"Court in the Act"

The Youth Court; The Children, Young Persons, and their Families Act 1989; And topical issues arising for NZ Youth Justice practitioners

A newsletter co-ordinated by the Principal Youth Court Judge for the Youth Justice community.
Contributions, feedback and letters to the Editor are not only acceptable, but encouraged.

Youth Court Website: http://www.courts.govt.nz/youth/ No.14, May 2005

"... a substantial body of longitudinal research consistently points to a very small group of males who display high rates of antisocial behaviour across time and in diverse situations. The professional nomenclature may change but their faces remain the same as they drift through successive systems aimed at curbing their deviance: schools, juvenile justice programs, psychiatric treatment centres, and prisons."

T E Moffitt, 1993; "*Adolescence-limited and life-cycle persistent antisocial behaviour: A developmental taxonomy* "

In this Issue … we concentrate on serious young offenders ...

[Press the heading for hyperlink access]

1. The Purpose of "Court in the Act"

"COURT In The Act" was originally designed as a newsletter for Youth Court Judges. However, it soon became obvious that the wider youth justice community in New Zealand was interested in much of the material that was being circulated. Also there is no national youth justice publication as to current issues, relevant cases, and important overseas developments.

Therefore, I will continue to produce "Court In The Act" – but simply as a foretaste of a more organised and regular publication to come. Until the arrival of a new publication, my office will act as a "clearing house" for all matters of interest regarding youth justice. I am happy to send out any items of national interest that people want to send me.

We have also collated a significant database of those receiving "Court In The Act". If you know of others who should be on the list please contact my PA, Jo Petrie at: Jo.Petrie@justice.govt.nz

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2. Hastings Blue Light Youth Driver Education Programme
A programme to emulate in your region?

The following information was provided by Youth Aid Constables Su Robinson and Sue Guy who have helped pioneer a driver education program for young traffic offenders. It has been very successful, is rated very highly by those who attend and was recently the subject of a TV3 documentary. Hawkes Bay Youth Court Judge, His Honour Judge Richard Watson also plays a part in the program.

I have set out all the relevant details about the program in the hope that it might provoke other areas to develop a similar program. Is this something that your local Youth Offending Team could consider?

What is the Program?
The program is a Police initiated driver education program run under Blue Light as an umbrella for funding and promotion of pro-active Police/Youth relations.

It is based on educating youth to become licensed in the appropriate law abiding manner, better informed with defensive driving skills, more aware of their own mortality and that of others on the roads.

The program revolves around introducing speakers who offer deterrence and advice from their own experiences to try to break the peer pressure that youth are often subjected to and their own ideals about themselves and their driving abilities.

We make no excuse for the fact that it is direct and hard hitting dealing with issues and facts that are often brushed over - this program is a reality check.

Who is the program for?
The program is directed at youth who come to the notice of Police for a range of driving offences, including EBA, careless and dangerous driving, speeding and on some occasions Unlawful taking of vehicles.

The youth are nominated by youth aid officers and can be placed on the program at their discretion by:

- A Police diversion or contract – more for 1st time lower end offending
- An FGC plan as a possibility to remain out of youth court with voluntary disqualification
- A youth court directed FGC and subsequent court disqualification

Where there is a doubt that the youth may not attend the program or will re-offend and due to the statute of limitations it is probable that an information will be laid in youth court following FGC.

We are also in liaison with the fines officer at our local District Court who nominates certain young people under 20 years old who are likely to have fines remitted in the District Court due to lack of sufficient income. They have to fill out a statement of means to the court, and then once they have attended the program the Judge makes the final decision on remittance (these are a minority group on the course and is a “one off” opportunity).

What are its aims?
To reduce re-offending regarding traffic offences by educating youth who have little or no driving experience or skills and those who recidivously offend in driving matters.

To have youth on our roads driving with a legal appropriate licence and encourage and remain in contact to take the next steps in their licence until they become fully licensed.

Introduce to the youth to a diverse range of speakers and scenarios that they can relate to that deliver a reality check of the results of naive and stupid driving e.g. honest and forthright speeches from a range of professionals who come into contact with offenders and victims of driving offences and where this behaviour can lead to, the ultimate being a trip to the funeral parlour. Our program consists of the following:

- A youth who drove intoxicated through a red light into the path of a truck, killing 2 of his mates
- The mother of one of the youths killed in this accident
- Mock crash scene with fire service, ambulance & Police
- Intensive care specialist
- A youth who is now brain damaged after getting in a car with a drunk driver
- A Hastings youth court Judge who speaks of the realities of court and prison

- A prison officer from the HB regional prison expands on the realities of prison
- A trip to the local funeral parlour where the youth experience the smells and sadness of the worst results.
- Defensive driving and learners licensing tuition
- Insurance debt collector explains how long they can pursue debts
- A young man who lost his eyes sight after driving into a brick wall whilst intoxicated speaks of what it is like to never see your own children
- A speaker from "drug arm" reiterates the down side of drugs especially behind the wheel of a car.

How long does the program last and how are youth referred to it?
The program is run over 2 days on a weekend to accommodate youth who are still at school/course or working. The program runs from 9am – 4pm both days

Youth are referred by youth aid officers in Hastings, Napier & Waipukurau and in some cases the District Court.

Due to the programs success and media coverage we have included 2 x youth from other districts on request of parents, they have sent their children at their own expense including overnight accommodation.

How is it funded?
We approached Road safe Hawke's Bay and applied for funding last year for 3 programs at 20 youth per program, after completing a presentation to the committee on top of our application we were successful in receiving the full amount (approx $5,000)

Road safe Hawke's Bay also funded an independent research company to evaluate the youth attending these programs with a 'before & after' view to the programs. The results were beyond our expectations and seemed to be having the effect that we were aiming for. This being the case after further application and presentation we have been secured the funding for a further 3 programs this year being in March, July & October.

At the end of this year we will have put 120 youth through the program and be assured that we have 120 youth who are licensed in some form with a better driving ability and awareness on our roads.

We have been supplied by Road safe Hawke's Bay a list of the equivalent counterparts for applications to be made to in all other areas of NZ, these will be part of a package we intend to distribute at the next Blue Light AGM.

Why did we set the progam up and what do we think are its gains?
The program was set up by two Hastings youth aid Constable's, Su Robinson & Sue Guy who were frustrated in seeing repeat offending in this area and serious driving issues that had no form of follow up or encouragement to change, other than disqualification and the obligatory fines through traffic tickets. In a lot of cases this seemed to lead to a cyclic effect of repeat disqualifications and a build up of fines which could not be paid.

It initially began by taking youth that came to our notice to the 'head injury' ward in the Hastings hospital and then to the Hastings Fire Station as a bit of a wake up call. This was not only time consuming but limited in the youth we were reaching.

As well as this on separate occasions during the year we would hold 2 day licensing courses for youth who we had identified as needing to sit their learners licence and who needed intense tuition due to a mixture of learning difficulties, lack of motivation from themselves and lack of guidance from parents.

The combination of each with added recourses as defined in the program was developed and the funding applied for through Blue Light.

The gains of this program have certainly been beyond our expectations which have both been evaluated via our own evaluations and that of the research undertaken by Cinta Research.

A typical response before the program from the youth was: "it will be boring listening to a bunch of cops lecture us".

To the example of a response after "I've learnt a lot on this course and feel I will be a better driver for it".

Overall we feel we have better educated, more aware, licence holding youth on our roads after this program and although we know we will not change the driving and attitude of every youth who attends the program, the percentage we do reach may save some lives in the future. Click to go back to contents

3. Special Feature 1:

What we know about Youth Offenders

Ground breaking New Zealand research through Canterbury and Otago Universities, arising from two longitudinal studies (of large groups of people born in the 1970s), has led the world in our understanding of youth offenders. Since the early to mid 1990s it has been generally accepted that youth offenders fall into ***two categories****:-*

1. *A very large group of young offenders, up to 80%, who may commit as little as 20% of all offences committed by young people. They are variously described in the literature as "adolescent limited offenders" or "desisters".*

   They tend to stop offending with minimal intervention, provided it is quick, efficient, emphasises accountability, and is community based. An effective Police alternative action programme will often be enough to stop "adolescent limited" offenders in their tracks. In fact, New Zealand leads the world in its alternative action/community diversion rates for young offenders.

2. *A second group is perhaps 5% to 15% of youth offenders who may commit up to 50% to 60% of total offending. For example, in Invercargill, 11% of youth offenders are responsible for 48% of youth offending.*
   The literature variously describes them as "life course", "early onset", chronic, long term serious offenders. The "… persisters start offending young – before the age of 14 and as early as 10 – and start committing serious crimes fairly early in their careers. While this is bad enough, what is worse is that they keep offending well into their 20s and beyond, long after 80% of young offenders have given it up as a bad job" (K McLaren, "Tough is Not Enough: Getting smart about youth crime"; Ministry of Youth Affairs, June 2000).
   This group of persistent offenders usually come to the attention of a variety of authorities – health, education, Police, at an early age and need to be properly identified so that they and their families can be directed into appropriate interventions as soon as possible.

If we look more closely at the 5% to 10% of serious, life course, hardcore youth offenders we can observe the following common characteristics:-

1. *85% are male.*
2. *70-80% have a drug and/or alcohol problem, and a significant number are drug dependent/addicted.*
3. *70% are not engaged with school – most are not even enrolled at a secondary school. Non-enrolment, rather than truancy, is the problem.*
4. *Most experience family dysfunction and disadvantage; and most lack positive male role models.*
5. *Many have some form of borderline psychological disorder, and display little remorse, let alone any victim empathy*
6. *At least 50% are Maori and in some Youth Courts; in areas of high Maori population the Maori appearance rate is 90%. This figure is a particular challenge to the youth justice system, and to all working with young offenders.*
7. *Many have a history of abuse and neglect, and previous involvement with Child, Youth and Family Services.*

Some recent, interesting research from Harvard University has to some degree challenged the conventional analysis of "adolescent limited offenders" as opposed to "early onset, serious, life course offenders".

That research is summarised below by Rhonda Thompson the Research Counsel for the Principal Youth Court Judge. I then set out a brief summary response from His Honour Judge Chris Harding. I think you will find the "debate" thought provoking.

A General Age-Graded Theory of Crime: Lessons Learned and the Future of Life-Course Criminology
(R J Sampson, Harvard University and J H Laub, University of Maryland – Prepared for "Advances in Criminological Theory (Vol 13, 2004): Testing Integrated Development/Life Course Theories of Offending", edited by D Farrington)

FLYING in the face of theories that seek to divide offenders into "persistent life-course" and "adolescent-limited offenders", Sampson and Laub now posit an age-graded theory of informal social control. Their theory argues that persistence in crime is explained by a lack of social control, few structured routine activities or purposeful human agency. People are more likely to commit crime when their links to society are cut – perhaps because of a dysfunctional family or unemployment – and more likely to desist from crime when they have structure and social control through strong marriages, jobs and successful military service. Sampson and Laub argue that a multitude of intervening factors which may strengthen or weaken these social bonds come into play in the late teenage years making it impossible to predict whether a child will become a life course criminal.

This theory is the result of data from a long-forgotten study of juvenile delinquents conducted in the 1940s and found gathering dust in the basement of Harvard Law School. The original study of 500 male delinquents and 500 male non-delinquents taken at ages 14, 25 and 32 was updated using death record checks, criminal record checks and personal interviews with a sample of 52 of the original men. This gave a 50 year window on criminal careers – possibly the longest longitudinal study to date in criminology.

The study found that social control via family, school and peers had the greatest impact on delinquency. On the home front, low levels of parental supervision, the combination of erratic, threatening and harsh discipline, and weak parental attachment encouraged delinquency but school attachment had large negative associations with delinquency independent of family processes. Peers and poverty were less important factors in the equation than family and school attachment and sibling influences were found to be insignificant.

Salient life events and socialisation experiences can counteract, to some extent, the influence of negative early life experiences. The study found that childhood prognoses predicting levels of crime were reasonably accurate up until the participant's twenties but that they did not yield distinct groupings that were valid prospectively over the life course. Sampson and Laub deem the notion that divergent adult outcomes can be ascribed to various childhood experiences as a "seductive notion" but describe such models as "woefully inadequate".

The authors found no evidence that distinct groups could be identified amongst the study participants and emphasised that choice was an important factor to be considered in response to:
1. New situations that knife off the past from the present;
2. New situations that provide both supervision and monitoring as well as new opportunities of social support and growth;
3. New situations that change and structure routine activities; and
4. New situations that provide the opportunity for identity transformation.

Social ties embedded in adult transitions such as marriage and job stability could help explain variations in crime unaccounted for by childhood propensities but some participants found it impossible to choose to desist from crime. For them, crime was an addiction – seductive, alluring and hard to give up despite its clear costs. As age increased, the participants did begin to give up crime but even in old age, the men found giving up crime a daily struggle.

Thus, Sampson and Laub argue that choice and institutions are important for understanding crime over the life course. Involvement in institutions such as marriage, work and the military reorders short-term situational inducements to crime and, over time, redirects long-term commitments to conformity. These factors, along with choice, make the prediction of life course criminals difficult and a foretold life-course persister or career criminal a myth. Theories of crime resulting from deprivation were also

found to be baseless as were those that see institutional turning points as merely exogenous events that act on individuals.

Sampson and Laub conclude that studying choice and life turning points along with support structures simultaneously may allow the possibility of discovering common themes in the ways that turning points across the adult life course align with individual decisions.

A response from Judge Chris Harding, Administrative Youth Court Judge for the Bay of Plenty, Rotorua, Taupö area.

His Honour Judge Chris Harding, leads the Youth Court work in relation to serious offending. In response to the paper by Simpson and Laub, he writes as follows:-

"I have always thought that the division of offenders into "life course, persisters, serious offenders" and "adolescent limited / short term, desisters", was a little too neat to be real. I would have thought that those are simply potentially useful description of two ends of the continuum. As I read the Sampson Laub paper, a number of things seem to come out:-

1. *Persistence in crime is explained by lack of social controls, few structured routine activities, and purposeful human agencies.*
2. *Desistance from crimes is explained by confluence of social controls, structured routine activities, and purposeful human agencies.*
3. *The general organising principle is that crime is more likely to occur when an individual's bond to society is attenuated.*
4. *The strongest and most consistent effects on "delinquency" in adolescence are connected to family, school and peers.*
5. *Family factors which are strong predictors of delinquency include:*
   - *(a) Low levels of parental supervision.*
   - *(b) The combination of erratic threatening and harsh discipline.*
   - *(c) Weak parental attachment.*
6. *Attachment to delinquent peers has a significant positive effect on delinquency.*
7. *Sibling influences are insignificant.*
8. *Family and school processes are more important in the causal chain than peers.*
9. *The concept of "cumulative disadvantage" is referred to and seems entirely understandable.*
10. *As people become older different influences become important, but from the Youth Court perspective, influences such as marital attachment, job instability, military involvement and the like, are matters for <u>future</u> rather than <u>present</u> consideration.*
11. *Successful cessation from crime occurs when the causes are disrupted - a central element being the "knifing off" of individual offenders from their immediate environment and offering them new script for the future.*
12. *Another component in the process is "structured role stability" across various life domains.*
13. *Neighbourhood change can be important.*
14. *Persistent offenders tend to experience considerable residential instability, marital instability, job instability, failure in the school and the military, and relatively long periods of incarceration.*
15. *Without permanent addresses, steady jobs, spouses, children and other rooted forms of life, crime and deviance is an unsurprising result.*
16. *The classic pattern is that crime declines with age.*
17. *Therefore some "adult life course" offenders will start late or refrain from crime altogether whereas some "innocence" will start early and continue.*
18. *A substantial portion of the offending population will display a zig-zag pattern of offending over long time periods.*

From my perspective, the only real use of risk and needs assessments, is to identify those things which can be demonstrated to cause likely involvement with crime at the stage that we are concerned about, and address them.

The sorts of societal family and schooling issues which are referred to above we already know about.

I do not see the research as being all that contentious, although I must confess to not having understood the earlier position as being as definitively put forward as these people seem to think it is."

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Editors Note: Perhaps the real worth of the Harvard study is the reminder that not all serious young offenders necessarily become serious adult offenders. There are many potential intervening factors that may divert them from this course. Nothing is inevitable. As far as the Youth Court is concerned, which deals with young people before these "change" events can intervene, it is still vital that potential life course persistent offenders are identified at the earliest possible stage in the proceedings and are given Rolls Royce interventions. As far as possible they should be separated off from the "adolescent limited" offenders (mixing can harm both groups) and they should receive good monitoring, oversight and effective interventions, working with their siblings and family, to eliminate re-offending.

4. Rethinking Crime and Punishment: An English perspective on youth offending

"Which is best, to pay for the policeman or the schoolmaster – the prison or the school?" (extract from The Times 1867). RCP Report, pp 42-46.

RESEARCH has highlighted the importance of early intervention in combating youth offending. Most youth residence inmates have a "heartbreaking history of personal misery, professional neglect and lost opportunities". Research by Rethinking Crime and Punishment ("RCP") – a £3 million pound, 4 year study in the UK – stressed that more should be done to deal with abuse and neglect and prevent at risk children from being drawn into crime. The RCP initiative proposed parenting education, family group conferencing and family support and advice centres as a means of tackling the problem. In particular, a programme to assist parents of teenagers was found to be useful.

The research also highlighted the importance of education in dealing with youth offending. Problems such as underachievement, truancy, the impact of custodial sentences and the efficacy of school organisation have complex and negative interrelationships but are each independent risk factors. Surveys showed most people thought that teachers were more important in crime prevention than police, courts or custody and that better school discipline and more constructive activities for young people were the most efficient way of dealing with crime. Young people identified tackling bullying and truancy as of key importance. Most thought that suspending or excluding bullies was ineffective as it merely "gave them a holiday".

The research also assessed the usefulness of official court processes for dealing with young offenders and found strengths in the more relaxed child centred approach of the Scottish system where a panel of lay members consider whether to impose compulsory measures. Research also highlighted the usefulness of proper evaluation and dissemination of the results of interventions, greater involvement of young people in the process, greater accountability of young people although responses should be no more punitive and the importance of restorative justice. Restorative justice techniques are growing in popularity in Europe where, in some jurisdictions, the age of criminal responsibility is as high as 15. The RCP recommended that decisions about young offenders should be made in a forum that prioritises problem solving over punishment and makes appropriate use of measures to make amends to victims.

The RCP concluded that too many young people were being locked up in the UK and the NCH, a child welfare organisation, described the situation as: "a criminal waste of money and an appalling waste of young lives". Alternatives such as Finland's specialised psychiatric units and the use of community-based penalties were seen as useful. The RCP recommended that prison alternatives should be developed that were sufficiently intensive to assist often highly damaged young people and that sought to genuinely involve ordinary members of the community in contributing practical solutions.

Summarised by Rhonda Thompson, Research Counsel for the Principal Youth Court Judge.

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5. Special Feature 2:

Sentencing Young Offenders – How and why their young age makes a difference

INTRODUCTION

Within a day of each other in early 2005, the New Zealand Court of Appeal and the United States Supreme Court released significant decisions in the area of youth justice. In New Zealand, the case of *R v Slade and Hamilton*[1] set aside the stipulation of a 17-year non-parole period in respect of Slade, a convicted murderer. The Court of Appeal held that in light of Slade's age (he was 16 at the time of the murder) and personal circumstances (including a background of abuse) a 17-year non-parole period was "manifestly unjust".[2]

In the United States case of *Roper v Simmons*,[3] the majority of the Supreme Court held that the death penalty is a disproportionate punishment for young offenders under 18 years of age. In their reasoning the Supreme Court recognised significant differences between youth and adult offenders. Among other things, the Court acknowledged that young people exhibit less maturity of judgement, are more vulnerable or susceptible to peer pressure, and tend to have an undeveloped sense of responsibility.[4]

Just a few weeks earlier the New Zealand High Court dealt with the applicability of youth justice principles in the adult tariff courts: see *X v Police* (High Court, Auckland, CRI-2004-404-374, 7 February 2005 (judgment) 11 February 2005 (reasons), Heath, Courtney JJ).

It is remarkable that three important decisions, all touching on the same general issue, were given in such a short space of time. As there has been so much interest in the issue, I set out detailed case notes on each of the three decisions.

1. X v New Zealand Police
(High Court, Auckland CRI 2004-404-374 7 February 2005 (judgment) 11 February 2005 (reasons), Heath, Courtney JJ)

Issue

Whether youth justice principles (set out in s208 of the Children, Young Persons and Their Families Act 1989 ("**CYP Act**")) apply in an adult tariff Court, and if so, to what extent should those principles be taken into account?

Facts

- X was charged with several counts of unlawful sexual connection and indecent assault with two young males (one under the age of 12 and one aged between 12-16).
- X was aged between 14 and 15 at the time of the particular offending with which he was charged. He came before the Youth Court at the age of 17.

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[1] *R v Slade and Hamilton* (28 February 2005) CA245/04; CA266/04.
[2] Sentencing Act 2002, s104. See *R v Slade and Hamilton*, above n 1, para 53.
[3] *Donald P Roper, Superintendent Potosi Correctional Center, Petitioner v Christopher Simmons* (1 March 2005) 543 US __ (unreported) ("*Simmons*").
[4] *Simmons*, above n 3, 15-16 per Justice Kennedy, delivering the judgment of the Court.

- X admitted the charges in the Youth Court. The Court entered a conviction on each charge and ordered that X be transferred to the District Court for sentence under s 283(o) CYP Act.[5]
- The District Court sentenced X to three years imprisonment on each of the sexual violation charges, to be served concurrently.
- X appealed against his sentence on the ground that the sentence imposed by the District Court Judge was manifestly excessive, inappropriate, and did not take into account youth justice principles relevant to the sentencing decision.

Held

The District Court must take into account youth justice principles in determining the length of the sentence of imprisonment to be imposed for a youth offender following a transfer for sentence from the Youth Court.

Several factors should be taken into account when sentencing young offenders, including:
- The age of the offender and their particular vulnerability and immaturity;
- Findings in the Youth Court as to chances of rehabilitation and support groups;
- The reasons why the Youth Court Judge transferred the case to the District Court; and
- The principles and purposes of sentencing reflected in the goals of s208 of the CYP Act.

Outcome

- Appeal allowed. Sentences imposed by District Court Judge set aside.
- X sentenced to 2 years on each sexual violation charge, terms to be concurrent. 50% discount to sentence due to acceptance of early responsibility, remorse, and age of offender. Age was an important factor: "The age of the offender takes account of his vulnerability and immaturity which in turn operate to lessen (at least to some degree) the weight to be given to premeditated offending." [109]
- Leave to apply for home detention granted.
- Section 14(1) Parole Act 2002 conditions apply with other conditions specified in judgment.

The High Court's Analysis

The Statutory Scheme

There are important differences in procedure and the consequences of any finding that a charge has been proved between the youth and adult courts.

The CYP Act governs youth justice in New Zealand. The law recognises that youth offenders ought to be treated differently from adult offenders. The particular features of the youth justice system highlighted in the High Court case were:

- The Youth Court operates using age-related controls, sanctions and procedures that recognise the limited understanding and particular vulnerability to influence of young people (*Police v Edge* [1993] 2 NZLR 7 (CA).
- The Youth Court applies "youth justice principles" set out in s208 of CYP Act (*E v Police* (1995) 13 FRNZ 139, 140) that reflect the objects of the Act.
- The consequences of electing trial by jury are significant as to potential sentence. The maximum sentence that can be imposed by a District Court following a transfer for sentence from the Youth Court is 5 years for the reasons given by the Court of Appeal in *R v P* (CA59/03, 18 September 2003, Keith, Hammond and Patterson J).
- The method of disposal of criminal proceedings in the Youth Court is unique. The Youth Court does not have to enter convictions after proof that the offence has been committed. Rather, the Court may make one or more of the orders set out in s283 of the CYP Act.

[5] Note that the young person was only 14 at time of most of the offending so a s 283(o) order should probably not have been made. This was not raised by counsel or discussed by the High Court.

In this case, the Youth Court made an order for transfer to the District Court under s283(o) of the CYP Act. Section 290 restricts the making of a s283(o) order:

> **290.Restrictions on imposition of supervision with residence or transfer to District Court for sentence—**
> (1)No order shall be made under paragraph (n) or paragraph (o) of section 283 of this Act in respect of a young person unless—
> (a)The offence is a purely indictable offence; or
> (b)The nature or circumstances of the offence are such that if the young person were an adult and had been convicted of the offence in a Court other than a Youth Court, a [sentence of imprisonment (within the meaning of section 4(1) of the Sentencing Act 2002]) would be required to be imposed on the young person; or
> (c)The Court is satisfied that, because of the special circumstances of the offence or of the offender, any order of a non-custodial nature would be clearly inadequate.
> (2)No order shall be made under section 283(o) of this Act unless the Court has considered all other alternatives available to it under this Part of this Act and is satisfied that none of them is appropriate in the circumstances of the particular case

The High Court stated that this process was of some importance as "In effect, an order for transfer is a recognition that sanctions available solely in the Youth Court are inappropriate to respond to the particular offending in issue." [38] A transfer order indicates that a wider range of sentencing options ought to be considered. It removes the option of purely Youth Court sanctions being imposed for the offending. [41]

In making sentencing decisions the Youth Court is guided by:

(a) the principles of youth justice (s208 of the CYP Act);
(b) The objects of the CYP Act;
(c) The principles to be applied generally in the exercise of powers conferred by the Act; and
(d) The long title to the Act.

When a decision is transferred to the adult tariff court the provisions of the Sentencing Act apply. The High Court therefore had to consider whether and how youth justice principles would apply in the District Court. The authorities on the applicability of youth justice principles outside the Youth Court have developed in an ad hoc manner:

- A detailed history of the case law is at paras [46] to [56]. Only one case dealt with the interface between the CYP Act and Sentencing Act in the context of a transfer for sentence in the District Court under s283(o) of the CYP Act, *R v Thompson Jackson* (2002) 20 CRNZ 1051.
- *R v Thompson Jackson* was a case that involved an aggravated robbery where the tariff case of *R v Mako* ordinarily applied. In his judgment, Judge Harvey held that the sections in the CYP Act continued to be available in the District or Sentencing Court. The High Court quoted extensively from his judgment, citing in full paras [25] to [30].

Reasoning

The Court's analysis is set out at paras [68] to [85].

(a) Applicability of youth justice principles

- The starting point for analysis is s283(o) of the CYP Act. "In effect an order for transfer has the effect of removing a young offender from the youth justice regime." [68] Once in the adult tariff court, the provisions of the Sentencing Act 2002 apply.
- The Sentencing Act provides a framework for analysis when imposing a sentence. Nothing in either s9(1) or (2) of the Sentencing Act (which list aggravating and mitigating factors to be considered by a sentencing Court) prevents the Court from taking into account other aggravating or mitigating factors.
- When a Youth Court determines if a young offender should be sentenced in the District Court it must apply the criteria set out in s290 of the CYP Act. The factors of particular importance relate to the likelihood of a custodial sentence being imposed (s290(1)(b) and (c)). When the Youth Court makes that assessment, ss16 and 18 of the Sentencing Act are also relevant.

- In determining whether a District Court is obliged to have regard to youth justice principles the wording of s208 of the CYP Act assumes importance. The first two principles are only relevant to the youth court "*[p]rima facie*, the balance of the principles set out in s208 are relevant to sentencing, whether in the Youth Court or the District Court" (i.e. s208 (c) to (h)).
- Section 5 of the CYP Act, to which s208 is expressly subject – refers to principles to be applied by <u>any Court exercising powers conferred by or under the Act</u> (i.e. s5(a)-(f)). There was some discussion about the meaning of the underlined words. The High Court held:
  (a) The words "any Court" are not limited to the Youth Court [76].
  (b) When the District Court sentences a young person pursuant to a s283(o) order the DC exercises a power conferred by or under parts 4 or 5 of the CYP Act, and so is exercising a power "conferred by or under the Act".
- The High Court addressed "whether this construction causes an inconsistency between those cases in which the young person is tried summarily in the Youth Court (whether in respect of summary or indictable offences) and those in which trial by jury is elected and the option to revert to the Youth Court jurisdiction is not offered or not accepted". It held at [80]:

> "We accept the argument that sentencing exercised after trial by jury is a power "conferred by or under [Part 4] or Part 5" of the CYP Act (for the purposes of s208) is more tenuous. But, we have come to the view that it is a valid interpretation given that, even in the most serious offence of murder, a modified preliminary process is mandated by the CYP Act. For that reason we hold that the CYP Act empowers the sentencing Court by providing for the way in which different Courts deal with particular charges in specified circumstances."
>
> [81] As s4, 5, and the Long Title to the CYP Act are located within earlier parts of the statute, there is nothing in s208 of the CYP Act that could preclude a sentencing Court, other than the Youth Court, from taking those objectives, purposes and principles into account." [81]

- The effect of this obiter statement is that where a case has only passed through the Youth Court as a matter of procedure any sentencing decision in the adult tariff courts will have to consider youth justice principles.
- The High Court stated that their interpretation was consistent with that of Judge Harvey in *Jackson Thompson* except in three important aspects, set out at para [83] from (a) to (c).

<u>Some Important Principles</u>

- The Court outlined at [85] "some important principles which we consider ought to be followed when District Court Judges are asked to sentence under s283(o) of the CYP Act":

> a) In many cases the Youth Court will have inquired, both through the receipt of specialist reports and at a Family Group Conference, whether adequate family support groups exist to assist an offender to rehabilitate. Findings on that issue ought to be included in the reasons for transferring the young offender to the District Court for sentence because a finding, one way or the other, may influence the District Court on sentence. Similarly, any findings as to the nature of such a support group are also likely to be helpful.
> b) The extent to which the youth justice principles set out in s208 and the purposes of the CYP Act can be taken into account will fall for consideration on a case by case basis. A District Court Judge will need to be reasonably specific in his or her analysis of the weight to be given to particular factors so that an appellate Court can understand the reasons why the sentence was chosen. In particular, it is important that the District Court Judge take account of the reasons for transfer given by the Youth Court because the decision to transfer necessarily means the case is too serious for Youth Court sanctions alone.
> c) In cases of sexual violation, non-custodial sentences can rarely (if ever) be justified because of the existence of s128B of the Crimes Act 1961 and the dicta of the Court of Appeal in *R v N*. Nevertheless, the principles of youth justice are still relevant in fixing the length of the appropriate term of imprisonment. Often, the youth justice principles will be relevant to the sentencing goal of imposing the least restrictive outcome available in the circumstances: s8(g) of the Sentencing Act.
> d) Many of the principles and purposes of sentencing reflect goals set out in s208 of the CYP Act. For example, s8(h) and (i) and the mitigating factor of age (s9(2)(a)) can be seen as directly relevant to the principles in s208(c), (d), (e) and (f).
>
> [85] Finally, and most important of all, we reinforce what was said by Judge Harvey in *Jackson-Thompson*. The application of youth justice principles does not prevent the District Court from

> imposing a sentence of imprisonment. Nor does it they prevent the District Court, in appropriate circumstances, from holding that sentencing goals of accountability for harm done, denunciation and deterrence require a longer custodial sentence because those factors assume primacy over the youth justice principles. Each case must be determined on its own facts. The point is that the sentencing of a young person must take account of youth justice principles.

2. R v Slade & Hamilton
(CA, CA245/04, CA266/04, 28 February 2005, Anderson P, Hammond and William Young JJ)

Seventeen year minimum non-parole period may be so crushing for young offenders that its imposition would be "manifestly unjust"

The Court of Appeal has ruled that a minimum non-parole period of 17 years under s104 Sentencing Act 2002, may be so crushing for a young person that it would be manifestly unjust to impose it. In *R v Slade & Hamilton* two youths appealed against sentences of life imprisonment with a minimum 17 year non-parole period for murder. The pair (then 16), along with a third youth, had viciously attacked and robbed a passer-by who later died of massive head injuries. Section 104 requires that the 17 year minimum be imposed where certain factors are present during the murder unless the Court is satisfied that "it would be manifestly unjust to do so". The Court of Appeal held that this was a case where s104 applied and then considered whether a 17 year sentence of actual imprisonment would fall so heavily on the young men that it would be "genuinely crushing and destructive of their lives and therefore manifestly unjust".

The ringleader in the offence, Hamilton, was particularly brutal and lacking in remorse, and the Court had little difficulty in dismissing his appeal. Slade, whose involvement had been more peripheral, although not minimal, and who nevertheless faced the full 17 year sentence, presented a greater challenge to the Court.

The Court stressed that there is no youth exemption to s104 but noted evidence showing that adolescents' developmental levels are different to those of adults. Statistics show a high degree of violent offending amongst youths but offending tails off once offenders reach their twenties. Registered consultant psychologist, Dr Ian Lambie [incidentally, a member of the Youth Justice Independent Advisory Group], set out the reasons for this in a report for the defence:

> It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices even without clear coercion (Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.

Dr Lambie's report also referred to the high levels of depression, anxiety, suicidal ideation and self-injurious behaviour, and victimisation from other inmates that adolescents experience in prison. Further, adult institutions offer fewer health and mental health services for adolescents than for adult prisoners. The Court noted the policy implications arising for the criminal justice sphere from this evidence, particularly in addressing the causes of offending.

The Court stated that cases such as the present can only turn on their own facts, having regard particularly to the intent of the perpetrator, their actual participation in the wrongful event, and their "attitude" to what occurred. In this case, Slade showed some empathy and awareness and, although his involvement was not minimal, he was not the principal perpetrator and could not be considered to be on all fours with Hamilton for the purposes of s104.

Considering his age, abusive and deprived upbringing and the crushing nature of a sentence such as this for a 17 year old, the Court decided that this would be a case where manifest injustice would result from the lengthy non-parole period. Consequently, Slade's appeal was allowed and the 17 year minimum non-parole period was set aside. His sentence of life imprisonment remained.

3. Roper v Simmons

(*Donald P Roper, Superintendent Potosi Correctional Center, Petitioner v Christopher Simmons* (1 March 2005) 543 US (unreported))

Between 1 January 1973 and 31 December 2004, 22 young offenders under the age of 18 were executed in the United States of America.[6] Nineteen States in the United States of America allow for the execution of young offenders under the age of 18.[7] Data (see Appendix 2 of the decision) on the juvenile death penalty in the United States informs that 38 states and the federal government still have statutes authorising the death penalty for capital crimes.[8] Of those, 14 have chosen the age of 16 as the minimum age for eligibility for the death penalty,[9] five jurisdictions have chosen the age of 17, and 20 states have selected 18 as the minimum age of eligibility.

In order to safeguard against arbitrary application of the death penalty, the Supreme Court has developed guiding principles for the administration of the death penalty, including the principle that at sentencing, the jury is authorised to consider any other appropriate aggravating or mitigating circumstances, including the youth of the offender.[10]

In relation to juvenile death penalty cases, the age debate centres on the interpretation of the Eighth Amendment to the United States Constitution,[11] and what the Supreme Court has termed its "inquiry into society's standards of decency".[12]

In the first case to make a definitive statement on the issue of youth executions, **Thompson v Oklahoma**, the Supreme Court, in a 5-3 decision, held that a State's execution of a juvenile offender who had committed a capital offence at the age of 15 was unconstitutional, and offended civilised standards of decency.[13] Their decision reflected an understanding that irresponsible conduct by young people was "not as morally reprehensible as that of an adult."[14]

The following year the Supreme Court overturned its approach in **Thompson**, holding that the Eighth Amendment did not prohibit the death penalty for crimes committed at ages 16 or 17.[15] The Supreme Court was influenced in their decision by the fact that out of 37 death penalty states, 22 permitted juvenile executions. In this light, the Supreme Court felt that it could not conclude, with sufficient particularity, that there was national consensus "sufficient to label a particular punishment cruel and unusual."[16]

In the most recent Supreme Court decision on the matter[17] the Supreme Court determined, by a 5-4 majority that the death penalty is unconstitutional for under 18 year olds. The Supreme Court overturned their decision in **Stanford** on several grounds, including:

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[6] Victor Streib *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1 1973 – December 31, 2004* (Periodic Report, Ohio Northern University College of Law, 2005), 4 <http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf> (last accessed 16 March 2005).
[7] Streib, above n 26, 6.
[8] Streib, above n 26, 6.
[9] Streib, above n 26.
[10] *Gregg v Georgia* (1976) 428 US 15,3 196-197.
[11] US Constitution, amendment 8 reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
[12] *Simmons*, above n 3, 9 (plurality decision).
[13] *Thompson v Oklahoma* (1988) 487 US 815, 818-838.
[14] *Thompson*, above n 33, 835.
[15] *Stanford v Kentucky* (1989) 492 US 361.
[16] *Stanford*, above n 35, 370–371.
[17] *Simmons*, above n 3.

(1) A recognition that a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults;
(2) Recognition that juveniles are more vulnerable or susceptible to negative influences and "peer pressure";
(3) Recognition that the character of a juvenile is not as well formed as that of an adult; and
(4) An understanding that, from a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. [18]

Dissenting judgments took issue with the Majority's methodology, in particular its interpretation of the "trend" towards the abolition of the death penalty, but most notably the Majority's use of scientific and sociological studies in support of its position. In a strong dissent, Justice Scalia considered alternative studies into the psychological development of under 18 year olds, some of which suggested that "adult" reasoning and judgement is developed by the ages of 14-15 years of age.[19]

Conclusion

In respect of the most serious offenders, the law in New Zealand and the United States has, at times, found it difficult to distinguish between young offenders who commit serious, sometimes heinous, crimes and their adult counterparts.

In respect of our treatment of the most serious youth offenders, New Zealand and the United States have both struggled to balance the public interest in retribution and punishment with the aims of youth justice. The cases of **Slade** and **Simmons** do not indicate a softening in the Courts' stance towards youth offenders, but a greater understanding that the particular circumstances of youth demand leniency when sentencing.

(The first and third case notes were compiled by Rebecca Paton, Research Counsel to the Chief District Court Judge and the second case note by Rhonda Thompson, Research Counsel for the Principal Youth Court Judge. If you require further information about these cases please do not hesitate to contact either of these Research Counsel at (04) 914 3440)

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6. Back Copies of Court in the Act

I am frequently asked where previous copies of Court in the Act can be accessed. The easiest way is to visit the Youth Court website at:- www.justice.govt.nz/youth/

On the Homepage, there is a heading "About Youth Justice". The sixth bullet point down under that heading is entitled "Media Releases and Newsletters". If you click on that heading then all the previous Court in the Acts are displayed and can be easily accessed.

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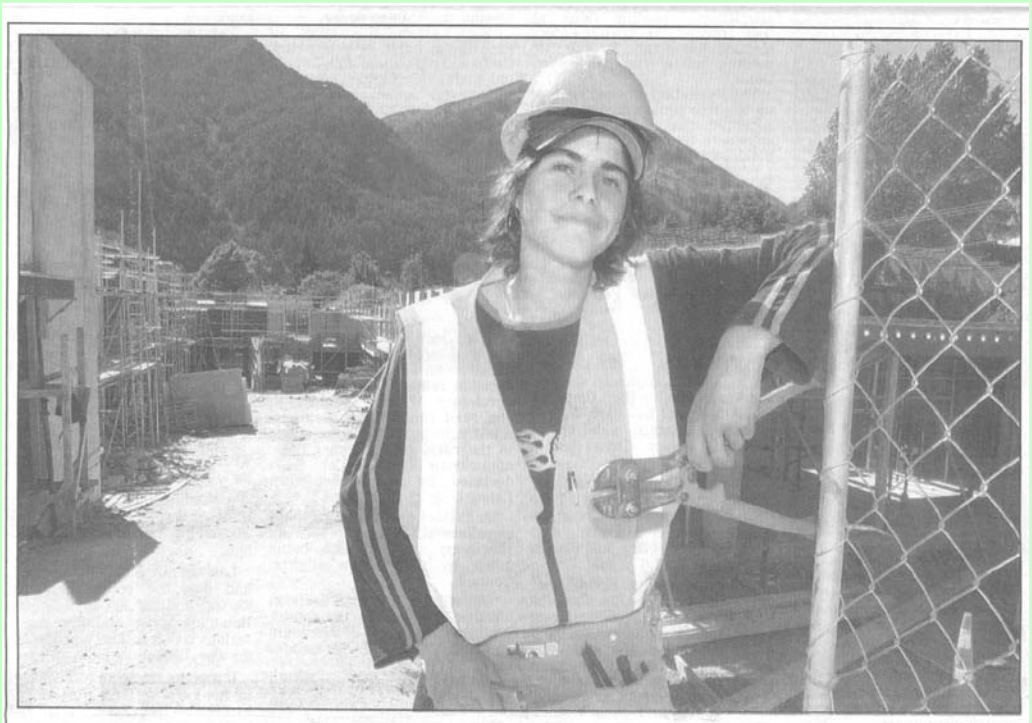
[18] *Simmons*, above n 3 at 10-21 (plurality decision).
[19] *Simmons*, above n 3, 12 (dissenting judgment of Scalia J)

7. "Destructor turns constructor" (A good news story from a Family Group Conference)

Too often we only hear about the (occasionally) bad experiences from Youth Justice Family Group Conferences (FGCs). But there are some excellent good news stories that we need to hear about. Here is one, recently reported in the Southland Times. It only emphasises that which is repeated up and down the country time after time, when as a result of an excellent FGC process, victims end up playing the prime role in the reform of the person who offended against them. It is a good story with which to end this first 2005 edition of Court In The Act, and to keep in mind as we continue our efforts to work with young offenders in 2005.



Picture: ROWAN QUINN

Alex Parent at Southern Lakes Construction's Hallenstein St site.

Destructor turns constructor

By Rowan Quinn

QUEENSTOWN — Alex Parent has turned his shovel to good — with a job at the worksite he made headlines for vandalising last year.

The 17-year-old has a job at Southern Lakes Construction, one of several Queenstown businesses he and a friend damaged when they went on a four-week spree around the resort in May.

The most dangerous of their crimes was the re-wiring of lamps in the Queenstown Gardens, with one left live.

But they also went from hotels to the high school, and other businesses in between, trying their hand at creative, but destructive, crimes.

At Southern Lakes Construction they started a 3.5-tonne digger, wedging a spade into the controls to keep it running on its own around the site and through a fence until it fell over.

But nine months later Alex is employed fulltime on the firm's Hallenstein St worksite — the one that suffered digger damage at his hands.

To begin with, he was just working 20 hours as reparation for his crimes.

But he liked the work, impressed the bosses and is now on the books as a fulltime ground man and the youngest worker on site.

Alex said the work was hard but he enjoyed the atmosphere.

"The guys give me a hard time — especially any time there's a digger around," he said.

"They say 'there's your digger' and keep telling me where it is."

For the record, Alex hasn't been reunited with the digger in question; it's now on another site.

"I've seen the shovel though. I've been using it."

Southern Lakes Construction boss Dean Chisholm met Alex at a Youth Court family group conference that victims attended.

Rather than simply get money for reparation, Mr Chisholm saw the potential for the clever kid to repay some of what he owed in hours.

"That's what struck me when I went to the victims' meeting. There's all this potential and it's just being wasted.

"He had all this energy and it was just being channelled in the wrong way," Mr Chisholm said.

"He just needed a bit of direction."

Alex plans to keep working on the site for now, but may head back to his homeland, the United States, to work on an antique sailing ship.

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8. A Guide to Youth Language How Hip are you?

Are today's young people speaking a different language? Youth Week 2005 (9-15 May), highlighted the need to brush up on some current youth lingo.

Newly designated Youth Court Judge, His Honour Greg Hikaka, has recently sent these to all Youth Court Judges, originating from the Department of Youth Affairs. The Judges now know what is meant when it is said they are "Hella Phat. Laters."

Phrase and Meaning

Aight: Alright (pronounced like "height")

Bay, bro, cuz: Mate or friend

Bling bling: Flashy or expensive jewellery

Breaking: Break-dancing – a key element of hip-hop culture

Chur: Thanks – e.g. "chur cuz!"

Deejaying: The art of mixing music, usually on a record turntable. Part of hip-hop culture

Diss': To show disrespect to someone

Dope, gravy, mint, wicked: Used to describe something looking or feeling good – e.g. "That concert was really dope"

Emceeing: Derivative of "MC" – the art of talking/integrating lyrics with music, usually hip-hop

Fo' shizzle ma nizzle: Means "I agree"

Ginga, morange: Person with red or ginger hair

Hella: Used to give emphasis to something, e.g. "Brad Pitt is hella good-looking"

Hook up: To get romantically involved with someone; to start dating

Jokes: Equivalent of "just kidding". Usually follows a lie such as: "you smell terrible – jokes"

Kewl: Cool (pronounced "kee-yool") - e.g. "Brad Pitt is a hella kewl actor"

Klingon, blender: An outsider who does not belong to a certain social cluster and is attempting to join.

Laters: Short version of "see you later"

Meh: Expression of indifference – equivalent of "I don't know/don't care," e.g. Q: "What are you doing tonight?" – A: "Meh"

Moked Owned: Derivative of "smoked" – means embarrassed or ashamed e.g. "Jack was 'moked after being told off in front of everyone at school." Or, "Jane was totally owned when she fell flat on her face in front of the whole class"

Peeps: People

Phat: Pronounced "fat" – means, cool, good-looking, hot or tempting e.g. "Catherine Zeta-Jones is really phat"

Phat-phree: Opposite of phat

Player: Someone (usually male) romantically involved with many people and "playing the scene"

Skux: Pretty boy/cool guy/nice gear (flexible)

Trippin': On drugs, or acting as if drugged

True dat: That's true

Wack: Something that seems strange or abnormal

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