**Bereavement as a Mitigating Factor**

Martin Wasik

*Emeritus Professor of Law, Keele University*

*Introduction*

In its recent revised guideline on *Sentencing Children and Young People*[[1]](#footnote-1)the Sentencing Council has included ‘experiences of trauma or loss’ as a specific factor of personal mitigation in relation to offenders aged under 18 who have been convicted of a sexual offence, or robbery. This particular consideration had not previously been referred to in any sentencing guideline in England and Wales. Further, ‘the death of a close relative’ is identified as a possible ‘trigger event’ which ‘may have played a part in leading a child or young person to commit a sexual offence’. In making these additions to the earlier guideline on *Sentencing Youths* the Council was clearly influenced by submissions made to it by consultees including the Howard League for Penal Reform and NACRO, who had urged that a number of factors, commonly encountered in the background and upbringing of young offenders, including ‘physical illness, experience of bereavement, experience of discrimination and experience of self-harm’ should be more clearly spelled out as mitigating factors in the guidelines for children and young people.[[2]](#footnote-2)

The purpose of this article is to open the topic of bereavement as mitigation for further discussion. Studies on individual mitigating factors are relatively rare,[[3]](#footnote-3) and the relevance of bereavement to sentencing outcome appears thus far to have been largely overlooked as an object of inquiry. Apart from the new guideline, the author’s interest in this topic has two sources. The first is from hearing mitigation based upon bereavement put forward in Crown Court sentencing hearings where he has sat as a Recorder. The second is from involvement in a wider multidisciplinary research study, based at Keele, into the relevance of bereavement to criminal justice issues more generally.[[4]](#footnote-4) The article examines the limited research evidence and appellate case-law to see to what extent a defendant’s bereavement and associated grief may amount to mitigation for sentencing purposes. We consider adult defendants as well as children and young people, and assess what rationale there can be for the inclusion of bereavement as a mitigating factor in sentencing.

*Identifying the Mitigation*

As is now well known, modern sentencing guidelines require the judge or magistrates at step 1 to determine dimensions of culpability and harm in relation to the offence, and then to place that within a particular category range and starting point in the guideline. At step 2 the court may then decide to move up or down the scale to reflect the presence of one or more aggravating or mitigating factors, non-exclusive lists of which are set out in each offence guideline. Further adjustments can then be made if appropriate to reflect a plea of guilty, totality of sentence, and other matters. As far as mitigation is concerned, traditionally a distinction has been drawn between mitigating factors which impinge on the seriousness of the offence (gauged by reference to harm and culpability), and mitigating factors which relate more loosely to the defendant’s particular circumstances. This article adopts that traditional distinction. It will be shown that, in most cases where bereavement is advanced as mitigation it is the effect of that bereavement upon the culpability of the defendant which is in issue. In other cases, however, the bereavement is adduced as a factor of personal mitigation, designed to engage the sympathy and understanding of the court. This distinction is discussed in more detail below.

The range of material which can be adduced as mitigation is very wide, with judges or magistrates able to take account of ‘any such matter’ which appears to the court to be ‘relevant’ in mitigation of sentence[[5]](#footnote-5). In some cases mitigation has the effect of reducing the severity of the sentence (such as by reducing the custodial sentence length) but in other cases the offence itself may deserve custody but when mitigation is taken into account the appropriate disposal changes to a suspended sentence or a community order.[[6]](#footnote-6) Often, an important consideration in the latter case is the desirability of addressing the underlying cause(s) of the offending in a non-custodial setting.[[7]](#footnote-7) While it is not possible to provide a comprehensive list of factors which might qualify as mitigation, the standard sentencing works indicate those matters which seem to come up most often[[8]](#footnote-8). These include the defendant’s previous good character, old age, serious illness, remorse, meritorious conduct unconnected with the offending, a determination to tackle addiction or other issues which underlie the offending, collateral damaging effects on the defendant’s family, and so on. It seems that none of the texts mention the relevance of bereavement as a mitigating factor. This suggests that either it does not come up very often or that (at least taken on its own) it has little mitigating power.

The leading empirical study on mitigation is by Jacobson and Hough[[9]](#footnote-9). They examined 132 cases, and found that in over 40 of those cases the defendant avoided an immediate custodial sentence because of mitigating factors. The researchers helpfully grouped those factors into the following six categories, and indicated the total number of cases in which each category of mitigation was raised. These were as follows:

 (1) factors relating to the criminal act, such as playing a minor role in the offence (mentioned in 31 cases);

 (2) factors relating to the immediate circumstances of the offence, such as provocation or pressure from others (4 cases);

 (3) the defendant’s circumstances at the time of the offence, such as youth /immaturity, psychiatric problems or severe stress (41 cases);

 (4) the defendant’s response to the offence and prosecution, such as remorse, co-operation with the authorities (40 cases);

 (5) factors relating to the defendant’s past, such as good character, disadvantaged / disrupted background, or traumatic life events (40 cases); and

 (6) the defendant’s present and future situation, such as family responsibilities, willingness to address underlying problems (53 cases).

While the report therefore considers a wide range of potential mitigating factors, there is no specific mention of bereavement. In a separate part of the same study, forty Crown Court judges were asked about the types of personal mitigation which they thought were important but, again, there was no mention of bereavement. It will be shown below that mitigation based upon the bereavement of the defendant may in fact figure in category 2 (immediate circumstances of the offence), or 3 (psychiatric problems / severe stress), or 5 (traumatic life events) and a final factor not mentioned by Jacobson and Hough, which is the use of mercy to temper the normal requirements of justice.

Defence mitigation traditionally draws upon the pre-sentence report, prepared for the court by a probation officer (or, in the case of an offender under eighteen, by a social worker). When compiling a PSR the officer must follow national standards setting out what the report should contain, and how it should be structured[[10]](#footnote-10). As well as examining the immediate circumstances of the offence and the risk of re-offending, the officer is required to explore the defendant’s background, significant life events, circumstances which led up the commission of the offence, and the offender’s attitude to the offence (remorse, victim empathy, and so on). Given these national standards, and the background and training of report writers, it is likely that matters such as the death of a parent, sibling or child of the defendant will be mentioned in the report assuming, of course, that the defendant is forthcoming about it in interview. As Denney[[11]](#footnote-11) explains, the PSR writer has a critical role in placing the offence in context for the court, and this might include matters of ‘depression, sickness, bereavement’, or characterising the offence as a temporary aberration. The range of case examples referred to below clearly show that where information about the defendant’s grief following bereavement is made known to the sentencing court, it will normally have originated from the PSR.

*Advancing the Mitigation*

Defence lawyers, in their plea in mitigation, often refer the court to a particular part, or parts of the PSR. Reflecting on their empirical research, Jacobson and Hough[[12]](#footnote-12) note that

‘… many of the pleas in mitigation that we heard in court made much of the misfortunes experienced by defendants, particularly as children: numerous unhappy stories were told of child neglect and abuse, family breakdown and bereavement.’

A few examples of personal mitigation based to a greater or lesser extent upon bereavement can be found in local press reports of sentencing. In one recent example the *Hertfordshire Advertiser*[[13]](#footnote-13) reported the case of a nineteen year-old defendant employed as a cleaner who was given a suspended sentence for stealing property from her clients. The personal mitigation was her previous good character, together with the ‘turmoil and depression’ which the defendant suffered following her father’s death when she was aged seventeen. It is not clear from the report whether the defendant’s personal loss was a significant factor in suspending the sentence, but the judge did comment on the need for the defendant to seek ‘bereavement support’. By contrast, in another case a 25 year-old defendant admitted taking and driving away a taxi, and then setting fire to it. He was sentenced to five years’ imprisonment. Commenting on the information that the defendant had recently suffered a bereavement (his grandmother) which was said to have had a ‘massive effect’ on him, the judge observed that this could not have any bearing on the sentence – ‘it’s an explanation, but not mitigation’: *Northampton Chronicle*.[[14]](#footnote-14)

Despite the meagre coverage of the topic in the texts and research studies, a search of appellate sentencing decisions produces a large number of examples of bereavement being advanced as mitigation. A range of these cases is set out below. None of them contains a detailed or principled exposition of the relevance of bereavement to sentencing, but it is possible to see something of a pattern. For convenience, the cases are separated out by reference to Jacobson and Hough’s categories 2, 3, and 5 plus the further suggested category of mercy, though these should not be regarded as watertight compartments.

*Mitigation relating to the immediate circumstances of the offence*

This category of mitigation is based upon reduced culpability. The proposition is that the circumstances of the bereavement, and its acute effect upon the defendant, render the defendant less blameworthy for committing the offence. Take first the partial defences to murder, where the defendant is taunted about the death of someone close to him, and that taunting triggers a loss of temper. In the murder case of *Howson*[[15]](#footnote-15) the defendant ran the partial defence of loss of control. A psychiatric report prepared for the defence spoke of the defendant going through the bereavement process in relation to his mother. Howson blamed his victim Atkinson for Howson’s mother’s death, since she had overdosed on Atkinson’s insulin and Atkinson had been slow to call for assistance. When Howson killed Atkinson the defendant had taken drink and drugs at the time, such that he found it difficult to cope when Atkinson started making remarks about the defendant’s mother. The jury convicted Howson and a co-defendant of the murder of Atkinson and his flat-mate Gilmour, both of whom were beaten to death. The issue of the defendant’s loss of control could not be resolved at the first trial, but at a second trial the jury convicted him of murder.[[16]](#footnote-16) The mitigation (although ultimately unsuccessful) was here based upon the defendant’s fragile mental state following bereavement, and hence his greater susceptibility to loss of temper. Cases of non-fatal violence linked to provocation and stress following bereavement can also be found. One example is *Henry*[[17]](#footnote-17), where the 18 year-old defendant who had previous convictions for robbery, assaulted and robbed the complainant. It was accepted that the defendant believed the complainant was responsible for the death of the defendant’s younger brother three days earlier. On appeal, a sentence of detention for public protection was reduced to a determinate sentence of three years, Leveson LJ saying that:

‘The appellant must have been labouring under a great sense of grief, distress and upset as a result of the premature death of his young brother, and in such circumstances may well not have been thinking as clearly or as logically, or maintaining his self-control in the way that he might otherwise have been able to do.’

Another is *Malcolm*[[18]](#footnote-18), where the defendant and the complainant were both heavily intoxicated, and ‘conversation turned to the defendant’s recent bereavement in respect of his baby daughter’. The defendant became agitated and repeatedly punched the complainant in the face.

A different example is where an extreme bereavement reaction might form the basis for diminished responsibility in murder, or reduced culpability in other kinds of crime. In the well-known case of *Dietschmann* [[19]](#footnote-19) the defendant was diagnosed by two psychiatrists as suffering from a mental abnormality, variously described as a ‘depressed grief reaction’, a ‘delayed grief reaction’ and an ‘adjustment disorder’ relating to the death of his aunt (who had also been his partner), the death having occurred while the defendant was in prison. The defendant believed that his aunt had committed suicide, and that he was somehow to blame for her death, but a post mortem later established that her death had been from natural causes. Shortly following his release from custody the defendant, while heavily intoxicated, killed the victim, who had unintentionally damaged a watch belonging to the defendant, and which had been a present from the deceased. The defendant launched a frenzied attack on the victim, while asserting that the victim had ‘pissed on the grave’ of the deceased woman. The partial defence of diminished responsibility was rejected by the jury, but the conviction of murder was quashed by the House of Lords on the basis of misdirection. A retrial was ordered, and this time provocation as well as diminished responsibility was in issue, but the defendant was again convicted of murder.[[20]](#footnote-20)

A common feature in these cases is the relationship between the circumstances of the bereavement and the defendant’s self-induced intoxication. The law is clear that in relation to both loss of control and diminished responsibility defences it is essential for the jury to put to one side the effect of the self-induced intoxication before deciding whether the underlying condition provides an explanation for the killing. It has often been observed that while this principle is clear, its application to the particular facts may be acutely difficult. In the cases considered so far it seems likely that the defendants had resorted to substance abuse in an attempt to dull the pain of the bereavement, which makes the disentangling of the two threads even more difficult. The ‘depressed grief reaction’ referred to in *Dietschmann*, is not a mental disorder within the Mental Health Act, but is a well-recognised form of depressive illness, triggered by bereavement. It is sometimes referred to as ‘pathological bereavement’ or ‘complicated grief’. The typical sequence of a bereavement reaction[[21]](#footnote-21) is considered to be (i) initial shock, (ii) denial, (iii) depression, (iv) guilt, anger or blame and finally (v) acceptance. The bereaved person may move through these stages in a different order or more than once. The phases may take days, weeks or several months each. Some people's grief can appear to be more traumatic than others, and may become entrenched and difficult to resolve without help. Matters can be made worse if the person is socially isolated, lacks a family or other support structure, or has a chaotic lifestyle. The research literature shows that typical warning signs for abnormal grieving include self-neglect, prolonged functional impairment, misuse of drugs or alcohol and antisocial behaviour.

In the next group of appellate cases the court considered argument that bereavement was a significant reason for the defendant (re-)lapsing into drug or alcohol misuse, and then into (re-) offending. In *McDonough[[22]](#footnote-22)* the defendant started a fire in the block of flats where he was living, apparently as a protest against the anti-social behaviour of another resident. The PSR explained that the defendant had been law-abiding and hard working until two years before the offence, when his then partner and unborn child both died during childbirth. The defendant had since struggled to cope, became extremely depressed, lost his job, and had taken to alcohol as a coping mechanism. He had only two minor previous convictions, and was extremely remorseful. The sentence was five years. The Court of Appeal, perhaps surprisingly in the context of an offence of arson, said that the judge had been correct not to call for a psychiatric report, but in all the circumstances the sentence was reduced from five years to three years.

The next case is *Webster*[[23]](#footnote-23), where the offender was a man of 48 with an ‘appalling record’ for burglary. He pleaded guilty to two house burglaries, and asked for fifteen more to be ‘taken into consideration’. In this case the defendant had been sentenced without the benefit of a PSR, but the Court of Appeal itself obtained reports before dealing with the appeal. The Court noted that the appellant had lost his partner ‘in particularly distressing circumstances’, and the bereavement had ‘sent him off the rails back into the cycle of drugs and criminality’. Prior to the bereavement there had been a gap in his otherwise prolific offending and he had been complying with the terms of his licence. Goss J in the Court of Appeal agreed with the observation of the sentencing judge, that:

 ‘No judge could fail to understand and sympathise with his loss, but when he burgled people’s houses he made innocent victims suffer.’

The Court added that, although not an excuse for the offending, proper consideration had to be given to the circumstances that caused the defendant ‘to revert to burglary to fund his rekindled drug habit, when he had been making progress.’ For this and other reasons,[[24]](#footnote-24) there was a modest reduction in the sentence, from six years to five years. In *Ward*[[25]](#footnote-25) the defendant admitted theft from a shop, committed in breach of a suspended sentence imposed for supplying heroin. The defendant was aged sixty and had been convicted on 42 previous occasions for 154 offences, but there had been a gap of no less than sixteen years in his offending prior to the drugs offence. A sentence of six months was imposed for the theft, together with activation of the suspended sentence. The PSR explained that Ward had become depressed following the death of his partner, and had no money to pay for food, but the report writer conceded that Ward’s relapse into heroin use was the immediate cause of his offending. The Court of Appeal in reviewing the case investigated the mitigation no further, but reduced the sentence for the theft to two months, making fourteen months in all. Finally, in *Freer[[26]](#footnote-26)*, an Attorney General’s Reference case, the defendant admitted cultivation of cannabis at his home and was sentenced to eighteen months’ imprisonment suspended for two years. The mitigation was his guilty plea, the fact that he had only one previous conviction for a minor offence, and

‘… had suffered a double bereavement in the death of his mother and his grandmother within a relatively short space of time, and had experienced particular difficulties in coming to terms with the death of his mother. When a friend was bereaved, he had taken the time to use his own experiences to help them through the grieving process.’

The Court of Appeal declined to increase the sentence.

It is unclear in these cases how much difference to the outcome the mitigation made, but in each of them it was accepted that the bereavement was a relevant causal precursor to the offending, or that the defendant’s efforts at desistance from crime had been undermined by a severe personal blow.

It is helpful to recall Hart’s observation, that there can be good reason for administering a less severe penalty if the ‘situation or mental state’ of the offender is such that ‘his ability to control his actions [has] been impaired or weakened otherwise than by his own action, so that conformity to the law which he has broken was of special difficulty for him’[[27]](#footnote-27) The leading study on bereavement in adults notes that while most people come through the experience of bereavement well, with the support of family and friends, depression, stress and anxiety are common consequences of loss, and that in a minority of cases individuals can become withdrawn, irritable, bitter, lack judgment, and be quick to lose their temper.[[28]](#footnote-28) It is submitted that such a state of mind on the part of a bereaved defendant may properly form the basis for a claim of reduced culpability. The cases suggest that a court might be receptive to that argument, but there are countervailing considerations. The first is the seriousness of the offence. It is a well-recognised principle of sentencing that personal mitigation carries less weight in more serious cases. The worse the offence, the less scope there can be for mitigation to make any real difference to outcome. The above cases were heard on appeal from the Crown Court, and are thus at the more serious end of the spectrum. In principle there should be greater scope for such mitigation in the magistrates’ courts, although empirical research would be required to see if that was true. Second, apart from the seriousness of the offence, there is ambivalence over culpability. The court may take the view that the mitigating effect of the bereavement is cancelled out by the defendant’s voluntary intoxication through drink or drugs (which is a standard aggravating factor in Sentencing Council offence guidelines). It will be said that where the defendant has lapsed into drug or alcohol abuse this was the defendant’s fault, and (as it was put by the PSR writer in *Ward*), the most immediate cause of the offence. On the other hand, as mentioned above, there is an acknowledged association between abnormal bereavement reaction and misuse of alcohol or drugs, so it may be that if the court had sight of an expert report it might have made a different assessment.

The cases considered so far have all involved adult offenders. For a young person bereavement is likely to be all the more unexpected and shocking, especially if the death is of a parent or sibling, or the circumstances were particularly traumatic.[[29]](#footnote-29) The available research shows that young people in custody report a significantly higher rate of bereavement than those of a similar age in the general population. A recent report of the *Beyond Youth Custody*[[30]](#footnote-30)project states that there is now a substantial body of research evidence to suggest that young offenders have a disproportionate amount of childhood and adolescent trauma in their backgrounds, and they are more likely than non-offenders to have suffered adverse impacts from traumatic experiences in childhood and adolescence. The research demonstrates a concomitance of factors but for the most part does not suggest a causal connection between bereavement and offending in young people. There is, however, some self-report evidence from young people in custody that bereavement was a precipitating factor in their offending[[31]](#footnote-31), and *Beyond Youth Custody* suggests that the impact of trauma may be linked to offending behaviour. In its guideline on *Sentencing Children and Young People* the Sentencing Council suggests a causal link between bereavement and offending, although the link is narrowly drawn. The guideline states that the death of a close relative (or a family breakdown) might have been a ‘triggering event’ for a child or young person to commit a *sexual* offence. This proposition did not appear in the earlier SGC guideline on sexual offences committed by offenders under 18[[32]](#footnote-32), nor was it in the guideline on *Sentencing Youths.* Significantly, such a link is not mentioned in the robbery guideline for young offenders. The newguideline, and the consultation paper which preceded it[[33]](#footnote-33), are silent as to the research base for the proposition of a causal connection between bereavement and sexual offending, rather than bereavement and offending more generally.

*Mitigation based upon psychiatric problems or severe stress*

A more detailed discussion of the debilitating effect of grief following bereavement can be found in *McCann*[[34]](#footnote-34), where the defendant had been convicted of money laundering and was sentenced to two and a half years’ imprisonment. In this case the defence had been so concerned about the appellant’s mental state that they ordered the preparation of a psychiatric report. The Court of Appeal observed:

‘The sadness in McCann’s life was the fact that his son Paul committed suicide in September 2005. This would be a tragedy for any parent and, as Dr Wilson’s psychiatric report makes clear, the effect on the appellant was very severe – an abnormal bereavement reaction leading to a moderate depressive episode …The tragic history of his son’s suicide and its consequences for him were mitigation, but we cannot accept that they were such powerful mitigation as to make the sentence excessive.’

The defence had argued that the defendant’s depressive illness had induced in him a state of hopelessness and despair, and had thereby impaired his judgement in taking part in the dishonest scheme. Bean J in the Court of Appeal agreed with the judge’s approach, however. The offences had involved a large amount of money, were persisted in over a number of years, and the defendant ‘clearly knew very well what he was doing’. The sentence was upheld with the final observation that, without the mitigation, the sentence would have been longer.

In *Templeman*[[35]](#footnote-35)the 30 year-old defendant admitted serious assaults occasioning actual bodily harm on two nurses in a hospital where the defendant was detained under the Mental Health Act. He had no previous convictions for violence. A psychiatric report explained that following close family member bereavements, the defendant had turned to alcohol and drugs, and had become alcohol-dependent. He was acutely psychotic at the time of the assaults. An extended sentence, with a custodial term of four years, and an extended licence period of one year, was reduced to a determinate sentence of 40 months, but for reasons unrelated to the mitigation.[[36]](#footnote-36) In *Allan*[[37]](#footnote-37) the defendant, a man in his mid-40s with no previous convictions, sent sexually suggestive text messages to the teenage daughter of a friend. He pleaded guilty to harassment. Two years before the offence the defendant had been diagnosed with cancer, and one year before his brother had been killed by a landmine while serving in the Army. At the time of the offence the defendant was severely depressed and had attempted suicide. The judge had the benefit of a PSR and a psychiatric report, and she concluded that the offence was ‘explained, though not justified, by the problems in the defendant’s life’ including the traumatic bereavement, and she imposed a community order for six months, ‘in the interests of both the appellant and the wider public to assist him in resolving his problems’.[[38]](#footnote-38)

In *Donaghy*[[39]](#footnote-39) the 20 year-old lightly convicted defendant had obstructed the railway by climbing on a bridge over the tracks, and threatening to jump. Again, the judge had the benefit of both pre-sentence and psychiatric reports. The defendant had been referred to a psychologist at an early age with learning difficulties, and by his mid-teens was in a cycle of drug and alcohol abuse. A year before the instant offence he had witnessed a friend being shot and killed, and the defendant’s grandfather had died three days before the offence, such that the defendant was ‘in an acutely depressive state of grief reaction’. He had just separated from his girlfriend, who had disclosed that she was pregnant by another man. The Court of Appeal quashed the sentence of 12 months’ detention and substituted a community order, with requirements directed to education and training and to co-operate with counselling. Finally, in *Brooks*[[40]](#footnote-40) the PSR and a report from a psychologist sought to explain why the defendant, a doctor of otherwise exemplary character, had committed four sexual offences on young girls. The ‘clear picture’ emerging from the reports was that the defendant had suffered a number of bereavements in recent years, as well as other adverse events. He ‘had been particularly affected by the deaths of persons close to him and by the terminal illness of his stepfather’. In addition, he was under great pressure of work, working very long hours, ‘and had simply tried to bottle up all these various emotional stresses, hoping they would go away rather than seeking any professional help for them’. As a result of the offences the defendant ‘had very sadly thrown away his medical career’. The sentence of 28 months was reduced to 22 months.

The cases considered in this section rely upon the bereavement and its effect upon the defendant, as explanation (in part) for the offending, and as reducing the culpability of the offender. It is an obvious point that almost all adults will have experienced bereavement at some point in their lives, but very few will have resorted to criminality as part of the coping process. In the absence of a psychiatric or psychological report it is likely that sentencers will assess mitigation based upon bereavement on the same basis as any other mitigation – in a sympathetic common-sense manner, filtered through their own knowledge and experience. It is natural that at the sentencing stage of a criminal trial report writers, defence counsel, judges and magistrates will look for explanation for aberrant behaviour, such as where the offending is extreme or bizarre in character, or the defendant has offended for the first time, or has lapsed back into offending after a significant conviction-free period. The cases show that a court can be receptive to argument, in an expert report, that the defendant’s bereavement has triggered a severe depressive reaction which (in whole or in part) has led to the offending.

*Mitigation based upon disadvantaged background / traumatic life events*

Some mitigating factors do not impinge upon harm or culpability. These include the defendant’s previous good character, remorse, the performance of unrelated good deeds by the defendant, and the adverse impact of the deserved sentence upon innocent third parties. To these one might add the various ‘misfortunes’ and ‘unhappy stories’ that Jacobson and Hough observed defence counsel relying upon in their speeches. In a telling observation, the same authors[[41]](#footnote-41) comment that, in the cases which they saw, defence counsel made much of the misfortunes experienced by defendants, including bereavement, but ‘… whether these accounts were claims of reduced culpability or simply attempts to engage the sympathy of the judge, was rarely made clear’. The issue is a difficult one. Von Hirsch and Ashworth are sceptical about a general reduction in sentence for adult offenders who have experienced social deprivation[[42]](#footnote-42), taking the view that such disadvantage does not impinge upon culpability, but the authors mainly address social and economic disadvantage, rather than the specific traumatic life events with which this article is concerned. The same writers do accept that in some cases there may be ‘special grounds for sympathy’, but that sentencing reductions on that basis should be regulated by sentencing standards, rather than simply left to the discretion of the individual judge.

The main thrust of bereavement as mitigation in the Sentencing Council’s guideline on *Children and Young People* is to do with disadvantaged background / traumatic life events as meriting a reduced sentence. The prevalence of such matters in relation to young offenders is well established in the research. In what is still the leading study of the population of young offenders inducted into custody, published by the Prison Reform Trust in 2010[[43]](#footnote-43), 12 per cent of the young offenders had experienced the loss of a parent or a sibling. That figure may seem high, but it should be placed in the context that, of the same population, 20 per cent had self-harmed, 27 per cent had been in care, 39 per cent were on the child protection register, 54 per cent were school truants, and 76 per cent had absent fathers. This survey presents a picture of young people suffering from multiple disadvantages, of which the experience of bereavement or loss is likely to be just one aspect. In recent years there has been a very marked decline in the number of young offenders coming before the courts, so that youth courts sit far less frequently than they did, but the corollary of that is the increased number of young offenders who have suffered multiple disadvantages and now have complex and challenging needs.[[44]](#footnote-44) All these matters are reflected in Taylor’s recent review of the youth justice system.[[45]](#footnote-45) This research is reflected in protocols on report writing, in relevant training packages, and in texts for social workers. The Kent Youth Offending Service, for example, refers to the need for PSR writers to address issues of ‘mental and emotional health, including separation, loss, bereavement and rejection’[[46]](#footnote-46). In their text for social workers working in the field of youth justice Fox and Arnull[[47]](#footnote-47) state that many young people encountered in the youth justice system ‘have experienced a disruptive childhood, negative experiences, bereavement and loss or may at that time be struggling with transition from childhood to adulthood with little guidance, stability or few positive role models’. In her research Sharpe found that bereavement and loss was a ‘recurrent theme’ in the narratives of girls and young women entering the youth justice system[[48]](#footnote-48).

There is widespread acceptance that young offenders must be treated differently.[[49]](#footnote-49) The Sentencing Council refers to the need for a ‘fundamentally different’ approach from adult guidelines when sentencing children and young people. It is clear that personal mitigation, including bereavement, will carry more weight if the defendant is aged under eighteen, where the court is under a statutory duty to consider the ‘welfare’ of the young offender[[50]](#footnote-50) and is required to focus on the defendant as an individual, rather than passing a sentence which is deserved for the offence committed[[51]](#footnote-51). In the earlier sections of the new guideline the Council re-states much of the wording in the *Sentencing Youths* guideline, which urged that in complying with its statutory duty to have regard to the welfare of the young person a court should ensure that it is alert to (inter alia) ‘… the effect on young people of experiences of loss and neglect and / or abuse’. It is notable that in its revised offence guidelines on sexual offences, and on robbery, when committed by a child or young person the Council has moved from a general statement that courts should be alert to these issues, to the inclusion of ‘unstable upbringing’ (including ‘experiences of trauma and loss’) as a generic form of mitigation in sentencing guidelines. The revised guidelines on sexual offences, and on robbery, committed by young offenders, include specific reference to this effect. It is very hard to see why these matters should mitigate *only* in relation to robbery or sexual offences, and it seems safe to assume that they are relevant mitigation for all offences committed by children and young people. If so, this can be seen as a significant step in according greater recognition to experience of trauma, including bereavement, as a mitigating factor in sentencing.

The Court of Appeal rarely addresses a defendant’s disadvantaged background or traumatic life events as a sentencing consideration, though it is interesting to see thatDietschmann’s ‘wretched life’ was explicitly taken into account when setting his minimum term for murder.[[52]](#footnote-52) In that case Clarke J noted that the defendant had been physically abused by a stepfather until the age of 17, and had been powerless to prevent the sexual abuse of his own sister. *Keenan*[[53]](#footnote-53) is a rare example of the Court reflecting on the relevance of childhood trauma when sentencing an adult. The defendant, aged 28 when convicted, was sentenced to 12 months’ imprisonment for shoplifting. This was against a background of persistent offending of that kind, with regular court appearances since the age of fourteen. In reviewing the sentence the Court of Appeal referred to two PSRs which had been placed before the judge, detailing the defendant’s poor upbringing in a household which had, 20 years before, suffered ‘extremely unfortunate bereavements and in which her parents were in an unsatisfactory and disorderly relationship’. There was also a history of disruptive schooling. Hughes J said that

‘We do not doubt that her difficult upbringing, which was not her fault, will have contributed to making her the person that she is. But she is now a grown woman. She has had more than ample opportunity to make her own choices about the kind of activity that she will pursue and with, we have no doubt, inevitable pressures, she has elected to choose a path of repeated crime.’

While there has been much more research on the impact of traumatic life events on young offenders than there has been on adults, the appellate authorities are less fruitful because the Court of Appeal sees fewer cases involving juveniles, and they are skewed to the most serious offending. Even so, traumatic life events, including bereavement, do feature in the narratives. In the recent horrific case of *Markham*[[54]](#footnote-54) the 14 year-old defendant murdered the mother and sister of his girlfriend by stabbing them both as they slept. The PSR and psychiatric reports urged the sentencing judge to recognise the defendant’s ‘childhood traumas of experiencing domestic violence, inconsistent care, and bereavement, and the influence of those factors upon his psychological development’. The Court of Appeal found that the judge had considered all relevant material, had applied the new Sentencing Council guideline, and had made ‘every appropriate concession’ to the age, background and negative experiences of the defendant.[[55]](#footnote-55) *Harper*[[56]](#footnote-56)involved a 16 year old defendant who had committed robberies of convenience stores while carrying an imitation firearm. The defendant was of previous good character. The PSR referred to the death of the defendant’s father when the defendant was aged 12, explaining that ‘he did not receive bereavement counselling’ and that he suffered from low moods and feelings of helplessness. The sentence of 54 months detention under section 91 of the PCC(S)A 2000 was, nonetheless, upheld.

The 16 year-old defendant in *C*[[57]](#footnote-57) admitted sexual assault on his stepbrother, aged four. The defendant had no previous convictions, but the PSR and a psychological report showed that he had moderate learning difficulties and a disadvantaged childhood. His mother had died suddenly 12 months earlier. He had no bereavement counselling and he felt rejected by a number of close relatives who had been unable to offer him a home. He was described as socially isolated, lacking self-esteem and social support. A **SENTENCE** of three years detention under section **91** was set aside by the Court of Appeal, which substituted a supervision order for three years. Finally, in *Smith*[[58]](#footnote-58) the defendant, who was 18 at the time of the offence, admitted robbery. He had convictions for other violent offences, committed while under the influence of drugs. The PSR indicated that the defendant’s father had died four years earlier, his elder brother had been murdered, and the defendant had been physically abused by his stepfather. These losses ‘were at the root of his anger and consequently his offending’ and he had resorted to heavy use of alcohol and cannabis. A report from the young offender institution indicated that the defendant had been referred for bereavement counselling as well as drug and alcohol awareness courses. The Court made a modest reduction in sentence, from 42 to 33 months.

*Mitigation based upon sympathy and mercy*

In several of the appellate cases cited above there is reference to compassion and sympathy engendered in the court by hearing of the defendant’s circumstances of bereavement. Examples are *McCann, Allan* and especially *Webster* (… no judge could fail to understand and sympathise with his loss …). As Manson[[59]](#footnote-59) points out in the sentencing context, ‘Sympathy is a normal human response. Tragedy, misfortune, pain and loss elicit sympathy.’ Of course, judges and magistrates will almost inevitably have experienced bereavement themselves (indeed, when Darbyshire[[60]](#footnote-60) interviewed 77 Crown Court judges she found that seven of them had experienced the death of one of their own children). All this is clear enough, but whether sympathy towards the defendant should lead to mitigation of sentence is doubted by some writers, on the basis that it depends too much on the personal feelings of the judge, and so tends towards inconsistency and undermines the structured approach to sentencing. Von Hirsch and Ashworth[[61]](#footnote-61) say that considerations of compassion tend to operate ‘in a highly discretionary fashion, when the individual judge … happens to feel moved by the defendant’s plight.’

In the SGC guideline on *Causing Death by Driving* it is an accepted reason for passing a lower sentence on a defendant if one or more of the victims of the offence had been in a close family or personal relationship with the offender.[[62]](#footnote-62) This is a long-standing principle which can be found in earlier Court of Appeal guideline cases[[63]](#footnote-63) as well as the current sentencing guidelines. The rationale for it is somewhat unclear. A defendant who has caused the death of a close relative or friend is bound to feel very shocked and remorseful, but remorse is treated as a separate matter in the guideline. It has been suggested that in this situation the defendant has suffered a substantial ‘natural punishment’ which, when placed in the scale, allows the court to reduce the formal sanction.[[64]](#footnote-64) But perhaps it is simply a mark of sympathy, recognising that the defendant, although responsible for the death, has also been bereaved. A striking example is *AG’s Ref (No 77 of 2002)(Scotney)*[[65]](#footnote-65). The defendant was aged 20, with no convictions. He held a provisional licence, but had not passed his test. The defendant, his girlfriend, and his cousin visited a pub in the evening and the defendant consumed alcohol because he was not intending to drive. His cousin, who was well over the legal limit to drive, then asked the defendant to drive him home in his (the cousin’s) car, and the defendant did so. The defendant was one and a half times over the legal limit. The car went out of control and collided with a vehicle coming in the other direction, and the cousin was killed. The girlfriend suffered minor injuries and the driver of the other car was physically unhurt but deeply shocked. The accident happened because the girlfriend had been fooling around, grabbing at the steering wheel. The defendant and his cousin had been very close, ‘like brothers’. The PSR explained that the defendant was deeply depressed, had expressed suicidal thoughts and spent a great deal of time at the grave of the deceased. He had the support of his family, including the sisters of the deceased who wrote to the judge asking for a lenient sentence. The judge, who recognised the defendant’s ‘profound regret and grief’, imposed a community order. Giving the decision of the Court of Appeal, Judge LJ said:

‘Just as the fact of the death affects the level of sentence, so it seems to us the impact of the death on the offender may do so. A husband who is responsible for the death of a beloved wife, or a mother who kills her own child, will be carrying his or her own punishment to the grave, and that, too, is the sort of feature which may be relevant to be weighed in the sentencing decision. Taking account of all the circumstances, the sentencing judge decided that the facts were exceptional and that he could impose a merciful non-custodial sentence. The ability to exercise mercy, and to identify the appropriate case in which mercy should be exercised, has long been acknowledged as a judicial attribute.’

The Court said that the degree of mercy and leniency was well justified in this case, and declined to increase the sentence. Walker has observed[[66]](#footnote-66) that the Court of Appeal tends to resort to the explanation of mercy when it has compassion for the offender but cannot articulate a precise reason for reducing the severity of the sentence. This certainly seems apt in relation to the final example considered here, another Attorney General’s reference case[[67]](#footnote-67), where the defendant initially received a sentence of 12 months imprisonment for an offence of street robbery. The judge was told during the plea in mitigation that the defendant’s sister was terminally ill. In fact she died one week after sentence was passed. The judge, having heard of this, called the offender back for re-sentencing, and reduced the term of imprisonment to six months. There was some uncertainty over exactly why sentence had been reduced, but the Court of Appeal was sure that the death of the sister had been an important factor. The Court of Appeal said that the final sentence was lenient, but declined to increase it, saying that the judge had ‘exercised the right of all judges to extend mercy’. Here there was no causal link betweenere

 the bereavement and the offence at all, so this is entirely an appeal to the court’s mercy based upon sympathy for the bereaved.

*Some Further Thoughts*

It has been shown that, despite the lack of reference to the matter in sentencing texts, issues of bereavement are indeed flagged up in reports placed before the sentencing courts. Most often they are identified in the PSR, and sometimes also in a psychiatric or psychological report. We have no way of knowing how often this kind of mitigation figures in the everyday practice of sentencing, but there was no suggestion in any of the cases cited above that the Court of Appeal regarded the mitigation as unusual or outlandish. Indeed, the Court of Appeal seems to have had no difficulty in recognising bereavement as a form of mitigation, but clearly its relevance varied from case to case. In many of the cases bereavement was only one strand of the mitigation, often set alongside the defendant’s clean record (or conviction-free gap), remorse, and other considerations. Mitigation and aggravating factors are accorded no specific weighting in the sentencing process, so where several such factors are in play it is rarely possible to identify the significance of any particular one. It appears that in some (perhaps most) examples the fact of bereavement formed part of the general background of the offender, but made little difference to sentence outcome. In some cases the Court expressed confidence that the sentencing judge had already made any necessary adjustment for the mitigation, including the bereavement, and pursued the issue no further. *Chambers* is an example.[[68]](#footnote-68) In others the Court felt that insufficient weight had been given to the mitigation, including the bereavement. *Webster* is an example.

The cases tend to suggest that a court is more likely to be influenced by evidence of a very recent bereavement, multiple bereavements (as in *McDonough*, *Donaghy* and *Brooks*), bereavement in particularly tragic circumstances (such as the son’s suicide in *McCann*), bereavement closely linked in time with other life-changing events, severe stresses additional to and independent of the bereavement or, finally, medical evidence of an ‘extreme bereavement reaction’. Conversely, the cases where the mitigation seems to have made little if any difference are those where the offence is regarded as very serious, so that the mitigation can gain no traction, or where the bereavement does not stand out as especially tragic, or it has occurred a considerable time ago (as in *Keenan*), or where it is not apparently linked to the offence and simply forms part of the general background of the offender.[[69]](#footnote-69) Finally, it seems that the mitigation is unlikely to make a difference if, post-bereavement, there has been persistent or prolonged offending (as in *McCann*), or the offending has required planning and determination[[70]](#footnote-70), or where the mitigating power of the bereavement is undermined by the defendant’s offending while under the influence of drink or drugs (as in *Dietschmann* and *Ward,* and other examples).

The cases where bereavement seems to have made a difference are those where the defendant’s offence was starkly out of character (as in *Brooks*), or where the nature of the offending (or information in the PSR) has prompted further inquiry into the defendant’s mental well-being at the time of the offence. The importance of the PSR in placing matters such as the impact of bereavement before the court is clear. Issues relating to bereavement are always sensitive, and are likely only to emerge in the context of a full PSR interview, where the report writer has time to probe the defendant’s background and circumstances. It is also worth repeating the point that the defendant must be willing, and be given the opportunity, to ‘open up’ and discuss this difficult personal issue with the report-writer. In several of the cases cited above, the Court of Appeal commended the PSR writer for the thoroughness of the report and the insight and assistance provided. This leads to the reflection that, with the current emphasis through *Better Case Management* on sentencing where possible without a report, or relying on a ‘stand-down’ report compiled on the day,[[71]](#footnote-71) information of this kind is much less likely to come to light and be placed before the court. Surely it was right for the custodial sentence to be quashed in *Donaghy*, where the young man who threatened to commit suicide on the railway line had done so following a series of devastating psychological blows. The same is true of *Allan* where the judge passed a community order for a serious sexual offence which would normally have attracted custody. It is significant that in both cases the court had the full benefit of appropriate reports.

An important function of the report, in any case where immediate custody can conceivably be avoided, is to explain what assistance may be offered by the probation service (or, now, the relevant community rehabilitation company) to address the problem identified. There are several examples in the cases cited above of judges recognising that the defendant was dealing with unresolved grief and needed bereavement support and counselling. In a borderline custody case the court might opt for a community disposal where that seems to offer a better chance to obtain counselling for the issue of unresolved grief. It is, however, unclear to what extent the probation service, youth offending teams, or the various CRCs have the skills or resources to assist with bereavement issues. It is striking that in none of the cases considered in this article did the PSR writer, having identified the problem, then offer bereavement support as part of the sentence proposal. Back in 2004 Baroness Scotland, then Minister of State at the Home Office said in a written Parliamentary answer that

‘… a significant bereavement or loss may influence future offending behaviour [of children and young people] but there are no current plans to commission further research in this area … If bereavement is identified as a risk factor, then bereavement counselling can be offered [but] no resources are provided specifically for bereavement counselling… ’.[[72]](#footnote-72)

Matters have changed little since then, and there appears to be an unmet need. There are no accredited programmes directed to dealing with bereavement, and the author’s own survey of various CRC mission statements and annual reports has unearthed no mention of the topic. Emerging findings from a Keele-based research study show that few criminal justice practitioners have the required counselling skills.[[73]](#footnote-73)

The Sentencing Council is to be congratulated for including the experience of bereavement and other forms of trauma as mitigating factors in its recent guideline on *Sentencing Children and Young People*. As we have seen, however, the issue of defendant bereavement can be relevant for adults as well as for young offenders, and it is raised as such before the courts by PSR writers and defence counsel. It has been argued that while the Council’s reference to bereavement as part of a picture of deprived upbringing is important, there are also situations in which a causal link between the bereavement and the offending can be shown. The impaired mental functioning of the defendant at the time of the offence then becomes critical, the issue being one of reduced culpability, rather than a more nebulous expression of sympathy for the disadvantaged offender. Further thought is required as to when, and to what extent, bereavement should make a difference to sentencing outcome. And more work is needed on identifying what bereavement support can be drawn upon by the probation service if the court is persuaded that the issue needs to be addressed as a requirement of the sentence passed.

1. I am grateful to Loraine Gelsthorpe, Lyndon Harris, Julian Roberts, Sotirios Santatzoglou and the anonymous reviewer for their very helpful comments on an earlier version of this article.

 Sentencing Council (2017) *Definitive Guideline: Sentencing Children and Young People*

[www.sentencingcouncil.org.uk/publications](http://www.sentencingcouncil.org.uk/publications) [↑](#footnote-ref-1)
2. Howard League (2016) [www.Howardleague.org/wp-content/uploads/2016/08/Howard-League-Sentencing-Council-Reponse-03082016.pdf](http://www.Howardleague.org/wp-content/uploads/2016/08/Howard-League-Sentencing-Council-Reponse-03082016.pdf) [www.nacro.org.uk/news/announcements/beyond-youth-custody-project-findings-featured-in-the-independent/](http://www.nacro.org.uk/news/announcements/beyond-youth-custody-project-findings-featured-in-the-independent/) [↑](#footnote-ref-2)
3. Though on the issue of remorse see H. Maslen, *Remorse, Penal Theory and Sentencing*, 2017, Hart Publishing [↑](#footnote-ref-3)
4. *‘Integrating Loss and Bereavement Assessment Support and Advocacy in the T2A Pathway for Young Adults*: *A community based research project’*, funded by the Barrow Cadbury Trust 2016-2018.Lead researchers: Professor Sue Read, School of Nursing and Midwifery and Dr. Sotirios Santatzoglou, School of Law. [↑](#footnote-ref-4)
5. CJA 2003, s.166(1) [↑](#footnote-ref-5)
6. See note 5. The Sentencing Council, in its *Sentencing Children and Young Persons, Sexual Offences Guideline*, at Step 3 states that ‘The effect of personal mitigation may reduce what would otherwise be a custodial sentence to a non-custodial one, or a community sentence to a different means of disposal.’ [↑](#footnote-ref-6)
7. An obvious example is to test the defendant’s resolve to tackle drug dependency by including a drug rehabilitation requirement within a community order or suspended sentence. The Sentencing Council (2017) *Definitive Guidelin*e on *Imposition of Community and Custodial Sentences* includes ‘strong personal mitigation’ as a factor indicating that it may be appropriate to suspend a custodial sentence. [↑](#footnote-ref-7)
8. A. Ashworth, *Sentencing and Criminal Justice* (2015), 6th ed, Cambridge pp.178-201; see also N. Walker, 1999 *Aggravation, Mitigation and Mercy in English Criminal Justice*. [↑](#footnote-ref-8)
9. J. Jacobson and M. Hough (2007) *Mitigation: The Role of Personal Factors in Sentencing*, Prison Reform Trust [↑](#footnote-ref-9)
10. National Offender Management Service (NOMS) (2015) *National Standards for the Management of Offenders*; Youth Justice Board (2013) *National Standards for Youth Justice Services*, p.22 [www.gov.uk/government/uploads/system/uploads/attachment\_data/file/296274/national-standards-youth-justice-services.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/296274/national-standards-youth-justice-services.pdf) [↑](#footnote-ref-10)
11. D. Denney (2016) ‘Probation – Rights and New Agendas’, in M. Vanstone and P. Priestley (eds), *Probation and Politics: Academic Reflections from Former Practitioners* Palgrave Macmillan, pp.119-140 [↑](#footnote-ref-11)
12. J. Jacobson and M. Hough, ‘Personal mitigation: An empirical analysis in England and Wales’ in J. V. Roberts (ed), *Mitigation and Aggravation and Sentencing*, 2011, Cambridge, chap 8. [↑](#footnote-ref-12)
13. Hertfordshire Advertiser (2016) [www.hertsad.co.uk/news/court-watch/harpenden\_cleaner\_who\_stole\_from\_her\_clients\_sentenced\_1\_4609864](http://www.hertsad.co.uk/news/court-watch/harpenden_cleaner_who_stole_from_her_clients_sentenced_1_4609864) [↑](#footnote-ref-13)
14. Northampton Chronicle (2015) [www.northamptonchron.co.uk/news/robber-upset-over-death-of-grandmother-stole-and-torched-taxi-in-northampton-1-7056732](http://www.northamptonchron.co.uk/news/robber-upset-over-death-of-grandmother-stole-and-torched-taxi-in-northampton-1-7056732) [↑](#footnote-ref-14)
15. [2016] EWCA Crim 655 [↑](#footnote-ref-15)
16. A life sentence with a minimum term of 27 years was upheld by the Court of Appeal. [↑](#footnote-ref-16)
17. *Henry* [2007] EWCA Crim 1969 [↑](#footnote-ref-17)
18. *Malcolm* [2012] EWCA Crim 364; four years imprisonment upheld as ‘stiff, but not manifestly excessive’ [↑](#footnote-ref-18)
19. *Dietschmann* [2003] 1 AC 1209 [↑](#footnote-ref-19)
20. A life sentence with a minimum term of 14 years, less time on remand, was passed. [↑](#footnote-ref-20)
21. The following summary draws upon <http://www.gponline.com/consultation-skills-abnormal-bereavement-reactions/article/849305> [↑](#footnote-ref-21)
22. *McDonough* [2011] EWCA Crim 415; a comparable case is *Hilton* [2015] EWCA Crim 1442. [↑](#footnote-ref-22)
23. *Webster* [2015] EWCA Crim 2115 [↑](#footnote-ref-23)
24. The sentencing judge indicated that he had to impose a sentence longer than Webster’s previous sentence, whereas the Court of Appeal made it clear that there was no such principle. [↑](#footnote-ref-24)
25. *Ward* [2012] EWCA Crim 2534 [↑](#footnote-ref-25)
26. *Freer* [2014] EWCA Crim 456 [↑](#footnote-ref-26)
27. H.LA. Hart (1968), *Punishment and Responsibility*, Oxford, p.15 [↑](#footnote-ref-27)
28. C.M. Parkes and H.G Prigerson (2013) *Bereavement: Studies of Grief in Adult Life*, Routledge, especially chap 6: ‘Anger and guilt’ [↑](#footnote-ref-28)
29. For an overview of the research see R. Akerman and J.Statham, (2014), *Bereavement in Childhood: the impact on psychological and educational outcomes and the effectiveness of support services* (2014) Thomas Coram Research Unit, Institute of Education, University of London, Working Paper No 25 <http://www.cwrc.ac.uk/news/documents/Revised_Childhood_Bereavement_review_2014a.pdf> [↑](#footnote-ref-29)
30. <http://www.beyondyouthcustody.net/wp-content/uploads/BYC-Trauma-Young-Offenders-FINAL.pdf> [↑](#footnote-ref-30)
31. N. Vaswani, (2014), ‘The ripples of death: Exploring the bereavement experiences and mental health of young men in custody’ 53(4) *Howard Journal of Criminal Justice*, 341-359, citing (at p.342) Barnardo’s (2008), *Locking up or Giving up? Is Custody for Children Always the Right Answer?*, [↑](#footnote-ref-31)
32. SGC, *Sexual Offences Act 2003* ,Part 7 [↑](#footnote-ref-32)
33. [www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Response-to-consultation.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-young-people-Response-to-consultation.pdf) [↑](#footnote-ref-33)
34. *McCann* [2011] EWCA Crim 2038 [↑](#footnote-ref-34)
35. *Templeman* [2017] EWCA Crim 218 [↑](#footnote-ref-35)
36. The Court of Appeal said that the passing of concurrent sentences for the assaults had been correct, but noted that since the defendant had pleaded guilty at the first opportunity the judge must have taken a notional starting point of six years, which is higher than the maximum for the offence. The substituted sentence took a notional starting point of the maximum sentence and then reduced it by one third. [↑](#footnote-ref-36)
37. *Allan* [2012] EWCA Crim 2085 [↑](#footnote-ref-37)
38. The appeal against sentence was limited to the ancillary order of a SOPO, which was quashed. [↑](#footnote-ref-38)
39. *Donaghy* [2011] EWCA Crim 334 [↑](#footnote-ref-39)
40. *Brooks* [2017] EWCA Crim 1276 [↑](#footnote-ref-40)
41. Jacobson and Hough (2011), p.157 [↑](#footnote-ref-41)
42. A. von Hirsch and A. Ashworth (2005), *Proportionate Sentencing*, chap 5: ‘Proportionate punishment and social deprivation’, Oxford [↑](#footnote-ref-42)
43. J. Jacobson, B. Bhardwa, T. Gyateng, G. Hunter and M. Hough (2010), *Punishing Disadvantage, A profile of Children in Custody*, Prison Reform Trust <http://www.prisonreformtrust.org.uk/portals/0/documents/punishingdisadvantage.pdf> [↑](#footnote-ref-43)
44. M Wasik, ‘The changing face of youth justice’ in A. Brammer and J. Boylan (eds) *Critical Issues in Social Work Law*, 2016, Palgrave, chap 7 [↑](#footnote-ref-44)
45. C. Taylor (2016), *Review of the Youth Justice System in England and Wales* [↑](#footnote-ref-45)
46. Kent Youth Offending Service (2011) *Report writing policy: Pre-sentence reports, practice guidance*, p.31. See <https://cpdyouthcommunity.kentcpdonline.org.uk> [↑](#footnote-ref-46)
47. D. Fox and E. Arnull (2013), *Social Work in the Youth Justice System: A Multidisciplinary Perspective,* Oxford,2013, p.52 [↑](#footnote-ref-47)
48. G. Sharpe (2012) *Offending Girls: Young Women and Youth Justice* Routledge, pp.58-61 [↑](#footnote-ref-48)
49. A. von Hirsch and A. Ashworth (2005), *Proportionate Sentencing*, chap 3: ‘Proportionate sentences for juvenile offenders’, Oxford [↑](#footnote-ref-49)
50. Children and Young Persons Act 1933, s.44 [↑](#footnote-ref-50)
51. Sentencing Council, Definitive Guideline, *Sentencing Children and Young Persons*, 2017, para 1.2 [↑](#footnote-ref-51)
52. *Re Dietschmann (Setting of Minimum Term)* [2006] EWHC 418 [↑](#footnote-ref-52)
53. *Keenan* [2012] EWCA Crim 1059 [↑](#footnote-ref-53)
54. *Markham* [2017] EWCA Crim 739 [↑](#footnote-ref-54)
55. The minimum term of detention was reduced from 20 years to 17 and-a-half years, but for reasons to do with the appropriate discount for guilty plea rather than the personal mitigation. [↑](#footnote-ref-55)
56. *Harper* [2017] EWCA Crim 245 [↑](#footnote-ref-56)
57. *C* [2008] EWCA Crim 290 [↑](#footnote-ref-57)
58. *Smith* [2001] EWCA Crim 1610. [↑](#footnote-ref-58)
59. A. Manson (2011), ‘The search for principles of mitigation: integrating cultural demands’ in J. V. Roberts (ed), *Mitigation and Aggravation and Sentencing*, 2011, Cambridge, chap 3, at p.55 [↑](#footnote-ref-59)
60. P. Darbyshire (2011), *Sitting in Judgment: The Working Lives of Judges*, Hart Publishing, p.136 [↑](#footnote-ref-60)
61. A. von Hirsch and A. Ashworth (2005), p.68 [↑](#footnote-ref-61)
62. The guideline goes on to say that such mitigation will have less weight where the culpability of the driver was high. [↑](#footnote-ref-62)
63. *Boswell* (1984) 6 Cr App R (S) 257; *Cooksley* [2004] 1 Cr App R (S) 1 [↑](#footnote-ref-63)
64. N. Walker, 1999, *Aggravation, Mitigation and Mercy in English Criminal Justice*, Blackstone, p.132 [↑](#footnote-ref-64)
65. *Scotney* [2002] EWCA Crim 2312; the case was decided before *Cooksley* and the guideline [↑](#footnote-ref-65)
66. N. Walker, (1999), p.220 [↑](#footnote-ref-66)
67. *AG’s Ref (No 11 of 2007 (Knox)* [2008] 1 Cr App R (S) 6 [↑](#footnote-ref-67)
68. A sentence of three and a half years’ imprisonment was upheld in *Downie* for seven offences of theft. The Court of Appeal in that case said that the judge had given what credit he reasonably could for the mitigation - that the defendant had suffered three bereavements of close members of his family, had become drug-free since the offending, and was remorseful. [↑](#footnote-ref-68)
69. Apart from examples already given, see *Loughlin* [2017] EWCA Crim 755 and *Fawcett* [2017] EWCA Crim 724 [↑](#footnote-ref-69)
70. In *Gould* [2011] EWCA Crim2348 the defendant targeted a non-dwelling for theft of metal pipes and cabling, his usual mode of offending. The Court of Appeal noted that Gould had expressed remorse, and that his drug use was linked to a depressive illness and to the effect of a recent bereavement, but ‘… those matters must be taken into account but carry little weight – the inescapable reality is that the appellant was yet again resorting to deliberate dishonesty’. [↑](#footnote-ref-70)
71. The Sentencing Council (2017) *Definitive Guidelin*e on *Imposition of Community and Custodial Sentences* states that ‘Ideally a PSR should be completed on the same day to avoid adjourning the case’. For a powerful critique see G.Robinson, ‘Stand down and deliver: pre-sentence reports, quality and the new culture of speed’ (2017) 64(4) *Probation Journal* pp.337-353 [↑](#footnote-ref-71)
72. *Hansard* HL Deb, 16Jan 2004, s.106W [↑](#footnote-ref-72)
73. See note 4 [↑](#footnote-ref-73)