

Subjective Features

Two men may be charged with an identical offence such as drink driving. One of these men will be imprisoned while the other will be released without even a conviction – even if they go before the same magistrate. This causes confusion in the community and leads some to think that sentencing is capricious and arbitrary or simply random. It is not.

The reason for the disparity is that judicial officers give far more weight to the subjective features of the offender than to the objective facts of the offence. So, every lawyer needs to know what features are relevant in order to competently represent their clients in criminal court. This paper aims to assist legal practitioners in New South Wales.

Maximum Sentences

Criminal legislation creates offences and provides maximum sentences for them. However, it does not provide minimum sentences. This means that judicial officers have broad discretion to sentence an offender to anything between nothing and the stated maximum. Where an offender lands on this spectrum depends on his or her subjective features.

Very few people ever receive the stated maximum sentence. This is because it is only appropriate to the worst offender. This is a person who has a record of similar offences, has shown no remorse and has no prospects of rehabilitation. Fortunately, such people are few and far between.

Drink Drive Example

In the case of our drink drive example, the first man was imprisoned because he was this hypothetical worst case. He had multiple previous convictions for the same offence, showed no remorse and refused to undertake counselling and treatment for alcohol abuse. In fact, he came to court and said, 'I did it. I'm glad I did it and I'll do it again first chance I get.' Therefore, imprisonment was necessary to meet the purposes of sentencing.¹

The other man is 50 years old. He has been driving for 30 years without offending. He suffered an extraordinary adverse event such as witnessing the violent death of a workmate in an industrial accident. He had a few drinks to calm his nerves and then made the mistake of driving his car.

He wasn't thinking straight at the time and the offence is totally out of character. He has shown remorse, pleaded guilty, apologized to the court and is engaged in treatment. He hasn't had a drink since the offence and is unlikely to reoffend. Here, there is no need for further punishment, deterrence or rehabilitation. A dismissal without conviction is appropriate.

So, although they both blew the same reading on the breathalyzer, we see that they fall at opposite ends of the spectrum when it comes to sentencing.

¹ s3A Crimes (Sentencing Procedure) Act 1999

What Features Are Relevant?

The purposes for which a court may impose a sentence on an offender are found in section 3A Crimes (Sentencing Procedure) Act 1999:

- (a) to ensure that the offender is adequately punished for the offence,*
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,*
- (c) to protect the community from the offender,*
- (d) to promote the rehabilitation of the offender,*
- (e) to make the offender accountable for his or her actions,*
- (f) to denounce the conduct of the offender,*
- (g) to recognise the harm done to the victim of the crime and the community.*

Counsel should take detailed instructions regarding each item on this list.

- Has the client suffered extra-curial punishment? (This can be the humiliation of being arrested and spending time in custody).
- Why is he unlikely to reoffend?
- Why is he not a danger to the community?
- What has he done to rehabilitate himself?
- How has he been held accountable? (This could be punishment from his school or his parents or just the disapprobation of his peers).
- What has he done to compensate the victim and the community?

These subjective features can allow an offender to avoid imprisonment, reduce the hours of Community Service, reduce the amount of a fine or the length of a bond or even to avoid a conviction altogether. But you have to find out about them and then inform the court. If you don't tell the court, the court doesn't know, and you have not provided the best possible representation to your client.

I am available every day should you require further assistance.

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