**ISSUES IN SENTENCING PROCEDURE**

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**INTRODUCTION**

In his famous article on ‘Establishing a Factual basis for Sentencing’, published in this *Review* in 1970, David Thomas asserted that sentencing was ‘one of the weakest links in our system of criminal procedure’.[[1]](#footnote-1) He noted that, following a conviction at trial, and even more so after a plea of guilty, there may still be important matters in issue between the prosecution and defence versions of the circumstances surrounding the offence.[[2]](#footnote-2) It was therefore essential for the criminal courts to provide a proper process to establish an accurate version of the facts of the offence. He went on to suggest that a contested issue at sentencing should be tried on its own by the judge: ‘In some cases it would be necessary for the prosecutor to formulate an allegation and call evidence to support it, and in other cases the defence could seek to establish a particular fact on their own initiative’.[[3]](#footnote-3) His conclusion was:[[4]](#footnote-4)

*‘The guiding principle must surely be that any significant fact adverse to the accused and not implied in the verdict or plea and not accepted by the defence must be established after conviction by proper evidence to a proper level of certainty and subject to the same rights of cross-examination as the evidence on which the conviction is founded … This procedure would involve some extension of the prosecution’s present role. The defence should have a right to a separate hearing of any issue relevant to sentence which remains in dispute. The trial judge should state explicitly the facts he assumes as the basis for sentence.’*

In the years immediately following the publication of that article, and his reiteration of those proposals in Thomas’s *Principles of Sentencing*[[5]](#footnote-5), the Court of Appeal began to develop the structure and procedure which led in due course to the *Newton* hearing which is very well known today. Thomas referred to cases of strict liability, where the verdict or plea of guilty necessarily did not determine the extent of D’s culpability. This fundamental issue was addressed by the Court of Appeal in *Lester*[[6]](#footnote-6)in 1975. D in that case had admitted offences under the Trade Descriptions Act 1968 and was sentenced on the basis that he had *mens rea* (*ie* that he had knowledge that the milometers on the vehicles had been tampered with). The Court of Appeal said that it had been wrong for D to be sentenced on the *assumption* that he had knowledge, and D should have been given a chance to give evidence on the matter. Later, in *Newton* itself,[[7]](#footnote-7) the Court of Appeal held that, when faced with a clear divergence between the prosecution and defence versions of an important fact relevant to sentence, there were three possible approaches which a sentencing judge might take.

First, it might be possible in some cases to be sure of the disputed matter by proper interpretation of the verdict of the jury. Second, the judge might hear the evidence on one side and the other ‘and come to his own conclusion, acting so to speak as his own jury on the issue which is the root of the problem’. Third, it might be appropriate for the judge to hear no evidence, but to listen to submissions from counsel and then come to a conclusion. If there was a substantial difference between the two sides, then ‘the version of the defendant must, so far as possible, be accepted.’ The second of these three approaches is what has come to be known as the *Newton* hearing, i.e. a pre-sentence hearing before the judge or magistrates to establish critical facts for sentencing. Later cases have built upon the *Newton* foundations, and there have been substantial re-statements by the Court of Appeal of the applicable principles, in *Underwood*[[8]](#footnote-8) and *Cairns*[[9]](#footnote-9). It is striking that this has been entirely a non-statutory development, but key parts of the jurisprudence are now elaborated in the Criminal Practice Directions[[10]](#footnote-10).

As we have seen, David Thomas argued that ‘any significant fact adverse to the accused and not implied by the verdict or plea must be established ‘by proper evidence to a proper level of certainty.’ Thus for at least 50 years the position has been - where the prosecution has sought to introduce evidence after plea or conviction, relevant to sentence – that the courts have required that

‘the evidence itself must be particularized and given by a witness who can speak from first-hand knowledge without reliance on hearsay and records.’[[11]](#footnote-11)

The hearsay rule in criminal cases was subsequently relaxed by the Criminal Justice Act 2003, but the principle that the Court was upholding in *Robinson* was that the same requirements should obtain at the sentencing stage as are appropriate at trial. Thomas also mentioned that any prosecution evidence should be ‘subject to the same rights of cross-examination as the evidence on which the conviction is founded.’

The same theme of procedural fairness is found even more strongly in relation to taking account of other offences allegedly committed by the defendant. Thus Lord Bingham CJ stated that it is ‘a basic principle underlying the administration of the criminal law’ that a person cannot lawfully be sentenced ‘for offences for which he has not been indicted and which he has denied or declined to admit.’[[12]](#footnote-12)

There is a dearth of empirical research on sentencing procedure. In her book *Between Conviction and Sentence*, published in 1981, Shapland described a sentencing system which she said combined elements of the adversary processes of trial with the receipt of reports and testimony from independent outsiders, and she suggested that the sentencing process as a whole was moving in the direction of a ‘problem-solving model’.[[13]](#footnote-13) Later research which touches upon the judicial role in the sentencing process, including Darbyshire’s *Sitting in Judgment*[[14]](#footnote-14) and Jacobson *et al*’s *Inside Crown Court*[[15]](#footnote-15).The main focus of Jacobson *et al* is on contested trials, but Chapter 3 on ‘constructing versions of ‘the truth’ has much material relevant to sentencing. These works provide valuable insights, and are referred to later in this article

**FIVE KEY ISSUES**

We turn next to consider five key issues of sentencing procedure.

**(1) BURDENS AND STANDARDS OF PROOF**

In domestic law, the allocation of burdens and standards of proof is guided, largely, by the presumption of innocence. A person should be presumed innocent unless and until he or she is found guilty. The problem with transferring this to the sentencing stage is that the defendant has already been convicted or has pleaded guilty when sentencing begins, and so there can be no presumption of innocence. However, there are strong reasons for continuing to treat the defendant as if the presumption of innocence were still in force at the sentencing stage. The most compelling reason is that the defendant’s liberty may be at stake, or at least the defendant’s finances. Thus the European Commission on Human Rights established as long ago as 1972 that ‘the expression ‘everyone charged with a criminal offence’ in Article 6(3) [of the European Convention on Human Rights] includes persons who, although already convicted, have not been sentenced.’[[16]](#footnote-16) This is the position throughout Europe and also among Commonwealth countries such as Australia and New Zealand. Thus in English law, as we will see in the next paragraph, aggravating factors must be proved by the prosecution beyond reasonable doubt. However, this is not the position in the United States: the majority of states hold that both aggravating and mitigating factors must be established on a ‘preponderance of the evidence’, and this is also the approach adopted in the influential *Model Penal Code: Sentencing.*[[17]](#footnote-17)

Returning to English law, different burdens and standards of proof apply to different elements of the case. The courts have developed a distinction between, on the one hand, matters ‘directly relevant to the circumstances of the offence itself’[[18]](#footnote-18) and, on the other hand, ‘extraneous mitigation’ such as matters of personal mitigation and other matters ‘not connected with the facts or circumstances of the offence itself.’[[19]](#footnote-19) On matters directly relevant to the offence itself, the prosecution bears the burden of proof to the criminal standard: if the defendant puts forward mitigation that contests the prosecution’s version of the commission of the offence, there may or may not be a need for a *Newton* hearing, but the prosecution bears the burden of disproving the defence’s case. Only if the defence puts forward some ‘extraneous mitigation’, not connected with the facts or circumstances of the offence itself does the defence bear a burden of proof, on the balance of probabilities. Examples of ‘extraneous mitigation’ might be the effect of a prison sentence on the defendant’s family, the defendant’s state of health, or the defendant’s means to pay a financial penalty.[[20]](#footnote-20)

The Court of Appeal held in *Bush*[[21]](#footnote-21)that where aggravating factors are relied upon by the prosecution a proper foundation should be laid for them, and that it was ‘unhelpful’ for the prosecution simply to list matters such as ‘timing’ or ‘location’ of the offence as making that offence more serious without clarifying what particular feature of the case was being relied upon.

The distinction between matters relevant to the offence itself and ‘extraneous mitigation’ may be illustrated by reference to *Lashari*.[[22]](#footnote-22) L pleaded guilty to possession of a prohibited firearm, contrary to s.5(1)(aba) of the Firearms Act 1968, but argued that the minimum sentence of 5 years’ imprisonment should not be imposed because there were ‘exceptional circumstances’ – that L found the gun in a car park, placed it in the boot of his car, and then forgot about it. The trial judge appeared to hold that these circumstances were ‘extraneous’ to the offence and therefore that the defence had the burden of proving them to the civil standard (balance of probabilities). However, the Court of Appeal concluded that L’s account about how he came to possess the gun was directly relevant to the circumstances of the offence itself, being the basis of the argument for ‘exceptional circumstances’. As such, the prosecution had the burden of proving beyond a reasonable doubt that the defendant’s version was untrue. The Court of Appeal held that the judge had misdirected himself, applying the wrong requirements of proof, although it went on to uphold the judge’s finding that there were no ‘exceptional circumstances’ sufficient to justify not imposing the minimum sentence.[[23]](#footnote-23)

**(2) NEWTON HEARINGS**

The parameters applicable to *Newton* hearings (also commonly referred to as ‘trials of issue’) are now well settled and can be shortly summarised.

D should be sentenced on a basis which accurately reflects the facts.[[24]](#footnote-24) If the resolution of the facts in dispute will make a difference to the sentencing outcome the defence should notify the prosecutor as to the area and extent of the dispute. The prosecution may agree D’s version of the facts, but the agreed basis is conditional upon the judge’s acceptance of it. If the prosecution rejects D’s version the area of disagreement must be clearly identified. If the prosecution does not have evidence to dispute D’s version (such as where the matter is outside the knowledge of the prosecution) the prosecution should make that clear, but that does not mean that D’s version can simply be agreed as true. Whether the basis of plea is agreed or not, the judge is not bound by it and the judge is entitled to require evidence to be called, and may order a *Newton* hearing if necessary. At a *Newton* hearing the prosecution normally bear the burden of proof to the criminal standard, and the judge should direct herself or himself accordingly.[[25]](#footnote-25) It seems that this applies both to matters of aggravation and matters of mitigation within the scope of the *Newton* hearing, *ie* relating to the facts and circumstances of the offence. However, where D raises an extraneous matter of mitigation, D bears the burden of proving it to the civil standard, *ie* on the balance of probabilities.

Evidence may be called by each side. If the disputed issue is a matter within D’s personal knowledge, the defence should be ready to call D as a witness; and if D declines to give evidence or declines to answer questions, the judge may draw such adverse inference from that as he thinks appropriate. If the issue in the *Newton* hearing is resolved in D’s favour, the credit due to him for any guilty plea is not affected, but if the issue is resolved against D the credit due to him for any guilty plea is reduced. The starting point is a reduction by 50 per cent of the credit which would otherwise have been due, but more may be lost if prosecution witnesses have been required.[[26]](#footnote-26)

A *Newton* hearing is inappropriate if the disputed issue is properly one which requires a verdict from a jury (*eg* whether the relevant premises which are the subject of a burglary are a home or not[[27]](#footnote-27)). A *Newton* hearing is unnecessary if D’s basis is, in the judge’s view, ‘manifestly false’ and ‘does not merit examination by way of the calling of evidence’[[28]](#footnote-28). Further, the judge may take the view that resolving the dispute would make little or no difference to the sentencing outcome in that particular case. Lord Lane CJ in *Newton* said that the factual dispute between the two sides must be ‘substantial’, while Lord Judge CJ said in *Underwood* that the judge ‘is rarely likely to be concerned with minute differences about events on the periphery’.[[29]](#footnote-29) Whatever the precise test applicable here, the judge certainly has some room for manoeuvre as to whether a trial of issue needs to be held.

The development of the *Newton* procedure to date, as outlined above, has been welcomed by academic commentators.[[30]](#footnote-30) Despite the clear and principled importance of *Newton*, trials of issue are in practice the exception and not the norm. In her research Darbyshire noted the amount of time apparently wasted by Crown Court judges out of court awaiting the outcome of negotiation between prosecution and defence to see whether a trial would be required or D would enter a guilty plea,[[31]](#footnote-31) but she does not refer specifically to the use of a *Newton* hearing to resolve the differences. There are good practical reasons for this. If the judge orders a *Newton* hearing that may require sentencing to be adjourned to another day, and for court time to be set aside to hear argument and, if necessary, for witnesses to be called.[[32]](#footnote-32) It is well known that the criminal trial system relies upon large numbers of defendants admitting their guilt early, thereby receiving the benefit of a reduction for pleading guilty. Key justifications for the discount are that ‘it saves public time and money’, and ‘saves victims and witnesses from having to testify’[[33]](#footnote-33). Similar arguments can be made at sentencing, so that if a *Newton* hearing is required and D’s account of the facts is disbelieved, D will lose much of that discount. To the extent that there has been criticism of the *Newton* process it has mainly come from defence practitioners. Formally the initiative for prompting a *Newton* hearing lies with the defence, but defence practitioners urge caution when settling upon a basis of plea, especially where there are facts within it which lie outside the knowledge of the prosecutor. They point out that if D’s assertions are rejected at the trial of issue then, as they see it, D is doubly disadvantaged by receiving a higher sentence to accord with the prosecution version of the facts *and* in addition D suffers the loss of discount for their initial guilty plea.[[34]](#footnote-34)

It is often at a pre-trial hearing that an important factual divergence will be identified by the judge who will warn the parties that, in the event of a guilty plea, a *Newton* hearing will be required to resolve it. During the pre-trial stage, and indeed up to and including the day set down for trial, prosecution and defence may adjust their respective positions on the facts or, as time goes on, factual differences may appear less important than they did at the outset. Again, in practice, it is common to find that a matter identified and set down for a half-day *Newton* hearing seem less critical with the passage of time. A different prosecution counsel may take a more flexible view or the defence may decide that it is not worth risking loss of credit and, in the end, the sentencing hearing proceeds without the need for a trial of issue. Jacobson *et al* refer to charge-bargaining and fact-bargaining as the ‘process of negotiation and compromise over what really happened’.[[35]](#footnote-35) As Feeley has commented in the American context, ‘much of what passes for plea bargaining is really negotiation over the meaning of facts … facts are malleable.’[[36]](#footnote-36) Clearly, sharp disagreements over elements of the offence will require testing and resolution by trial. But, as Jacobson at al point out, ‘guilty pleas often reflect a contingent and highly contested version of events – ‘the truth’ can be just as elusive in cases where there has been a guilty plea as in cases that have gone to trial.’[[37]](#footnote-37)

In recent years the Court of Appeal has extended the use of *Newton* hearings to assist the judge in determining whether ‘exceptional circumstances’ pertain in the context of a minimum 5 year sentence for a firearms offence. The watershed case was *Rogers[[38]](#footnote-38)* and the importance of complying with the procedure in that context has been emphasised in later cases.[[39]](#footnote-39) The defence must set out in writing those facts which are relied upon as amounting to ‘exceptional circumstances’ and, if they are disputed by the prosecution, a *Newton* hearing should be held to resolve the matter.[[40]](#footnote-40) It does not appear to have been suggested that a *Newton* hearing is necessary in relation to argument over the presence of ‘particular circumstances’ which would render a three strikes drug trafficker or domestic burglar subject to the specified minimum sentence.

**(3) AGGRAVATING AND MITIGATING FACTORS**

When Thomas put forward his proposal for resolving contested issues at sentencing he had a number of particular scenarios in mind. It is striking that Thomas did not specifically refer to matters of aggravation and mitigation as being ripe for resolution by way of a judge-only hearing, but his ‘guiding principle’ set out at the start of this article, is certainly wide enough to extend to them. It is to matters of that kind that we turn next.

A reasonably comprehensive list of potential sentence aggravating and mitigating factors was set out in the SGC’s guideline on *Seriousness*. That guideline was superseded in 2019 by the Sentencing Council’s *General Guideline:* *Overarching Principles*.[[41]](#footnote-41) The new guideline sets out a list of ‘factors increasing seriousness’, divided into a group of four ‘statutory aggravating factors’ (previous convictions, offence committed on bail, offence motivated by or demonstrating hostility based upon a particular listed characteristic or presumed characteristic of V, or offence committed against an emergency worker), and a non-exclusive group of twenty-three ‘other aggravating factors’, which includes matters such as commission of offence while under influence of drink or drugs, planning, abuse of trust or dominant position, vulnerable victim, offence committed in a domestic context, location and / or timing of offence, and prevalence. The guideline also provides a non-exclusive list of seventeen ‘factors reducing seriousness or reflecting personal mitigation’, a mixed bag which includes good character, remorse, offender in a lesser role, offender involved through coercion, intimidation or exploitation, sole or primary carer for dependent relatives, physical disability / serious medical condition, or mental disorder / learning disability. Also from 2019 the Council has included ‘expanded explanations’ for aggravating and mitigating factors within the offence guidelines.

The *Overarching Principles* guideline states that the various factors are listed in no particular order, and that ‘once a provisional sentence is arrived at the court should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation.’ Clearly, in any given case the judge may have to take into account several aggravating and / or mitigating factors. Flexibility is inherent in the guideline’s approach – it states that the sentencer should ‘identify whether a combination of these or other relevant factors should result in any upward or downward adjustment’, that ‘it is for the sentencing court to determine how much weight should be assigned’ to these various matters, and that ‘not all factors that apply will necessarily influence the sentence’. There is no mention of sentencing procedure in this general guideline or in the expanded explanations, and specifically no mention of the use of a *Newton* hearing to resolve factual disputes over the presence or absence of aggravating or mitigating factors.[[42]](#footnote-42)

Space does not permit an examination of each of these factors. Many of them, such as D’s previous convictions or D’s bail status at the time of the offence, are uncontroversial in the sense that, should there be dispute or lack of clarity over the matter, it will be for the prosecution to prove the material fact to the criminal standard. It will then be for the judge to decide how much weight to attach to that established fact, in the context of all other relevant sentencing considerations. It is, however, worth examining in more detail the third of the statutory aggravating factors, the offence being motivated by hostility towards V based upon a characteristic of V, since this factor raises some issues of principle.

As is well known, the current law in this area is complex, in that it operates in two different ways. Firstly, there is a total of eleven ‘racially or religiously aggravated’ offences (including assault, criminal damage, public order and harassment) listed in sections 29 to 32 of the Crime and Disorder Act 1998,which carry higher maximum sentences than their equivalent non-aggravated forms. The prosecution must prove that D demonstrated hostility towards V based upon V’s membership or presumed membership of a racial or religious group, or that the offence was motivated by hostility towards members of a racial or religious group based upon their membership of that group. If one of the racially or religiously aggravated offences is charged, the issue of whether D is to be sentenced for the aggravated offence or the basic offence will be resolved by a jury to the criminal standard, or by D’s own admission of guilt. If D is guilty of the aggravated offence it will appear as such on his criminal record and he will be sentenced on that factual basis (the court being required to announce the ‘uplift’ to the sentence which has been given to reflect the aggravating feature) and if D is guilty of the ‘basic’ non-aggravated offence he will be sentenced on that lesser basis.[[43]](#footnote-43)

Secondly, however, racial or religious aggravation may operate as a conventional aggravating factor, and this is intended to apply in relation to any offence *other than* one listed in sections 29 to 32 of the 1998 Act. Section 145(2) of the Criminal Justice Act 2003 provides that in those circumstances

‘If the offence was racially or religiously aggravated, the court –

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.’

Identical wording is used in section 146(2) of the same Act, which specifies a statutory aggravating factor in cases where the offence was motivated by hostility towards persons of a particular sexual orientation, hostility towards persons who have a disability, or by hostility towards persons who are transgender. Since the matters referred to in sections 145 and 146 are aggravating factors relevant only to sentence there are no circumstances in which a jury will be required determine the issue. It is solely a matter for the sentencing judge.

No procedure is specified in these sections as to how the court is to determine whether the offence is so aggravated, but it is clear that if the presence of the aggravating factor is asserted by the prosecution but denied by the defence, a *Newton* hearing will almost always be required. The issue arose recently in *DPP v Giles*[[44]](#footnote-44) where, in the magistrates’ court, D pleaded guilty to assault occasioning actual bodily harm. He admitted throwing a glass at V in a pub, causing a cut to the back of V’s head, but D denied that he had used homophobic language towards V shortly before the assault. The district judge held that the custody threshold was met irrespective of the aggravating factor, and the effect of that factor would be marginal because the words used ‘were at the lower end of the scale’ and it would not be in the public interest to require V to attend and give evidence. The Crown appealed by way of case stated, and the Administrative Court held that a *Newton* hearing should have been held. The Court said that it would be ‘extremely rare’ for a court considering a plea of guilty presented by the prosecution as being aggravated by sexual orientation discrimination (and where disputed by the defence) not to order a *Newton* hearing. Even if it was thought that the outcome of the disputed issue would not materially affect the final sentence, a *Newton* hearing was still likely to be necessary because of the statutory requirement on the court to state in open court that the offence was so aggravated. This decision is concerned with the procedure to be applied following a guilty plea. However, it is submitted that the same approach would apply if D has been convicted after a trial but the parties dispute the presence of the aggravating feature: a *Newton* hearing may not normally be necessary, but it would depend on whether the evidence led at trial covered all the points relevant to sentence.[[45]](#footnote-45)

The existence of two different procedures for dealing with hate crime (on the one hand requiring conviction by a jury of a racially or religiously aggravated offence, and on the other hand requiring the judge to treat one of the specified matters as an aggravating feature on sentence) has created problems in practice.[[46]](#footnote-46) It has been suggested by researchers, drawing upon interviews with practitioners, that the difference in procedure means that hostility which is dealt with *via* the sentencing process is ‘treated differently from, and not as seriously as’ hostility based on race and religion.[[47]](#footnote-47). It has been further suggested that D’s interests are better protected if hostility is determined at trial rather than on sentence,[[48]](#footnote-48) because defence lawyers, and sometimes judges, can be caught unprepared if the issue is raised for the first time at the sentencing hearing. The most recent report from the CPS on this issue[[49]](#footnote-49) indicates that across the range of hate crime cases prosecuted in 2018-19, the number of convictions in which the court announced a sentence uplift was 73.6 per cent. Three quarters of those cases were guilty pleas. In respect of sexual orientation hate crime (which is determined solely at sentence) the proportion of cases resulting in a sentence uplift was 70.9 per cent. These figures suggest that whether it is the jury or the judge who determines the facts, the outcome is much the same.

The statutory wording in section 145(2), set out above, is replicated in other statutory aggravating factors, such as the commission of a listed offence against an ‘emergency worker’[[50]](#footnote-50), or where the court is invited by the prosecution to increase sentence for a listed offence because the offence has ‘a terrorist connection’[[51]](#footnote-51), or where the supply of a controlled drug or psychoactive substance has taken place on or in the vicinity of a school.[[52]](#footnote-52) It follows from the decision in *DPP v Giles* that, if the prosecution allege that any one of these aggravating features is present, but the defence denies it, a *Newton* hearing will almost always be required.

**(4) EVIDENCE OF LOCAL PREVALENCE**

In his work on sentencing, Thomas applied the same approach (of equivalent procedural and evidential protections in sentencing as at trial) to claims about the prevalence of a crime locally:

“To allow the prosecutor to tender, or the sentence to elicit, vague statements of a general nature based on personal impressions, would be inconsistent with the requirements which relate to evidence on other issues relevant to sentence.”[[53]](#footnote-53)

The issue of local prevalence was addressed in the Sentencing Guidelines Council’s definitive guideline on *Overarching Principles: Seriousness*. That guideline stated that:

‘It is essential that sentencers both have supporting evidence from an external source (for example the local Criminal Justice Board) to justify claims that a particular crime is prevalent in their area and are satisfied that there is a compelling need to treat the offence more seriously than elsewhere.’ [[54]](#footnote-54)

Although this guideline has not always been applied faithfully,[[55]](#footnote-55) the judgment of Treacy LJ in *Bondzie* [[56]](#footnote-56) seems to have restored its authority. Treacy LJ insisted that what is now termed ‘community impact evidence’ must be provided to the court ‘by a responsible body or by a senior police officer’, and that it should be made available to the Crown and the defence ‘in good time so that meaningful representations about that material can be made.’ Even then, he continued, the decision to increase the sentence for reasons of prevalence should be exceptional, since guidelines such as the Drugs guideline already take account of collective social harm and the judge must be satisfied that the level of harm locally is significantly higher than elsewhere. This judgment is now cited regularly by the Court of Appeal in ‘prevalence’ cases.[[57]](#footnote-57) Thomas was properly critical of the practice, as it existed in the 1970s, of police officers being called to give evidence at sentence as to D’s antecedents.[[58]](#footnote-58) This practice sometimes extended beyond the officer reading out the recorded offending history, to the making of generalised adverse comments about D. That practice was criticised in the Court of Appeal in several cases in the 1970s and 1980s, after which it ceased.[[59]](#footnote-59) The requirement that community impact evidence is properly sourced and evidenced should avoid such problems recurring, but a salutary warning was given in *Skelton*[[60]](#footnote-60) where a police officer had used the community impact scheme to make a statement as to the police’s knowledge of D being heavily involved in drug dealing in the local community. The Court of Appeal said that this ‘character assassination’ had been a singular misuse of the community impact evidence.

**(5) VICTIM PERSONAL STATEMENTS**

For at least two decades, what are now known as Victim Personal Statements (VPS) have been part of the criminal justice process in some cases, particularly sexual offences and offences of violence. The typical VPS will include details of the effect of the offence on the victim, in the form set out in Part VIIF of the Criminal Practice Direction. The VPS should be made in the form of a witness statement and served on the defence. In *Perkins*[[61]](#footnote-61) the Court of Appeal stated that the VPS, if it is in the proper form of a witness statement, “must be treated as evidence.” But the Court said nothing about the burden and standard of proof. That issue becomes particularly difficult when the judge has to take account of the VPS in order to decide whether the offence gave rise to ‘severe psychological harm’. In some offence guidelines such a finding would be relevant at Step 1 (as in the Assault guidelines); in others it would be relevant at Step 2 as an aggravating factor (as in some Sexual Offences guidelines). In its recent decision in *Chall*[[62]](#footnote-62)the Court of Appeal discussed whether the assertions about psychological harm in a VPS should be supported by expert evidence, and it decided that in the normal run of cases it should be for the judge to determine, on the basis of observing the victim during the trial, whether the effect on the victim amounted to ‘severe psychological harm’. Holroyde LJ held that the judge should not find that the psychological harm was ‘severe’, or ‘serious in the context of the offence’, ‘unless satisfied that it is correct’.

Three points may be made here. Firstly, it would have been preferable if Holroyde LJ had used the ‘beyond reasonable doubt’ formulation rather than the looser ‘satisfied.’[[63]](#footnote-63) Secondly, can we have confidence in the ability of judges to assess whether the victim has suffered ‘severe psychological harm’ as a result of the offence, simply on the basis of observing the victim give evidence in court? This assumes that there was a trial, rather than a guilty plea. The pragmatic view is that to require expert evidence in every case where an issue such as ‘severe psychological harm’ arises ‘would be time-consuming, costly, and perhaps in some cases fruitless’[[64]](#footnote-64) In principle, however, there may be an argument for saying that allowing the judge to make this ruling on the basis of observing the victim at trial is a shaky foundation for a ruling that may make a difference of years on the sentence. In some respects this reliance on the judge’s ability to take the measure of a victim raises a similar question to the finding that an offender is ‘dangerous’ for the purposes of the indeterminate or extended sentence provisions. All the research that has been carried out on predictions of dangerousness, even by clinicians, suggests that predictions are wrong in at least half of all cases.[[65]](#footnote-65) The coalition government of 2010 stated that ‘the limitations of our ability to predict future serious offending … [call] into question the whole basis on which offenders are sentenced to’ indeterminate sentences.

Thirdly, as we saw earlier, there is a strong argument that aggravating factors should be proved by the prosecution beyond reasonable doubt, and the same line of reasoning would support a requirement that the judge should be satisfied beyond reasonable doubt when deciding that a ‘harm’ factor within Step 1 of a guideline is made out. Certainly, in those cases where ‘severe psychological harm’ or the equivalent is a possible aggravating factor at Step 2 of an offence guideline, we have sought to argue that the judge should be satisfied beyond reasonable doubt.

**FACT DETERMINATION BY JUDGES**

In this article we have sought to follow through on David Thomas’ insights on the importance of establishing the factual basis for sentencing and on the importance of adhering to what he termed ‘proper’ evidential and procedural principles. These insights are as valid now, in an era dominated by sentencing guidelines, as they were in the 1970s. However, we have demonstrated that the Sentencing Council’s guidelines contain hardly any guidance on burdens and standards of proof, or on the relevance of other evidential principles, or on procedures for resolving factual disputes relevant to sentencing. Most of the available guidance on these matters stems from decisions of the Court of Appeal. Building on major judgments in cases such as *Robinson*,[[66]](#footnote-66) *Lester*,[[67]](#footnote-67) *Newton*,[[68]](#footnote-68) and *Guppy and Marsh,*[[69]](#footnote-69) the courts have developed judicial principles that substantially mirror the principles for which Thomas argued.

In brief, it should now be clear that the court must be satisfied beyond reasonable doubt of the existence of the harm and culpability factors that it takes into account at Step 1 of an offence guideline, and it should also be satisfied beyond reasonable doubt of the existence of the aggravating and mitigating factors it takes into account at Step 2 of an offence guideline, except in relation to matters of ‘extraneous mitigation’ that are purely personal and not connected to the seriousness of the offence, which the defence bears the burden of proving on a balance of probabilities. In order to determine these matters, the court will (under certain conditions) hold a *Newton* hearing, at which evidence is given on sentence-related matters of dispute between prosecution and defence, and after which the judge must decide whether issues have been proved to the required standard. As we have seen, the statutory aggravating factors require the court to treat the offence as being more serious and to make a statement in open court as to its effect. If disputed by the defence, this matter will usually require a *Newton* hearing and hence proof to the criminal standard. No relevant distinction can be drawn between statutory and non-statutory aggravating factors in this context.

Judges receive little training in the assessment and determination of facts, yet this is their task on many occasions. In the context of a summing up it is often assumed that it is the legal directions that will require most preparation by the judge, whereas the position now is that standard legal directions are readily available from the *Crown Court Compendium* and can usually be adapted without much difficulty to suit the circumstances of the instant case. It is the assimilation and coherent exposition of disputed facts to assist the jury which is often more demanding of judicial time and thought than the legal directions. At the sentencing stage, as we demonstrated earlier, where one of the various forms of hostility against V is treated as an aggravating factor in sentencing, it is the judge who must undertake the factual determination. The same applies whenever a *Newton* hearing is held. Despite the burdens of fact determination placed on the sentencing judge, the Court of Appeal has said that it will not interfere with a judge’s finding of facts following a *Newton* hearing where the judge has properly directed himself or herself, unless it is satisfied that no reasonable tribunal could have made that finding of fact.[[70]](#footnote-70) If the defence case is rejected when the defendant has given evidence, a successful appeal to the Court of Appeal on the basis that the judge reached the wrong view will be ‘rare indeed.’[[71]](#footnote-71) More generally, the Court is reluctant to interfere with judicial fact-finding on sentence, especially where the judge has presided over the trial.[[72]](#footnote-72) In the leading case of *King*[[73]](#footnote-73) the Court said that where there was more than one way in which the jury could have reached the verdict that it did the judge was under a duty to make his or her own assessment of the facts, applying the criminal standard of proof. Only if the judge was not sure which of two or more competing versions of the facts was the correct one was the judge obliged to pass sentence on the basis which was most favourable to D.

It is critical that these requirements of proof and procedure are not overlooked. While the Israeli sentencing system places the evidentiary requirements on a statutory footing,[[74]](#footnote-74) our preference would be to incorporate them into the guideline system by (i) drafting a general guideline on matters of proof and procedure, and (ii) using the language of ‘beyond reasonable doubt’ and ‘balance of probabilities’ when drafting Step One and Step Two of all offence guidelines. However, the most contentious questions of proof arise in relation to aggravating and mitigating factors, and we conclude with the example of the operation of Schedule 21 of the Criminal Justice Act 2003. The Court of Appeal in *Davies*[[75]](#footnote-75) held that if the presence of a particular feature was in issue which, if established, would mean that the murder would attract a 30-year rather than a 15-year minimum term starting point, then that feature must be proved to the criminal standard. It is hard to find other similar appellate statements of principle; the more usual line taken by the Court is to stress the importance of flexibility and judicial discretion and the need to avoid a ‘mechanistic or arithmetical approach’[[76]](#footnote-76) when applying Schedule 21. The applicable Practice Direction, although purporting to give ‘practical guidance as to the procedure for passing a mandatory life sentence’ does not reflect the decision in *Davies*, but states simply that the court must ‘take account’ of relevant aggravating and mitigating factors.[[77]](#footnote-77) This, then, is further testimony to the underdeveloped state of the law relating to fact determination by judges at sentencing, and, we submit, to the need for a general guideline on sentencing procedure and evidence.

1. DA Thomas, ‘Establishing a factual basis for sentencing’ [1970] Crim LR 80, at p.80 [↑](#footnote-ref-1)
2. Thomas at the same time argued that the problems he identified should be addressed by a reconstruction of broad substantive criminal offences towards narrower and more precise ones. [↑](#footnote-ref-2)
3. Thomas (1970), p.86 [↑](#footnote-ref-3)
4. Thomas (1970), p.90 [↑](#footnote-ref-4)
5. DA Thomas, *Principles of Sentencing*, 1st ed., 1970; 2nd ed, 1979, Heinemann, Chap 12: ‘The Procedure of Sentencing’ [↑](#footnote-ref-5)
6. (1975) 63 Cr App R 144 [↑](#footnote-ref-6)
7. [1982] 4 Cr App R (S) 388 [↑](#footnote-ref-7)
8. [2004] EWCA Crim 2256 [↑](#footnote-ref-8)
9. [2013] EWCA Crim 467 [↑](#footnote-ref-9)
10. CPD VII, Sentencing B1 – B27; see further HH Judge R Denyer, *Case Management in Criminal Trials*, 2nd ed, 2012, Hart Publishing [↑](#footnote-ref-10)
11. Thomas (1979), 371, citing *Robinson* (1969) 53 Cr. App. R. 314 [↑](#footnote-ref-11)
12. *Canavan* [1998] 1 Cr. App. R. (S) 243, at p. 246. Where the defendant has admitted other offences and asked the court to take them into consideration, clearly the *Canavan* principle does not apply. [↑](#footnote-ref-12)
13. J Shapland, *Between Conviction and Sentence*, 1981, pp.143-144 [↑](#footnote-ref-13)
14. P Darbyshire, *Sitting in Judgment: The Working Lives of Judges*, 2011, Hart Publishing, Chap 9, especially pp.206-210 [↑](#footnote-ref-14)
15. J Jacobson, G Hunter and A Kirby, *Inside Crown Court*, 2016, Policy Press, Chapter 3, especially p.55-60 [↑](#footnote-ref-15)
16. *X v. United Kingdom* (1972) 2 Digest 766; see, more recently, *Natsvlishvili v. Georgia* App no. 9043/05, judgment of 25 June 2013. [↑](#footnote-ref-16)
17. American Law Institute, *Model Penal Code: Sentencing* (Official Statutory Text, 2017), section 10.06(4). [↑](#footnote-ref-17)
18. *Lashari* [2011] 1 Cr. App. R. (S) 439, at [24]. [↑](#footnote-ref-18)
19. *Guppy and Marsh* (1995) 16 Cr. App. R. (S) 25, at p. 32. [↑](#footnote-ref-19)
20. *Guppy and Marsh* (1995) 16 Cr. App. R. (S) 25, at p. 32. [↑](#footnote-ref-20)
21. [2017] EWCA Crim 137 [↑](#footnote-ref-21)
22. [2011] 1 Cr. App. R. (S) 439 [↑](#footnote-ref-22)
23. Cf. *Hussain* [2019] 2 Cr. App. R. (S.) 52 on *Newton* hearings and minimum sentence for firearms possession. [↑](#footnote-ref-23)
24. By implication, a sentence indication under the *Goodyear* [2005] EWCA Crim 888 principles should not normally be given without an agreed written basis of plea: CPD Sentencing C3 [↑](#footnote-ref-24)
25. The judge’s ‘self-directions should reflect the relevant directions he would have given to the jury’, according to Lord Judge CJ in *Underwood*, at para 9 [↑](#footnote-ref-25)
26. Sentencing Council, Definitive Guideline, *Reduction in Sentence for a Guilty Plea* (2017), para F2 [↑](#footnote-ref-26)
27. See *Flack* [2013] EWCA Crim 115 [↑](#footnote-ref-27)
28. CPD Sentencing B10 [↑](#footnote-ref-28)
29. *Underwood*, at para 10(e) [↑](#footnote-ref-29)
30. ‘An important step forward in procedural fairness’: A Ashworth, *Sentencing and Criminal Justice* (2015), p.428 [↑](#footnote-ref-30)
31. Darbyshire (2011) , Chap 9, especially pp.179-185 and p.208: [↑](#footnote-ref-31)
32. Though see the comment of Lord Judge CJ in *Underwood*, at para 7, that ‘where a late plea of guilty is tendered, unless it is impracticable for some exceptional reason, the hearing should proceed immediately’. [↑](#footnote-ref-32)
33. Sentencing Council, Definitive Guideline, *Reduction in Sentence for a Guilty Plea* (2017), para B [↑](#footnote-ref-33)
34. See further D Wolchover and A Heaton-Armstrong, ‘Dumping *Newton*’ (2012) 176 *Criminal law & Justice* 334-5, 347-9 & 367-8; Lyndon Harris, ‘*Newton* hearings: A procedure stacked against the defence’ (2013) 177 *Criminal Law & Justice* 423-4 [↑](#footnote-ref-34)
35. Jacobson et al (2016), p.56 [↑](#footnote-ref-35)
36. M M Feeley, *The Process is the Punishment* (1992), p.197 [↑](#footnote-ref-36)
37. Jacobson et al (2016), p.54 [↑](#footnote-ref-37)
38. [2016] EWCA Crim 801 (dealing with the appellant Beaman); see also *Lashari,* above, n. 22. [↑](#footnote-ref-38)
39. *Dawson* [2017] EWCA Crim 2244; *Hussain* [2019] EWCA Crim 362; *Nancarrow* [2019] EWCA Crim 470 [↑](#footnote-ref-39)
40. See further M Wasik, ‘Time to repeal the firearms minimum sentence provision’ [2017] 3 Crim LR 203-212 [↑](#footnote-ref-40)
41. Sentencing Council, *General Guideline: Overarching Principles* (2019). [↑](#footnote-ref-41)
42. By contrast the Sentencing Council’s consultation guideline on *Firearms Offences* specifically endorses the use of a *Newton* hearing to determine any dispute as to the presence of ‘exceptional circumstances’. [↑](#footnote-ref-42)
43. Leaving on one side the complication arising from the decision in *O’Leary* [2015] EWCA Crim 1306 [↑](#footnote-ref-43)
44. [2019] EWHC 2015 (Admin) [↑](#footnote-ref-44)
45. Though see *Ardic, Tekagac and Onel* [2019] EWCA Crim 1836, where the Ds were convicted after a trial of throwing corrosive fluid with intent (OAPA 1861, s.29), and long custodial sentences were imposed. In his sentencing remarks the judge said that ‘it was very likely that homophobia underlay the offences, at least in part’, but no *Newton* hearing was held and no enhancement under s.146 was made because the judge (who had presided over the trial), said that it was not possible to be sure which of the Ds had made homophobic comments, or whether the offences were motivated by homophobia. The Court of Appeal made no criticism of the judge’s approach. [↑](#footnote-ref-45)
46. See Law Commission, *Hate Crime; Should the Current Offences be Extended?* Law Com No 348 2014, Cm 8865. A further, and wider, review by the Law Commission started in 2019. [↑](#footnote-ref-46)
47. Mark Austin Walters, Abeena Owusu-Bempah and Susann Widelitzka, ‘Hate crime and the ‘Justice Gap’: the case for law reform [2018] Crim LR 961, at p.985 [↑](#footnote-ref-47)
48. Ibid, p.975; also Abeena Owusu-Bempah, Mark Austin Walters, and Susann Widelitzka, ‘Racially and religiously aggravated offences: ‘God’s gift to the defence?’ [2019] Crim LR 463 [↑](#footnote-ref-48)
49. CPS, *Hate Crime Report 2018-2019* [↑](#footnote-ref-49)
50. Assaults on Emergency Workers (Offences) Act 2018, s.2 and s.3 [↑](#footnote-ref-50)
51. Counter-Terrorism Act 2008, s.30 [↑](#footnote-ref-51)
52. Misuse of Drugs Act 1971, s.4A; Psychoactive Substances Act 2016, s.6 [↑](#footnote-ref-52)
53. Thomas (1979), p.372 [↑](#footnote-ref-53)
54. SGC, *Overarching Principles: Seriousness* (2004), paras 1.38 – 1.39. There is no mention of the issue of local prevalence, or community impact evidence, in the Sentencing Council’s *General Guideline: Overarching Principles* (2019). [↑](#footnote-ref-54)
55. E.g. *Stockdale* [2005] EWCA Crim 1582, *Tatomir and Velicor* [2015] EWCA Crim 2167. [↑](#footnote-ref-55)
56. [2016] EWCA Crim 552, at [11]. [↑](#footnote-ref-56)
57. E.g. *Jeffrey and Carroll* [2018] EWCA Crim 2135, at [21]; *Ali (Liaquat)* [2018] EWCA Crim 2359 at [15]. [↑](#footnote-ref-57)
58. Practice Direction [1966] 1 WLR 1184 [↑](#footnote-ref-58)
59. See now CPD II 8A: Defendant’s Record [↑](#footnote-ref-59)
60. [2014] EWCA Crim 2409 [↑](#footnote-ref-60)
61. [2013] EWCA Crim 323, at para. 9c [↑](#footnote-ref-61)
62. [2019] EWCA Crim 865 [↑](#footnote-ref-62)
63. As, for example, in *King* [2017] 2 Cr. App. R. (S.) 25, at [31] and [37]. [↑](#footnote-ref-63)
64. [2019] Crim LR 1073, commentary by Lyndon Harris at p.1074. [↑](#footnote-ref-64)
65. See the summary in Ashworth, *Sentencing and Criminal Justice* (6th ed., 2015), 245-246. [↑](#footnote-ref-65)
66. (1969) 53 Cr App R 314, above, n. 11. [↑](#footnote-ref-66)
67. (1975) 63 Cr App R 144, above, n. 6. [↑](#footnote-ref-67)
68. (1982) 4 Cr App R (S) 388, above, n.7. [↑](#footnote-ref-68)
69. (1995) 16 Cr App R (S) 25, above n. 21. [↑](#footnote-ref-69)
70. *Cairns* [2013] EWCA Crim 467, above, n.9. [↑](#footnote-ref-70)
71. *Ahmed* (1984) 6 Cr App R (S) 391 [↑](#footnote-ref-71)
72. Eg *Morris* [2019] EWCA Crim 1367 (in relation to D’s level of involvement in drug supply) and *Dixon-Nash* [2019] EWCA Crim 1173 (in relation to the respective roles played by several Ds in a case of conspiracy to transfer firearms) [↑](#footnote-ref-72)
73. [2017] 2 Cr App R (S) 25 [↑](#footnote-ref-73)
74. J.V. Roberts and O. Gazal, ‘Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2013’, (2013) 46 *Israel L.R.* 455, referring to s. 40j(c) of the statute. [↑](#footnote-ref-74)
75. [2008] EWCA Crim 1055; [2008] 9 Crim LR 733, with commentary by David Thomas [↑](#footnote-ref-75)
76. See, for example, *A-G’s Ref (No 12 of 2008)* [2008] EWCA Crim 1060 [↑](#footnote-ref-76)
77. CPD VII Sentencing M: Mandatory Life Sentences, at M12, simply repeating the terms of sched 21, para 8 [↑](#footnote-ref-77)