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Judicial Responses to Alcohol-Fuelled Public Violence: The *Loveridge* Effect

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Abstract

After the death of Thomas Kelly (2012) and Daniel Christie (2013) in Sydney, New South Wales (NSW), there was widespread discussion and concern over the problem of so-called *one punch* alcohol-fuelled violence. A 'centre-piece' of the NSW Government's response was the enactment, in January 2014, of what is known colloquially as the 'One Punch Law': the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW), which includes a mandatory minimum sentence for assault causing death whilst intoxicated. This paper analyses the judicial response to one punch alcohol-fuelled violence, with a focus on the effect of the decision in *R v Loveridge* [2014] NSWCCA 120. I show that the judiciary has rejected the existence of a discrete category of 'one punch' manslaughters and, instead, has defined a category of alcohol-fuelled public violence for which there is a strong need for general deterrence. Based on an analysis of cases handed down since the NSW Court of Criminal Appeal's 2014 decision, I show that the '*Loveridge* effect' has been to significantly increase sentences in such matters.

Keywords

One punch; one punch laws; manslaughter; alcohol-fuelled violence; *Loveridge*; sentencing; assault causing death.

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Introduction

In recent years, the relationship between alcohol and violence has been prominent on the main stage of public policy debate in Australia. ‘One punch’ fatalities—although rare in the context of the many thousands of assaults that occur every year—have become a focal point for calls for a more punitive response from the criminal justice system. Much of the attention to date has focused on the response of the *legislature* to growing anxiety over ‘alcohol-fuelled’ violence, specifically, the addition of a new homicide offence in s 25A of the *Crimes Act 1900* (NSW) and changes to the *Crimes (Sentencing Procedure) Act 1999* (NSW), which introduced a special rule for self-induced intoxication in s 21A(5AA) (see also Quilter 2014a). Aside from trenchant criticism of the original sentencing decision in *R v Loveridge* [2013] NSWSC 1638, considerably less attention has been paid to the response of the *judiciary* to alcohol-related violence. This article seeks to fill that gap. Courts play an important role in shaping the contours of the criminal law, and their actions deserve scrutiny, credit and criticism in the same way as legislative actions. Based primarily on an analysis of the 2014 decision of the NSW Court of Criminal Appeal (NSWCCA) in *R v Loveridge* [2014] NSWCCA 120, and sentencing decisions made subsequently, this article argues that, although the judicial response has been less visible, to date it has produced more significant changes in the criminal law’s treatment of violent, alcohol-fuelled criminal behaviour than the changes made by the NSW Parliament.

The primary assertion of this article is that, contrary to the commonly made claim by media commentators and politicians that judges are ‘out of touch’ with, and unresponsive to, community sentiment on the seriousness of alcohol-related violence, there is strong evidence that the NSWCCA has actively recalibrated the ‘correct’ approach to sentencing in such cases, and that this has yielded significantly increased sentences. The Court has effected this change via a careful doctrinal redesign which has involved simultaneously rejecting the existence of a category of one punch manslaughter and any suggestion of a sentencing range for such offences. In its place the Court has created a *new* category of alcohol-related street violence—what I term the ‘*Loveridge* category’. This category, although crafted through the dispassionate language of sentencing principles, has many of the hallmarks (and tropes) that dominated media and political discourse on the crisis of public alcohol-related violence in the period after the one punch deaths of Thomas Kelly (July 2012) and Daniel Christie (December 2013) through to, and beyond, the 2014 enactment of the new offence of assault causing death. It is important that these events not be seen in isolation or as unique to the problem of one punch violence, but as an episode in the longer struggle between the executive/legislative arms of government and the judiciary over control of sentencing.² The central theme in the story told in this article is of the reassertion of judicial authority over punishment. However, contrary to the assumption that judges routinely work to mitigate legislative excess in this context (for example, *Muldrock v The Queen* (2011) 244 CLR 120), the ‘*Loveridge* effect’—a product of judicial action—has involved increased punitiveness in sentencing in the form of significantly longer prison terms.³

In the first part of this article I provide an overview of the events that propelled one punch fatalities into the media headlines and triggered a fast and punitive response by the NSW Parliament. I also introduce a tension that was already present in the judiciary’s handling of such cases, including how best to characterise the seriousness of one punch killings *and* to condemn and deter alcohol-related violence. In the second part I describe and analyse what, I argue, has proved to be a pivotal decision in recalibrating the approach to sentencing offenders in such cases: the decision of the NSWCCA in *R v Loveridge* [2014]. I next describe the creation of the *Loveridge* category. The fourth part discusses the judicial uptake of the principles espoused by the NSWCCA in *Loveridge*, including recognition that it represents a significant shift in sentencing principles as well as attempts to identify the limits of the category which it created. This is followed by an analysis of nine sentencing decisions handed down after *Loveridge* in which the court was required to formulate a sentence in a case that fell within the *Loveridge* category. I show

that the *Loveridge* effect has produced a significant increase in head sentences and non-parole periods for alcohol-related public violence.

Background

The death of Thomas Kelly in July 2012 in Kings Cross was the catalyst for a strong media and community campaign in relation to alcohol-fuelled violence, with a particular focus on random unprovoked one punch fatal violence (Quilter 2013). This campaign put significant pressure on the then NSW Government to respond with new measures (Quilter 2015b). Adding to the pressure on the Government was community unrest over what was perceived to be an inadequate sentence handed down to Kieran Loveridge for the manslaughter of Kelly. The sentence, handed down by Justice Campbell on 8 November 2013, was for a total of 7 years and 2 months for the combined manslaughter and four assaults (6 years for manslaughter with a 4-year non-parole period (NPP), and 1 year and 2 months for the assaults), with an effective total NPP of 5 years and 2 months. The sentence was widely criticised as too low ('4 years for a life') and as further evidence that the judiciary was 'out of touch' and inclined to be inconsistent and unduly lenient in sentencing violent offenders. And yet, as shown in previous research, at the time Campbell J sentenced Loveridge, his Honour's approach was *not* grossly at odds with prevailing sentencing principles and practice regarding one punch fatalities (Quilter 2014b). The charge of 'inconsistency' stuck, however, and the foundation for NSWCCA intervention was established. It might be argued that consistency is only desirable in political discourse if it connotes consistently high sentences that are in sync with prevailing 'penal ideologies' (Henham 2012; Loader and Sparks 2016).

Following another serious one punch assault (of 23-year-old Michael McEwen, at Bondi Beach, Sydney, on 14 December 2013, which put him in a coma for a week) and a one punch assault on New Year's Eve that ultimately led to the death of 18-year-old Daniel Christie, Sydney's two daily newspapers ran major campaigns in relation to alcohol-fuelled violence. *The Sydney Morning Herald* revived the 'Safer Sydney' campaign it had initiated after Mr Kelly's death, and *The Telegraph* ran the 'Enough' campaign (Quilter 2015b).

Legislative response

Within this context, the Government was under enormous pressure to respond to so-called alcohol-fuelled one punch violence—particularly, in light of what was perceived to be the failure of the courts to deliver on a just sentence (see Quilter 2014a). On 21 January 2014 the then Premier (O'Farrell) announced his 16-point plan to tackle drug and alcohol violence. Only a week later, on 30 January 2014, the NSW Parliament enacted the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) (the Act)—colloquially known as the One Punch Law. The Act, *inter alia*, amended the *Crimes Act 1900* (NSW) to add a third discrete category of homicide, alongside murder and manslaughter in Pt 3, Div 1 'Homicide'. Section 25A provides for an offence of 'assault causing death' and an aggravated version of that offence where the offender is intoxicated at the time of committing the offence. Notably, the aggravated offence under s 25B carries a mandatory minimum sentence of 8 years imprisonment. This was only the second time in recent NSW history that a mandatory minimum sentence (MMS) has been introduced.⁴

Elsewhere I have discussed the poor drafting of this legislation and the adverse legal and operational implications (Quilter 2014a, 2015a). Here I note that there is a significant disconnect between the 'solution' produced by the Act—that is, a new offence of 'assault causing death'—and the 'problem' which motivated the legislation. The dissatisfaction in the *Loveridge* matter focused on the adequacy of the sentence he received, not the suitability or availability of offences. Among other things, the Act was unquestionably a vote of 'no confidence' in the judiciary. The MMS attaching to the aggravated offence—which clearly fetters judicial discretion—is the most obvious example of this sentiment.

To date, one person (Hugh Garth) has been convicted of the aggravated offence, on 1 June 2017. At the time of writing, he is yet to be sentenced for that offence. Four other people have been charged under the new law (Office of the Director of Public Prosecutions, correspondence with author, 26 October 2016). Of these matters, two relate to s 25A(1) (with one matter having s 25A(1) as the principal offence and another as an alternative to manslaughter) and two involve s 25A(2). In another matter, *R v Johnson*, s 25A(2) was charged in the alternative to murder and manslaughter, however, on 19 May 2017 a jury convicted Mr Johnson of manslaughter.⁵ It is too early to conclude what effect the new offences may have on sentencing outcomes. As I show in this article (see the discussion on the impact of the *Loveridge* effect on sentences), while the new offences, including the MMS, were clearly part of the Legislature's 'solution' to the suggestion that the courts could not be trusted to do the right thing, to date it has been the self-initiated moves made by the judiciary that have had a greater effect on increasing sentences.

The Act also introduced a 'special rule' into s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) that self-induced intoxication cannot be a mitigating factor on sentence:

(5AA) Special rule for self-induced intoxication

In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

Arguably the inclusion of this section also did not significantly alter expressed sentencing principles in NSW, which already recognised that intoxication will not usually be a mitigating factor.⁶

In 2015 the Attorney General asked the NSW Sentencing Council to consider the desirability of a further amendment (proposed by the Thomas Kelly Youth Foundation) which would have treated *intoxication* as an aggravating factor in sentencing.⁷ After investigating the matter and considering submissions from a range of stakeholders, the Sentencing Council rejected the proposal (NSW Sentencing Council 2015: [0.6]-[0.7], [2.23]; see also NSW Sentencing Council 2009). In a context where knee-jerk punitive criminal law reform without expert/stakeholder consultation has become commonplace (the new assault causing death offence being a classic example), the decision *not* to add intoxication as an aggravating factor in sentencing is noteworthy. Ironically, however, even without legislative intervention, a more punitive approach to sentencing *has* emerged in recent years, as a result of the NSWCCA's approach to sentencing in cases of alcohol-related fatal violence.

Judicial engagement with the challenges of alcohol-related violence

I have already noted the pressured environment in which the NSW Parliament moved hastily to enact legislation in early 2014. The courts were also subjected to criticism and placed under pressure in the immediate aftermath of the sentencing of Kieran Loveridge in November 2013. The clear media-driven message was one of 'no confidence' in a judicial system that was 'out of touch' and too lenient (for example, Bibby 2013; Block 2013). In fact, prior to the tragic events of 2012-13, and the Government's 2014 legislative response, the courts had already begun to grapple with the challenge of sentencing offenders in cases involving alcohol-related fatal violence. In previous research on sentencing in one punch manslaughter cases I have identified that one of the problems courts faced in such matters was a tension in evaluating where these offences sit in terms of their relative objective seriousness (as a category of manslaughter) and the need for the sentence to account appropriately for general deterrence (Quilter 2014b). Thus, while each case ultimately turns on its facts, a line of authority indicated that one punch deaths should be viewed 'objectively at the lower end of the range of criminal conduct within that offence [manslaughter]'.⁸ Yet, even before *Loveridge*, there was recognition that there was a tension between this categorisation and general sentencing principles, specifically general deterrence

(*Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b)), denunciation (s 3A(f)), and retribution which is commonly articulated as necessary in these matters. For example, McClellan CJ at CL stated in *KT v The Queen* (2008) 182 A Crim R 571:

However, there is considerable force in the view that, notwithstanding the youth of the offenders, the decisions of the courts for this type of offence have *provided a range of penalty which fails to adequately reflect the need for general deterrence and retribution*. The recent experience of this Court indicates that the range of penalties imposed on young offenders who *commit random acts of violence resulting in death may not have been sufficient to deter others from similar irresponsible criminal behaviour*. In my opinion although the circumstances of an individual offence and offender must always be considered, this Court should in future *accept that more significant penalties may be required when sentencing offenders for this type of offence* [emphases added].⁹ (at [41])

Significantly, the importance of the violence being perpetrated in a public place after the consumption of alcohol—characteristic of a majority of one punch manslaughters—was said to make the offence a serious one for which adequate punishment is required particularly for general deterrence.¹⁰

Prior to the decision in *Loveridge*, therefore, there appeared to be a disjuncture between the practice of viewing these matters objectively at the lower end of the range of seriousness and the emphasis on the need for general deterrence (denunciation and retribution) in relation to violent offences perpetrated in public places particularly after the consumption of alcohol. It is also noted that in some cases the public nature of the commission of the offence was used to assess the objective seriousness of the offence producing further possibilities for a conflict in sentencing principles.¹¹ These tensions are reflected in the judgment of *R v CK, TS* [2007] NSWSC 1424 at [13]-[15]:

I pause to observe that, in terms of the objective gravity of this offence, it matters little that the offenders each inflicted violence upon the victim once or twice. The real gravamen of the offence lay in this entirely senseless, unprovoked, callous assault upon a young man, minding his own business in the company of his friends, in a public place.

... Some attempt must be made however, to mark the objective gravity of the offence, constituted by the unlawful taking of a human life, with a sentence that reflects the principles of punishment, retribution, deterrence, protection of the community, and the rehabilitation of the offenders.

Whilst the starting point in this sentencing exercise is the unlawful taking of a human life, the sentence to be imposed at law is constrained by the basis upon which the plea has been entered. *The law demands that the offenders be sentenced for an offence that is, objectively speaking, at the lower end of the available range*, [emphasis added] the upper limit of which is the maximum penalty. That maximum penalty encompasses a very broad range of manslaughter offences, including manslaughter offences that would otherwise be characterised as murder, but for the presence of a mental illness in the offender, or provocation, or excessive self-defence.

At the time *Loveridge* was sentenced in 2013, these tensions had not yet been resolved. The Director of Public Prosecutions' announcement on 14 November 2013 that his Office would appeal the sentence *and* apply for a guideline judgment in relation to such matters was recognition of the need to seek NSWCCA guidance on this matter (Coulton 2013). Although the

formal process for seeking a guideline judgment was interrupted by the actions of the legislature in introducing a new assault causing death offence, I will argue that the NSWCCA's decision in *Loveridge* resolved the tensions described here and, to that extent, now operates as a 'quasi' guideline judgment (see Spigelman 1999).

The NSW Court of Criminal Appeal 'responds': *R v Loveridge* [2014] NSWCCA 120

The normal course of action when a sentence is argued to be manifestly inadequate is for the Crown to appeal—which is what occurred. On 4 July 2014 (that is, 5 months after the introduction of the new offences), the NSWCCA upheld that appeal in *R v Loveridge* [2014] finding that the original sentence—which included an 8 year head sentence for manslaughter, reduced to 6 years after application of the guilty plea discount, with a NPP of 4 years—was manifestly inadequate. In re-sentencing *Loveridge*, the NSWCCA determined that a head sentence of 14 years' imprisonment was appropriate, reduced to (at [271]) 10.5 years after applying the 25 per cent discount for his guilty plea. *Loveridge's* overall sentence (taking into account the other assaults) was increased from 7 years to 13 years and 8 months, with a total NPP of 10 years, 2 months (almost double the originally imposed total NPP of 5 years, 2 months).

In the context of my concern in this article, to locate the *judicial* response to alcohol-related public violence in relation to the *legislative* response, it is noteworthy that the Court produced a sentence (after guilty plea) for manslaughter that is very similar to the outcome that is mandated by s 25B of the *Crimes Act 1900* (NSW). Section 25B mandates a minimum (that is, NPP) of 8 years, which, when the statutory ratio required by s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is applied, produces a head sentence of just over 10.5 years.

The full significance of the NSWCCA's increase in relation to *Loveridge's* sentence for manslaughter becomes more obvious when the sentence is compared with previous sentencing patterns in comparable cases. In an earlier study, I found that, between 1998 and 2013 in NSW, the median head sentence for one punch manslaughter cases was 5 years and 11 months and the median NPP was 3 years and 6 months (Quilter 2014b: 32). The median head sentence for all manslaughter convictions in the period 2006-2013 was 7 years (with sentences ranging from 36 months to more than 20 years) (Quilter 2014b: 32). Acknowledging that the NSWCCA described *Loveridge's* violence as a 'very grave example of manslaughter by unlawful and dangerous act' (at [267]), it is, nonetheless, important to consider more closely how and why the NSWCCA took the view that such a significant upward 'correction' was warranted.

I argue that the Court did three things: first, it refuted the notion that there is a 'category' of one punch manslaughters; secondly, it rejected any 'range' for such matters; thirdly, the Court manufactured a *new* category of manslaughter which has been actively designed to produce higher sentences. The new category has a heavy emphasis on objective seriousness and does not carry the mitigating 'baggage' of the old one punch category. I further argue that this change was effected through an approach that was 'stylistically' conservative: a careful doctrinal exegesis of existing sentencing principles. While the artifice is conservative, I will show that the substance has effected considerable change. Indeed, this *judicial* reform of sentencing may prove to be more radical than any change that flows from the reforms introduced by the legislature.¹²

No category of one punch manslaughters

In *Loveridge* [2014] the NSWCCA expressed the view that there is no category of manslaughter denoted by a 'one-punch' or 'single-punch' element or characteristic (at [215]), because the circumstances of such cases vary widely:

... it is not meaningful to speak of one-punch or single-punch manslaughter cases as constituting a single class of offences. The circumstances of these cases vary widely ...

Instead, '... attention must be given to the particular case before the sentencing court' (at [215]).

While expressly refuting the one punch category it is noted that the NSWCCA throughout its judgment, nevertheless, made various references to the one punch class or category:

No other sentencing decision in this State for so-called one-punch manslaughter involves this combination of factors. (at [207])

... where Lord Judge CJ ... again addressed the topic of single-punch manslaughter cases. (at [209])

With respect to a number of single-blow manslaughter sentencing decisions to which his Honour's attention had been drawn ... (at [187])

As noted above, prior to *Loveridge*, courts regularly recognised a category of one punch manslaughters. Therefore, the NSWCCA's decision to disendorse any such category for sentencing purposes was a significant development.

No range of sentences for one punch manslaughter

The Court proceeded to acknowledge that, although judgments may be tendered to the sentencing court for the purpose of the provision of principles 'relevant to the exercise of the sentencing discretion in the case at hand' (*R v Loveridge* [2014] at [223]) following the High Court ruling in *Barbaro v R*; *Zirilli v R* (2014) 305 ALR 323 and *Hili v R* (2010) 272 ALR 465, a numerical range should not be submitted by counsel in order to guide the sentencing Judge in their current sentencing task:

There is, in truth, no range of sentences for offences of manslaughter which may be said to have a single common component relating to the mechanism of death (such as the victim's head striking the ground after a blow to the head). To the same effect, there is no range of sentences for manslaughter offences said to have been committed by use of a knife or a rock or some other implement.

The myriad circumstances of manslaughter offences render it unhelpful to speak in terms of a range of sentences, or tariff, for a particular form of manslaughter. Gleeson CJ made this clear in *R v Blackledge* ... (*R v Loveridge* [2014] at [226]-[227])

Thus, in relation to manslaughter, the justification for denying the use of a numerical range appears to be exacerbated by the premise that manslaughter, as a broadly defined offence, necessarily involves widely varying 'myriad circumstances' and, consequently, it would be artificial to categorise types of manslaughter that are said to have common elements (such as an alcohol-fuelled single punch attack to the victim causing the victim to fall and strike their head).

In *Barbaro v R*, the High Court defined 'range' as being a reference to the upper and lower bounds of discretionary judgment which, if exceeded, would fall into legal error for either being manifestly excessive or manifestly inadequate (at [26]). The High Court discussed the practice developed in Victoria since *R v MacNeil-Brown* (2008) 20 VR 677 whereby the sentencing judge would ask counsel for the prosecution to make a submission as to the available range of sentences (*Barbaro* at [22]), a practice condemned by the High Court in *Barbaro* for a number of reasons:

1. The suggestion of a range, in terms of integrity, is contingent upon the provision of 'accurate, reliable and complete information' (at [30]). Ultimately however, counsel for the prosecution 'cannot be, dispassionate' (at [32]).

2. 'If a judge sentences within the range which has been suggested by the prosecution, the statement of that range may well be seen as suggesting that the sentencing judge has been swayed by the prosecution's view of what punishment should be imposed. By contrast, if the sentencing judge fixes a sentence outside the suggested range, appeal against sentence seems well-nigh inevitable' (at [33]).
3. Fixing a range also 'wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and they must do so by balancing many different and conflicting features' (at [34]).

Moreover, the High Court gave particular attention to the fact that any submission by counsel as to an appropriate range necessarily involves assumptions being made by counsel as to what considerations bear upon the sentence and what weight is given to each (at [35]), such as predictions about the facts that the sentencing judge will find (at [36]).

Essentially, as there is a multiplicity of circumstances for consideration in the sentencing exercise, any suggestion regarding an applicable range will be founded upon assumptions made by counsel, assumptions which may be at odds with findings of the sentencing judge. Consequently, if the judge were to rely upon the range, it would be effectively distorting the applicable sentence in the judge's mind. Seen in another light, this somewhat shifts the role of sentencing (and fact finding for sentencing purposes) from the judiciary to counsel.

The Court recognised there is still a place for reviewing material on sentences that have been imposed in other (more or less) comparable cases:

Consistency of sentencing is important. But the consistency that is sought is consistency in the application of relevant legal principles, not numerical equivalence. The history [of previous cases] stands as a yardstick against which to examine a proposed sentence. What is important is the unifying principles which those sentences both reveal and reflect. (at [40], [41])

It follows that, while reference to comparable cases (which may suggest a range) *may* be useful for the purpose of extrapolating the relevant principles applicable to the case at hand, they should not be employed as a restrictive mathematical template.

The High Court's rejection of the validity of numerical ranges was an important part of the logic by which the NSWCCA found fault with the original sentencing decision in *Loveridge*. Justice Campbell J had stated in *Loveridge* [2014] at [224] (and [188]):

These cases, which both the Crown and the defence drew to my attention, suggest most commonly for broadly similar offending for relatively young offenders a non-parole period of 3 years and 6 months is regarded as appropriate. A head sentence of between 5 and 6 years, depending on whether special circumstances are found, is commonly imposed. Occasionally higher or lesser sentences are imposed according to the particular circumstances of that case. I acknowledge that these cases provide some guidance.

The NSWCCA found that the sentencing judge had treated tendered sentencing judgments erroneously, by perceiving the existence of a sentencing range, and had thereby fallen into error.

It is appropriate to acknowledge that, prior to the High Court's rejection of numerical ranges, it was common in one punch manslaughter cases for sentencing judges to apply, and the NSWCCA to endorse, a range.¹³ For example, in *Donaczy v R* [2010] NSWCCA 143 at [54] the Court stated:

It is unnecessary to enter any exegesis on the seriousness of alcohol fuelled violence in public places to understand that the sentence imposed by the learned sentencing judge was well within the range for an offence of this character.

And in *R v Carroll* [2008] NSWCCA 218 at [23]:

In my view, the term of imprisonment which her Honour imposed was below the appropriate range for this offence.

Although presented as a conventional and neutral articulation of correct sentencing doctrine, it is important to recognise that, in *Loveridge*, the NSWCCA was doing more than simply embracing and applying the High Court's distaste for sentencing ranges as a matter of principle. It was actively rejecting the tendency to treat one punch fatalities as at the lower end of a manslaughter sentencing range. By declaring that no such range (and range location) existed, the Court was relieved of the burden of the traditional characterisation of one punch homicides as an unlucky case of fatality, which reduced their objective seriousness. By refuting any notion that there is a category of one punch cases, or any range that might apply to them, the NSWCCA paved the way for a fresh approach to the sentencing of *Loveridge*, consistent with a finding that the case represented a 'very grave example of manslaughter by unlawful and dangerous act' (*Loveridge* [2014] at [267]).

Decisions since *Loveridge* make it clear that judges have heard the NSWCCA's message in *Loveridge*: no sentencing range exists for one punch manslaughter cases.¹⁴ However, in the next part of this article I argue that the effect of the NSWCCA's decision in *Loveridge* was that, at the very time that the Court rejected a discrete category and range for one punch fatalities, it effectively ushered in a *new* category and a *new* range designed to produce significantly higher sentences than the range that was abandoned (or, in the language and style of the Court, declared not to exist).

A new category? Violence, public place, alcohol-fuelled and the need for general deterrence

Given the conviction with which the NSWCCA in *Loveridge* effected the demise of a one punch manslaughter category or sentencing range, it might have been assumed that the Court was generally opposed to such categories/ranges. On the contrary, having dismissed the one punch category, the Court immediately recognised a new one of manslaughter involving: (1) violence, (2) fuelled by alcohol, (3) in a public place (that is, the elements that, arguably, were defining features of the so-called one punch manslaughter category):

Firstly, it is not meaningful to speak of one punch or single punch manslaughter cases as constituting a single class of offences. The circumstances of these cases vary widely and attention must be given to the particular case before the sentencing court.

Secondly, the commission of *offences of violence*, including manslaughter, in the context of *alcohol fuelled conduct in a public street or public place* is of great concern to the community, and calls for an *emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence* [emphases added]. The United Kingdom decisions involve statements of serious concern by the courts of the type expressed in this State in *Hopley v R*, *R v Carroll* and *Pattalis v R* concerning a similar form of violent offending. (at [215]-[216]; see also [185]).

Rather than ascribing a range to offences that fall within the new category, the NSWCCA prescribes a certain level of objective seriousness that should be applied to those cases based on the need for general deterrence (in particular), denunciation and punishment.

The Court founded the new category on a lengthy discussion of various cases (especially from the UK where the courts had grappled with similar concerns) which featured violence (at [101]),¹⁵ committed in a public area or street (at [101])¹⁶ and fuelled by alcohol and drugs (at [101]).¹⁷ Notably, the focus is on violence, however inflicted, rather than the particularity of one punch or single punch methods of attack (at [102] and [208]). The NSWCCA also attached significance to other features of the type of violence in question: that the attack was unprovoked (or that the victim was innocent) (at [102], [105], [203] [208] and [210]); that the violence was gratuitous (at [152], [208], [209], [210] and [213]); and that the victim was randomly selected, without warning (at [102], [105], [122], [152], [156]). It seems that, when these additional elements are present, the seriousness of the core *Loveridge* category is increased:

The use of lethal force against a vulnerable, unsuspecting and innocent victim on a public street in the course of alcohol fuelled aggression accompanied, as it was, by other nonfatal attacks by the Respondent upon vulnerable, unsuspecting and innocent citizens in the crowded streets of King [sic] Cross on a Saturday evening, called for the express and demonstrable application of the element of general deterrence as a powerful factor on sentence in this case. (at 105)]

The NSWCCA further underscored the need for increased sentencing severity in such cases, by reference to other cases:

Other decisions of this Court have emphasised that violence on the streets, especially by young men in company and under the influence of alcohol and drugs, is all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence: *R v Mitchell*; *R v Gallagher* [2007] NSWCCA 296; 177 A Crim R 94 at 101 [29]. Even in the case of juvenile offenders (which the Respondent is not), this Court has emphasised that, in relation to crimes of violence committed in the streets by groups of young persons, general deterrence should be given substantial weight notwithstanding the youth of the offenders: *AI v R* [2011] NSWCCA 95 at [69]; *MB v R* [2013] NSWCCA 254 at [27]. (at [103])

The approach of the UK Court of Appeal in *Attorney General's Reference No. 60 of 2009 (Appleby and Ors)* [2009] EWCA Crim 2693; [2010] 2 Cr App R(S) 46 was strongly endorsed:

The Court of Appeal (Criminal Division) returned to this issue in ... *Appleby* ... where Lord Judge CJ ... again addressed the topic of single-punch manslaughter cases. Lord Judge CJ observed, at [12], that '*... an additional feature of manslaughter cases which has come to be seen as a significant aggravating feature of any such case is the public impact of violence on the streets, whether in city centres, or residential areas ... Specific attention should be paid to the problem of gratuitous violence in city centres and the streets*' [emphasis in original].

Lord Judge CJ continued at [12]:

'... the manslaughter cases with which we are concerned involved gratuitous, unprovoked violence in the streets of the kind which seriously discourages law-abiding citizens from walking their streets, particularly at night, and gives the city and town centres over to the kind of drunken yobbery with which we have become familiar, and a worried perception among decent citizens that it is not safe to walk the streets at night' [emphasis in original].

This statement echoes loudly in the context of the present appeal. (at [209]-[210])

It is important to recognise the significance of what took place in *Loveridge*. The NSWCCA did not simply adjust the terminology from one punch to violence + alcohol + public (+ random, unprovoked, innocent victim). I argue that it replaced one category (one punch manslaughter) which had typically resulted in *lower* sentences, with a new category which was designed to support *higher* sentences. In the context of the wider policy and law reform debate over government response to alcohol-related violence, the importance of this move by the *judicial* arm of government should not be overlooked.

The characteristics of the Loveridge category

Later in the article, I examine the practical effect that the *Loveridge* decision has had on sentences in the Supreme Court of NSW in 2014 and 2015, and demonstrate that crimes that fall within the *Loveridge* category are now likely to receive a significantly longer prison term. Given the seriousness of these consequences, it might have been expected that the Court would explain with some precision the sorts of cases in which a greater need for general deterrence arises. Yet, on closer inspection, it is apparent that the NSWCCA has neither precisely drawn nor fully articulated the relevant criteria. In this part of the article I look more closely at the principles endorsed, and the language used by, the NSWCCA in *Loveridge*. I will consider how sentencing judges in subsequent cases have received, interpreted and applied the *Loveridge* category. In turn, I seek to determine whether the courts have provided further illumination of the characteristics said to warrant higher penalties.

Violence

One of the NSWCCA's objectives in *Loveridge* was to signal that an 'emphatic sentencing response' (emphasising general deterrence, denunciation and punishment) was warranted in relation to offences of 'violence', not only in classic one punch scenarios but more generally. To this extent, its message has been received.

In *R v Wood* [2014] NSWCCA 184 the violence involved a push by the deceased 'with two open hands' to the victim's upper chest area, causing her to fall and strike her head on the concrete' (at [11]). The Court was satisfied that this was a case in which the 'emphatic response' from *Loveridge* was required. (at [65]-[66])

In *R v Lane (No 3)* [2015] NSWSC 118 at [80] there was a heated exchange of words between the victim and offender followed by grappling whereby the victim got the upper hand and subsequently retreated, lost his footing and fell over. The victim's friend then engaged the offender in a physical altercation before the victim stood back up and faced the offender. Both exchanged blows, and consequently the victim fell back and hit his head on the ground. Although this was not a classic one punch attack, the Court held that there was a need for the 'emphatic sentencing response discussed in *Loveridge*' (*Lane* at [80]), reflecting 'denunciation, punishment and general deterrence' (*Loveridge* [2014] at [216]).

In *R v Matthews* [2015] NSWSC 49 the physical conduct constituting the assault was not a single punch, but rather a series of punches that were exchanged during the course of a fight between the victim and the offender (who were known to each other, and where it was unclear who threw the first punch). Nonetheless, the Court was satisfied that the case bore the characteristics which, according to *Loveridge*, warranted harsher punishment:

The matters which make the present offence a serious one are the fact that it resulted from alcohol-fuelled violence committed in a public place by a person who had a most unsatisfactory record for violence in circumstances where he had

recently been placed on conditional liberty with a requirement not to drink alcohol.

Finally, in *R v Lambaditis* [2015] NSWSC 746, the Court found that the need for an emphatic sentencing response highlighting general deterrence (at [98]) echoed loudly as the offence involved 'gratuitous, unprovoked violence' fuelled by alcohol (at [96]-[97]), comprised a cowardly attack, and was committed in a public place (at [102]; see also *R v Dyer* [2014] NSWSC 1809 at [5]; *R v Field* [2014] NSWSC 1797 at [83] and [85]).

Public area

In *R v Wood* the Court emphasised the general entitlement to feel and be safe when out in public:

People have the right to expect that their streets will be safe. (at [66])

Guidance to sentencing judges that may be provided by this decision includes the need for general deterrence when elderly or vulnerable persons are attacked in public places. (at [101])

In *R v Field* the Court asserted that the fact that the offence was carried out 'in full public view', 'in a carpark open to members of the public and in sight of neighbouring residents and visitors to the area who were attracted to the incident', was significant in triggering a sentence that drew heavily on general deterrence (at [14] and [83]).

In *R v Lane*, where the assault took place in the northern NSW town of Casino, the Court lamented the fact that 'the scourge of alcohol-fuelled violence in public places is not restricted to the entertainment hubs of our major cities' (at [7]). The fact that the violence occurred in a public place added to objective seriousness (at [38]).

Fuelled by alcohol and drugs

Some post-*Loveridge* cases have accepted the view that, intoxication of the offender will increase the objective seriousness of the offence. For instance, in *R v Lane*:

... the features of the present case which lead me to conclude it is an objectively serious one include that the crime was committed in a public place when the offender was very intoxicated. (at [38])

However, in other cases it is possible to detect some uncertainty about the value judgment that intoxicated violence is more serious than violence perpetrated while sober. Interestingly in *R v Lambaditis* the Court stated that the offender's '... intoxicated state provides at least a partial explanation for his behaviour but in no way provides either justification or mitigation of the objective seriousness of the offence or the culpability of the offender' (at [30]).

In *R v McNeil (No 4)* [2015] NSWSC 1198, the offender's state of intoxication ('reasonably intoxicated') was not given much weight (at [4]). In fact, the Court held that alcohol consumption had contributed to the offender's misconception that the victim was part of a group of youths with whom he had just been involved in an altercation: 'With a mind addled by alcohol, he completely misconceived the situation there and gave vent to a perceived, but grossly mistaken, need to violently punish an innocent young man' (at [29]). Although the Court said that this did not justify his violent behaviour, it does appear that, on this occasion, the offender's intoxication was not a factor which was regarded as increasing his culpability.

Unprovoked/gratuitous

In *R v Wood* the Court emphasised that the victim was merely minding her own business, unsuspecting that she would be attacked in any manner. The Court also suggests that the fact that an assault is unprovoked goes hand-in-hand with gratuitousness:

The Judge's remarks included that the deceased was an elderly, vulnerable female going about her ordinary daily life, who was entitled to expect that she would not be confronted or assaulted in the manner that she was. The Judge found that the respondent's conduct was unprovoked, callous and gratuitous and of such sufficient force that it caused the deceased to fall backwards and strike her head on the concrete. (at [25])

... she was an elderly woman who had done nothing to provoke his aggression. (at [88])

The coupling together of 'gratuitous' and 'unprovoked' violence is also seen in *R v Lambaditis*, the Court observing that the victims were 'simply enjoying a night out' and were attacked 'without any interference or provocation' (at [94]).

In *R v Field*, the sentencing judge said:

... I am satisfied beyond reasonable doubt having regard to all the evidence, and consistent with the jury verdict, that it was the offender's punch to the deceased left jaw that caused him to immediately collapse or drop to the ground, and that the punch was both unprovoked and gratuitous. (at [58])

... I am satisfied beyond reasonable doubt that in so doing he acted in a state of uncontrolled anger, unprovoked by anything Mr Kane said or did. (at [64] and also [83])

The gratuitousness of the violence was underscored by reason that the victim '... was doing little more than peacefully spending time with an old friend while his partner ... was at a work dinner in another part of the hotel' (at [6]).

Conversely, in *R v Dyer*, provocation was found to exist. The homeless victim had left his trolley of possessions in the middle of the road when the offender tried to remove it for the purpose of safety. The victim responded with 'clenched and raised' fists, as 'if preparing to fight' (at [4]). The victim had then moved his fists around in a boxing motion followed by a number of pushes, continued aggression and fists still clenched prior to being hit (at [5]). In relation to this element the NSWCCA said: 'I do not mean by that statement to suggest the Prisoner was in any way justified in his reaction, merely to acknowledge a contributing factor' (at [24]).

In *R v Lane* there was a degree of provocation by the victim, who had initially said something to the offender or his accompanying son, resulting in an initial grappling, and a subsequent exchange of blows, before the final punch causing the death was thrown. However, the Court seemed to find that the provocation was overcome by the offender's escalation of 'the aggression even after Mr Morris [the victim] sought to disengage himself from the fracas' (at [38]).

Without in any way blaming Mr Morris for what happened there does seem to have been an angry exchange of words between two intoxicated, middle-aged men, each of whom should have known better. Moreover, Mr Morris was willing to grapple with the offender and initially seems to have obtained the upper hand. The

offender's culpability consists of escalating the violence after Mr Morris attempted to disengage from him. (at [79])

The result was a finding that there was no 'substantial provocation' which implies that there is a threshold level of provocation which must be satisfied before the seriousness of the offence can be said to be mitigated (at [8]).

There is a strong association between the characterisation of violence as gratuitous and an assessment that the victim was 'innocent'. Interestingly, in *R v Lane* the Court noted that 'This case is different from some other cases of drunken, public violence. The offender did not single out an unsuspecting innocent bystander for the infliction of gratuitous violence.' (at [79]; see also *R v McNeil (No 4)* at [29])

Two further insights emerge from this discussion of what I have called the *Loveridge* category. First, there is a notable similarity between the language employed by the NSWCCA—and endorsed by subsequent judgments—to describe the hallmarks of the types of violence where general deterrence warrants greater emphasis (thus producing higher penalties), and the rhetorical tropes about alcohol-related street violence that were prominent in both the media commentary and political discourse following Thomas Kelly's death and Kieran Loveridge's original sentencing (Quilter 2014a). This reinforces the point made earlier that the NSWCCA's recalibration of sentencing principles and practises can and should be seen as responsive to hardening community attitudes about alcohol-related violence. Second, the manner in which the NSWCCA has expressed the indicia of what I refer to as the *Loveridge* category has left sentencing judges with considerable work to do—and, therefore, considerable discretion—in identifying the 'edges' of where the category starts and ends. In the next part of this article I consider how post-*Loveridge* courts have responded to the NSWCCA's message, and the terms in which it was articulated.

The 'no range' message and the edges of the *Loveridge* category

No range

In *R v Wood*, the NSWCCA took the opportunity to reaffirm that 'we do not consider that there is a well recognised group of cases where a single punch or push has resulted in death' (at [55]). It followed that the sentencing judge's statement that the sentencing decision to be made was 'constrained to provide a sentence as guided by the overall pattern of current sentencing' was an error (at [52] and [54]). The NSWCCA went on to hold that sentencing statistics are of even less assistance in the offence of manslaughter compared with other offences, as the circumstances between the cases vary significantly and are thus largely incomparable. In other words the statistics are unhelpful and potentially dangerous as no account is made for the irreconcilable disparities between the cases of manslaughter (at [56]). Consequently, the NSWCCA went as far as saying that sentencing statistics should be altogether avoided in the sentencing process for manslaughter offences (at [56]).

There is strong evidence that the 'no range' message has been heard and embraced by sentencing judges in NSW, as illustrated by the following remarks in post-*Loveridge* cases:

... the circumstances in which manslaughter occurs are almost infinitely variable. The same can be said of 'one-punch' manslaughter and in these circumstances I do not think that anything is to be gained by detailed reference to any of the numerous cases where such killings have been considered. (*R v Wood* at [56])

[Comparable sentencing judgments] of course, do not disclose a range of tariff. When sentencing for manslaughter, a court is always to have regard to the full context in which death has occurred. (*R v Lambadatis* at [99])

It is no longer appropriate to [sic] for this court to regard one punch or single punch cases of manslaughter as constituting a single class of offence since the objective seriousness of each case may vary widely. It is essential that the particular case under consideration is the focus (see *R v Loveridge* [2014] NSWCCA 120). (*R v Field* at [91])

It is well recognised in our criminal law that the crime of manslaughter covers a very wide range of criminality and culpability ... The court must eschew any attempt to put cases of manslaughter into preconceived categories. Such categories do not exist. (*R v Lane (No 3)* at [37] and [68])

Limiting the category

There can be little doubt that the objective of the NSWCCA in *Loveridge* was to 'raise the bar' when it comes to sentencing in certain sorts of crimes of violence. As I show in the next part of this article, this has certainly been the effect of the decision: my analysis of sentencing decisions handed down after *Loveridge* suggests that, if it is determined that a case falls within the *Loveridge* category the level of objective seriousness attached to that case operates as a default starting point in the sentencing process, resulting in higher sentences. Any deviation from that line of sentencing severity must be expressly justified. Ironically, however, the NSWCCA's adoption of a careful doctrinal methodology to identify the cases in which harsher punishment is said to be warranted has, ironically, provided sentencing judges with the tools to avoid locating instances of offending behaviour in the *Loveridge* category. Here, I examine how judges have found and exploited the edges of the category.

Recognition of a default level of objective seriousness and 'starting point' for *Loveridge* category crimes was apparent in *R v Wood*. In this case, the intoxicated offender pushed the elderly victim over on a public footpath, causing her to hit her head on the concrete, ultimately leading to her death. This attack was random and unprovoked. The starting point for the NSWCCA in this sentencing appeal was to reaffirm that violence + public + intoxication cases carry a high level of objective seriousness and an additional need for general deterrence (at [65]-[66]). The Court observed that, '[a]lthough it appears that his Honour acknowledged the principle of general deterrence in a general way by referring to s 3A [of the *Crimes (Sentencing Procedure) Act 1999* (NSW)], the sentence, in our view, did not make any allowance for this *significant sentencing principle* [emphasis added]' (at [70]).

However, it is apparent that sentencing judges are also actively scrutinising the facts of the cases before them to determine whether the offender does fall squarely within the *Loveridge* category. In *R v Lane Campbell J* found that the case was one that involved the three defining elements of the category (violence, public place, intoxication):

The features of the present case which lead me to conclude it is an objectively serious one include that the crime was committed in a public place when the offender was very intoxicated. (at [38])

This was a case, therefore, in which the NSWCCA's 'emphatic sentencing response' appeared to be warranted (at [69]). However, Campbell J then went on to consider authority that might justify a departure from the *Loveridge* default position:

In *R v MD* [2005] NSWCCA 342 ... the Court of Criminal Appeal said: in many cases where an offender is convicted of manslaughter there will be exculpatory matters and personal circumstances that can lead the court to significantly ameliorate the sentence which might otherwise be imposed. (at [70])

Campbell J then justified deviation from the default level of objective seriousness associated with the *Loveridge* category:

This case is different from some other cases of drunken, public violence. The offender did not single out an unsuspecting innocent bystander for the infliction of gratuitous violence. Without in any way blaming Mr Morris [the victim] for what happened there does seem to have been an angry exchange of words between two intoxicated, middle-aged men, each of whom should have known better. Moreover, Mr Morris was willing to grapple with the offender and initially seems to have obtained the upper hand. The offender's culpability consists of escalating the violence after Mr Morris attempted to disengage from him.

In fixing the appropriate sentence for this offence and this offender I bear firmly in mind the considerations of denunciation, punishment and general deterrence, which call for the emphatic sentencing response discussed in *Loveridge*. As I have tried to demonstrate, the subjective circumstances of the offender are in some respects compelling. (at [79]-[80])

Although it involved a single punch leading to the death of the victim, occurring on a public street, *R v Dyer* was a case that had various differences to the quintessential *Loveridge* category case. The offender was not intoxicated, the offender and victim were both homeless, and the offender was provoked by the victim. Once again, the Judge started with the case of *Loveridge*, but said that 'because of the differing circumstances' the punishment warranted in this case was substantially reduced (at [23]). The Court distinguished this case from the *Loveridge* category:

Operating in the Prisoner's favour is that his offence was not one of alcohol fuelled violence—one factor ... which is relevant to the recent emphasis on general deterrence. Also, he was subject to some provocation by the deceased in circumstances where their proximity was inspired by the Prisoner's trying to assist the deceased. (at [24])

The fact that the offence was not alcohol-related and was subject to a degree of provocation were highlighted for the purpose of justifying deviation from the level of objective seriousness linked with *Loveridge* category cases.

The case of *R v McNeil (No 4)* is perhaps the most revealing illustration of how defence counsel and sentencing judges can work the edges of the category created by the NSWCCA in *Loveridge* by highlighting the *absence* of the characteristics said to warrant a greater emphasis on deterrence and a higher sentence. This is especially noteworthy given that, like *Loveridge*, *McNeil* was a case that was surrounded by intense pre-trial publicity. Indeed, it was regarded as having striking similarities to the circumstance of Thomas Kelly's death in 2012 (including because the events occurred very near to the site of Kelly's death and were reported as 'alcohol-fuelled' (see generally Flynn, Halsey and Lee 2016)). In *McNeil* the Court said:

I accept that the offender was not in Kings Cross on New Year's Eve 2013 looking for trouble, let alone that he had any intention to act violently towards anyone. In this respect the case is quite different to *R v Loveridge* [2014] NSWCCA 120 which at first blush might appear to be a strikingly similar case. The attack upon the deceased in that case occurred in almost the exact same spot as the attack in the present case and involved a single punch which caused death by an intoxicated offender. But in that case, the Court of Criminal Appeal described the offender's behaviour (at [168]) as involving the 'repeated and random selection of victims whom he attacked to the head in a public street for no reason'.

... In the present case, the offender was undoubtedly intoxicated, but he was in a buoyant mood and, at a relatively early hour of the evening, he was intent on leaving Kings Cross and going home. It was the unexpected interactions with the three young persons at the intersection of Darlinghurst Road and Victoria Street that precipitated the sudden explosion of a violent response by the offender directed towards a person he mistakenly thought was part of the same group. His action was reactive to the immediately preceding events rather than indicative of him acting in a manner that was premeditated. (at [27]-[28])

The Court thus sought to distinguish *McNeil's* case from that of *Loveridge* by emphasising the ways in which the events did not qualify as a *Loveridge* category crime, citing the fact that it did not involve repeated and random attacks, the violence was not gratuitous, that the incident was unexpected in that the three youths had initiated what turned into a physical altercation with the offender, and the final punch resulting in the manslaughter of Daniel Christie was induced by a mistaken belief (propelled by alcohol) that Christie was a member of the group with whom *McNeil* had just had a physical altercation. In these circumstances, a head sentence less than the 14 years (prior to the application of the guilty plea discount) set by the NSWCCA in *Loveridge* was justified.

In *R v McKnight (No 4)* [2014] NSWSC 1029, the Court recognised that the facts involved the major *Loveridge* category characteristics. General deterrence was a 'powerful factor' because:

... the offending in this case consisted of an unprovoked attack upon an unsuspecting and vulnerable member of the public, lawfully present on a public street by an offender intoxicated by too much alcohol and some cannabis. These considerations bespeak significant objective seriousness. (at [68])

However, although the Court started the sentence calculation process at the default position endorsed in *Loveridge*, it did not end there, because the case was distinguished by the offender's mental illness:

However the difficulty in this particular case, as the Crown submissions also recognised, is the part played by the offender's undoubted psychiatric illness. This consideration distinguishes this case considerably from cases involving manslaughter by dangerous and unlawful act where an offender has set out to either wreak havoc, engage in affray or give vent to a violent self-gratification. (at [71])

The need for emphatic justice in the present case must be ameliorated to a degree by the offender's undoubted psychiatric illness. (at [73])

McNeil and the other cases discussed here show that sentencing judges have not simply passively received and deployed the NSWCCA's recalibration of sentencing practice in cases of alcohol-related public violence. Consistent with principles of individualised justice, mindful of the potential harshness of too readily locating a case within the *Loveridge* category, and with the benefit of counsel submissions, judges have shown a willingness to distinguish the offences and offenders before them from the category of crimes which the NSWCCA has 'marked' as more objectively serious. In the next part I will show that, nevertheless, the Court of Criminal Appeal's decision has had a significant impact on sentencing in subsequent matters.

The *Loveridge* effect: Impact on sentences

The immediate objective of the NSWCCA in *Loveridge* [2014] was to provide an appropriate sentence for the offender, but the manner in which the Court went about this task made it clear that a wider agenda was also being pursued. Although *Loveridge* [2014] does not constitute a

formal guideline judgment,¹⁸ it is clear that the Court was determined to put down some permanent and ongoing ‘markers’ of general application—to influence how sentencing courts should approach the task of sentencing violent offenders in the future.

In this final part of the article, I consider what effect the NSWCCA’s *Loveridge* decision has had on sentences handed down in cases falling within what I have called the *Loveridge* category. I analyse nine decisions handed down in NSW between July 2014 and December 2015 (including *Loveridge* [2014]).¹⁹

Six of the nine cases were classic one punch fatalities.²⁰ Of the three remaining cases, *R v Lane*²¹ involved a grappling between the offender and victim, a subsequent exchange of blows and the final deliverance of a fatal punch by the offender; *R v Matthews* involved a series of punches being exchanged between offender and victim throughout their physical altercation; and *R v McKnight* involved three forceful kicks to the victim’s head and chest area.

Adopting a typology used in previous research (Quilter 2014b), Table 1 summarises the key characteristics of cases decided since *Loveridge* [2014].

Table 1: ‘Loveridge category’ cases in NSW, 2014-2015

Case	One punch	Alcohol /drugs	Guilty plea	Sentence	Public location	Stranger	Unplanned	Randomly selected	Provoked (by V)
<i>Loveridge</i>	Y	Y	Y (25%)	PGP: 14y 0m HS: 10y 6m NPP: 7y 0m	Y	Y	Y	Y	N
<i>Dyer</i>	Y	N	Y (15%)	PGP: 7y 8m HS: 6y 6m NPP: 3y 9m	Y	Y	Y	N	Y
<i>Lambaditis</i>	Y	Y	Y (25%)	PGP: 12y 0m HS: 9y 0m NPP: 6y 9m	Y	Y	Y	N	N
<i>Field</i>	Y	N	N	PGP: HS: 10y 0m NPP: 7y 6m	Y	Y	Y	Y	N
<i>Lane</i>	N	Y	Y (15%)	PGP: 10y 0m HS: 8y 6m NPP: 6y 4m	Y	Y	Y	N	Y
<i>McNeil</i>	Y	Y	Y (25%)	PGP: 12y 0m HS: 9y 0m NPP: 6y 9m	Y	Y	Y	N	N
<i>Wood</i>	Y	Y	Y (5%)	PGP: 12y 0m HS: 11y 4m NPP: 8y 0m	Y	Y	Y	N	N
<i>Matthews</i>	N	Y	Y (25%)	PGP: 10y 0m HS: 7y 6m NPP: 5y 0m	Y	N	Y	N	Y
<i>McKnight</i>	N	Y	Y (25%)	PGP: 10y 8m HS: 8y 0m NPP: 6y 0m	Y	Y	Y	N	N
Total/ Average	6	7	8	PGP: 11y 0.5m HS: 8y 11m NPP: 6y 4m	9	8	9	2	3

Alcohol/drugs

In seven of the nine cases, the offender was affected by alcohol or drugs.²²

Gender and age of victim and offender

In all but one case (*R v Wood*), both the offender and the victim were male. In *Wood*, the victim was an elderly woman (71 years) who was attacked by the 30-year-old male offender.

The mean offender age was 33.84 years, with a range from 18 years to 52.75 years at the time of offending. That is, contrary to the familiar media profile, *Loveridge*-style fatal assaults were not primarily committed by youthful men but, rather, by an older demographic.

Randomness

All cases involved 'unplanned' random violence. However, in only two cases (including *Loveridge*) could it be said that the victim was 'randomly selected' (see *R v Loveridge* [2014]; *R v Field*).

Public setting

All nine of the cases occurred in a public place, with the majority (seven) occurring in public streets. Of the other two, one occurred on a public footpath (*R v Wood*) and the other in an open and public car-park (*R v Field*).

Offender/victim relationship

Eight of nine cases occurred in circumstances where the offender and the victim were strangers. In the sole case where the offender and victim were not strangers (*R v Matthews*), their association was only through mutual friends—that is, they were not friends themselves but acquaintances. In only three of the nine cases was there some provocation by the victim.

Plea

In all nine cases the offender was originally charged with murder. In four of the cases, the Prosecution accepted a plea of guilty of manslaughter. In four other cases, the murder charge went to trial, and the accused was found not guilty of murder but guilty of manslaughter. In the final case (*R v Matthews*), the offender was initially charged with, and convicted of, murder. On appeal the murder conviction was quashed, a retrial ordered and subsequently a plea of manslaughter accepted.

In eight cases the accused pleaded guilty to manslaughter (including the four cases in which the Prosecution declined to accept the pleas and the murder charge proceeded to trial), with the majority of offenders (five) receiving the full guilty plea discount (25 per cent). In only one case (*R v Field*) was a guilty plea of manslaughter not entered. In that case, the offender was tried for murder but ultimately found guilty of manslaughter.

Remorse and rehabilitation prospects

In seven out of the nine cases, remorse was found, and in six of the nine cases, there were reasonable-to-good prospects of rehabilitation.

Sentences

Table 1 includes the sentences handed down in each of the nine cases. Table 2 compares the sentences (head sentence and NPP) handed down in the post-*Loveridge* period with those in the pre-*Loveridge* period (Quilter 2014b).²³

Table 2: Comparison of mean and median sentences pre- and post-*Loveridge*

	Mean			Median		
	Pre- Loveridge	Post- Loveridge	Increase	Pre- Loveridge	Post- Loveridge	Increase
Pre-guilty plea reduction	6y 10m	11y 0.5m	4y 2.5m	7y 6m	11y 4m	3y 10m
Head sentence	5y 2m	8y 11m	3y 9m	5y 11m	9y 0m	3y 1m
Non-parole period	3y 2m	6y 4m	3y 2m	3y 6m	6y 9m	3y 3m

Table 2 shows that, after *Loveridge*, the head sentence for *Loveridge* category was, on average, 3 years and 9 months higher, and the median increased by 3 years and 1 month. In terms of the NPP, the average increase since *Loveridge* was 3 years and 2 months whereas the median increase was 3 years and 3 months.

Firm conclusions cannot be made on the basis of a small number of cases decided in the immediate aftermath of a landmark decision. However, the data summarised here show that the NSWCCA's decision in *Loveridge* has had an immediate upward effect on the duration of both head sentences and non-parole periods for manslaughter deaths perpetrated by alcohol- and drug-affected men in public during the course of spontaneous and unprovoked attacks.

Conclusion

Five years on from the tragedy of Thomas Kelly's death in Kings Cross it is widely recognised that the legal landscape has changed dramatically. The criminal law now supports a more punitive response to fatal assaults that occur in public and are associated with offender intoxication. Whether to praise or condemn, most observers have attributed the raising of the penalty bar to the NSW Parliament, because it enacted a new offence of assault causing death while intoxicated, carrying a minimum prison term of 8 years (*Crimes Act 1900* (NSW), ss 25A(2), 25B). However, at the present time, that would be a misattribution. Without any relevant change to the *Crimes Act 1900* (NSW) or the *Crimes (Sentencing Procedure) Act 1999* (NSW),²⁴ the NSW Court of Criminal Appeal has effectively created a new category of manslaughter for sentencing purposes via its landmark *Loveridge* decision in 2014. The *Loveridge* effect described in this article is that individuals who cause the death of another person—through violence perpetrated in public while intoxicated (especially if the victim was 'innocent' and the attack 'unprovoked')—will be spending a substantially longer period in prison than those who perpetrated similar crimes in the past.

On the one hand, legislatures are often (and appropriately) criticised for making major changes to the criminal law in response to a single or small number of highly publicised tragic crimes, which have wider and long-term consequences, including the potential for injustice (Quilter 2014a). Such was the case with the decision in 2014 of the NSW Parliament to create new offences of assault causing death, and assault causing death while intoxicated. On the other hand, Courts in Australia are rarely subjected to scrutiny and criticism for contributing to increased *punitiveness* in criminal punishment. On the contrary, they are more likely to be criticised for perceived *leniency*. This article has shown, however, that, to date, it is the *judicial* arm of government, rather than the *legislative* arm of government that has been responsible for a significant movement of the sentencing needle towards longer prison terms in cases of alcohol-related public violence, although definitive assessment should be reserved until pending charges and sentences under s 25A of the *Crimes Act 1900* (NSW) are finalised in the courts.

Whether the shift described here is a desirable one is a moot point, and will require further investigation and debate, but, in closing, I make four observations.

First, the developments described in this article should prompt re-evaluation of the conventional wisdom that it is elected politicians who are responsive to the electorate and judges who are 'out of touch'.

Secondly, unlike other manifestations of so-called judicial 'activism', which are routinely criticised by politicians as 'undemocratic' and illegitimate, the NSWCCA's move to mandate tougher sentences in the case of alcohol- and drug-related public violence is more likely to be *applauded* because the courts are seen to be responding to the same community anxieties and attitudinal changes in society, and producing the same penal effects, as those which have dominated government rhetoric, policy and legislative reform in recent years.

Thirdly, in so doing, the courts appear to have endorsed the view, prominent in government policy discourse, that alcohol- and drug-related violence inflicted on strangers in public is more objectively serious than violence that occurs in private settings, which frequently is gendered domestic violence with female intimate partners as victims (McNamara and Quilter 2015; Quilter et al. 2016). Neither legislators nor judges draw the distinction in such stark terms, but it appears to be an inevitable consequence of treating 'public location' and 'randomness' as factors that increase the objective seriousness of an offence.

Finally, there is already some evidence of sentencing judge resistance to the idea that an incident that ostensibly falls with the *Loveridge* category necessarily warrants a longer prison term. Consistent with their primary obligation to administer individualised justice, it is likely that some judges will continue to work assiduously to find the edges of the category, consistent with their own intuitive assessment of where the offender before them sits on the spectrum of culpability. Indeed, such exercises of discretion may prove to be an important release valve on the pressure towards more punitive sentencing that the NSWCCA has exerted via its decision in *Loveridge*.

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² Previous examples of this tension include: guideline judgments; standard non-parole sentencing; and mandatory sentencing (see generally Brown et al. 2015: 1246-1294).

³ For discussion of another context in which the courts have expanded rather than contracted the parameters of criminalisation, see McNamara 2014: 104-117.

⁴ The first was added in 2011 for murdering a police officer in execution of his or her duties and the mandatory penalty is life: *Crimes Act 1900* (NSW) s 19B.

⁵ While Mr Johnson was ultimately convicted of manslaughter during the trial, his Honour, Judge Button, delivered the first decision on how 'intoxication' should be defined for the purposes of the aggravated offence in s 25A(2): see *R v Johnson (No 4)* [2017] NSWSC 609. His Honour (at [8]-[11]) expansively defined intoxication—based on dictionary definitions—as meaning 'drunk' (at [9]) which 'involves something more than a person having a small amount of alcohol in his or her body' (at [10]). In line with the argument made in this article that the judiciary has played a significant role in changing the criminal law's treatment of alcohol-fuelled criminal behaviour, should such a definition be adopted in future cases, this has the potential to greatly widen the net of those caught by s 25A(2). It is noted that the legislature has required a much higher standard in s 25A(6) for an accused to be 'conclusively presumed to be intoxicated by alcohol'; namely, the prosecution must prove 'in accordance with an analysis carried out in accordance with that Division that there was present in the accused's breath or blood a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood'.

⁶ Prior to this legislative change, the common law position expressed the position that intoxication was only to operate as a form of *mitigation* when the limited 'out of character' exception applied: *Hasan v R* (2010) 222 A Crim R 306; *R v GWM* [2012] NSWCCA 240.

- ⁷ The specific question that the Sentencing Council was asked to advise upon was: 'Whether a mandatory aggravating factor should be introduced to s 21A of the *Crimes (Sentencing Procedure) Act 1999* that applies where the offence involved violence because the offender was taking, inhaling or being affected by a narcotic drug, alcohol or any other intoxicating substance' (NSW Sentencing Council 2015: [1.15]).
- ⁸ See, for example, *R v Bashford* [2007] NSWSC 1380 at [50]. See also *R v Maclurcan* [2003] NSWSC 799 at [25]; *Hutchison v The Queen* [2010] NSWCCA 122 at [6]; *R v Loveridge* [2013] NSWSC 1638 at [62]; *R v Munter* [2009] NSWSC 158 at [17]; *R v Castle* [2012] NSWSC 1603 at [17]; *R v CK, TS* [2007] NSWSC 1424 at [13], [15].
- ⁹ See also *R v Smith* [2008] NSWSC 201 at [15], [18]-[19]; *R v O'Hare* [2003] NSWSC 652 at [35]; *R v Carroll* (2010) 77 NSWLR 45 at [60]-[61]; *Donaczy v R* [2010] NSWCCA 143 at [53]-[54]; *R v Munter* [2009] NSWSC 158 at [16]; *R v Loveridge* [2013] NSWSC 1638 at [67]; *Hopley v The Queen* [2008] NSWCCA 105 at [47]; *R v Risteski* [1999] NSWSC 1248 at [23]; *R v Castle* [2012] NSWSC 1603 at [36].
- ¹⁰ See *Hopley v The Queen* [2008] NSWCCA 105 at [53]; *R v Carroll* (2010) 77 NSWLR 45 at [60]; *Donaczy v R* [2010] NSWCCA 143 at [53]-[54].
- ¹¹ See Adams J in *R v Greenhalgh* [2001] NSWCCA 437 at [13]; *R v O'Hare* [2003] NSWSC 652 at [35] and [37].
- ¹² The next phase in the larger study of which this article is part will analyse decisions and sentences in assault causing death cases (s 25A), several of which are currently pending in the NSW courts.
- ¹³ Although in *R v Castle* [2012] NSWSC 1603, *R v Greenhalgh* [2001] NSWCCA 437 and *Hopley v R* [2008] NSWCCA 105, there was no specific comment made in relation to a 'range'.
- ¹⁴ See, for example, *R v Wood* [2014] NSWCCA 184, [55]-[56], [59]; *R v Dyer* [2014] NSWSC 1809, [23]; *Lambaditis* [2015] NSWSC 746, [99]; *R v Field* [2014] NSWSC 1719, [91]; *R v Lane (No 3)* [2015] NSWSC 118, [37]; and the discussion below dealing with the no range message of the *Loveridge* category.
- ¹⁵ This was the subject of multiple references by the Court: see *R v Loveridge* [2014] NSWCCA 120 at [101], [103], [105], [107], [122], [152], [156], [168], [203], [206], [207], [209], [209], [210], [212], [213], [216], [219], [234] and [267].
- ¹⁶ This was the subject of multiple references by the Court: see *R v Loveridge* [2014] NSWCCA 120 at [101], [103], [105], [107], [122], [156], [168], [206], [208], [209], [210], [212], [213], [216], [219], [269], [275] and [281].
- ¹⁷ This was the subject of multiple references by the Court: see *R v Loveridge* [2014] NSWCCA 120 at [101], [102], [103], [105], [107], [120], [122], [204], [210], [216] and [218].
- ¹⁸ As noted when providing the background of the article, following *Loveridge's* original sentencing in November 2013, the Office of the Director of Public Prosecutions announced that, in addition to appealing the decision, the NSWCCA would be asked to hand down a formal guideline judgment in relation to cases of unlawful and dangerous act manslaughter involving death caused by single or limited punches that were unprovoked, random and gratuitous. This course of action was later abandoned when, in January 2014, the NSW Parliament introduced the new offences of assault causing death and assault causing death while intoxicated (*Crimes Act 1900* (NSW), s 25A).
- ¹⁹ The 9 cases are: *R v Loveridge* [2014] NSWCCA 120; *R v Wood* [2014] NSWCCA 184; *R v Dyer* [2014] NSWSC 1809; *R v Lambaditis* [2015] NSWSC 746; *R v Field* [2014] NSWSC 1797; *R v Lane (No 3)* [2015] NSWSC 118; *R v McNeil (No 4)* [2015] NSWSC 1198; *R v Matthews* [2015] NSWSC 49; *R v McKnight (No 4)* [2014] NSWSC 1029. It is noted that, in *R v McKnight (No 4)* [2014] NSWSC 1029, the offender was suffering from delusional schizophrenia at the time of offending, which created an internal misconception that the victim had stolen from him, in addition to the presence of voices compelling the violence. Although the judge noted that the need for general deterrence and 'emphatic justice' was ameliorated accordingly, this case has been included because it nonetheless demonstrates the heightened severity of sentencing by the judiciary post-*Loveridge*. The case of *Matia v R; R v Matia* [2015] NSWCCA 79 has been excluded because the violent conduct occurred in the context of excessive self-defence which consequently renders the factual circumstances and the subsequent sentence incomparable with the other cases.
- ²⁰ Of these six I note *R v Wood* [2014] NSWCCA 184 involved a single double-handed push by the offender to the elderly victim; *R v Dyer* [2014] NSWSC 1809 involved a push-and-shove prior to a single fatal punch being thrown by the offender.
- ²¹ It is noted that Lane's appeal against conviction was dismissed: *Lane v R* [2017] NSWCCA 46.
- ²² In *R v Field* [2014] NSWSC 1719, although the Court recognised that the offender had been consuming alcohol for a significant period of time prior to the offence, as no evidence was led, intoxication could not be taken into account in the determination of sentence.
- ²³ Pre-*Loveridge* period' here refers to the cases surveyed in Quilter 2014b, being NSW sentencing decisions from 1998-2013 involving one punch manslaughters. While it is not claimed that the post-*Loveridge* cases are identical to those reviewed in the earlier study, there are sufficient similarities between the two groups of cases—including that they are primarily one punch alcohol-related cases originally charged as murder, but in which a plea to manslaughter was accepted (except in one instance in both groups)—that comparison is valid and illuminating.
- ²⁴ Although it is noted that the special rule against intoxication being a mitigating factor was introduced in 2014 into the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5AA), see above.

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Legislation

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