulty in making the suspended element conditional on payment of the sum offered.

91. The appellant is, therefore, entitled to a level of credit for the offer and actual payments made in this case. However, while this is not a matter that can easily be dealt with in terms of hard and fast rules, in my view the Court of Appeal was correct to see the case as coming within the category of cases that require a custodial sanction. The serious and lasting impact on the victim, coupled with the fact that the harm was inflicted in completely inexcusable circumstances, was such that some term of imprisonment was inevitable in the absence of exceptional circumstances affecting the appellant. To be clear, I would take that view even if the plea to a s.3 assault had been accepted.

92. The appellant's personal circumstances did, indeed, indicate remorse and a good prospect for rehabilitation but I cannot see the necessary exceptionality. Further, while he cannot be blamed or penalised for not making admissions, or not entering an earlier plea, or for taking legal advice as to the prospects of a preliminary application to dismiss the charge or fight a trial, nonetheless his credit is inevitably diminished by the delay. It must be borne in mind that during this time an innocent person was going through a horrendous experience as a result of his injuries and was, in fact, in great financial need. An early acceptance of responsibility and offer of compensation would necessarily have carried more weight at that stage.

Summary of Principles

93. The purpose of receiving evidence or submissions under s.5 of the Criminal Justice Act 1993, as amended, is so that the sentencing court can be fully informed about the harm caused by an offence involving violence. The views of an injured party cannot, in

general, influence the sentencing court in determining the appropriate sentence for the offence committed by the accused. However, an injured party may put forward an *ad misericordiam* plea for leniency, and if it is based on a reason specific to the accused the court is entitled to take it into account.

94. A voluntary offer of financial compensation is in all cases to be considered as a factor in mitigation, if the court finds that it is a genuine expression of remorse and acceptance of responsibility for the harm done. The weight to be attached to it will vary according to the court's view of the genuineness of the offer and the degree of hardship it is likely to cause the accused, as well as all the other circumstances of the case.

95. The offer and acceptance of compensation does not mean that a custodial sentence will not be imposed. While it is a mitigatory factor, the court should never countenance the possibility that money can purchase leniency. The task is to impose a sentence that, having regard to everything put before the court, is appropriate to the crime and to the personal circumstances of the offender.

96. Accordingly, the court should never put pressure on the victim to accept the money. Nor should it put pressure on the accused to increase the offer, since an increase will not necessarily mean a greater level of remorse on his part and may simply have the effect of driving his family to seek money from dubious or extortionately expensive sources.

97. The mechanism provided under s. 6 of the Criminal Justice Act 1993 may most appropriately be used in minor cases where the judge is, in any event, considering a

non-custodial option and the damage done is relatively easy to quantify. In more serious cases, it may be deployed where it is clear that the injured party would be entitled to seek an award of damages in civil proceedings, the accused person has means and an order can be made without unduly prolonging the sentencing process. An order made in these circumstances should not affect the court's determination of the appropriate sentence.

98. In the circumstances I would dismiss the appeal.