

## **Criminal Law Guidebook Second Edition – Chapter 12: Sentencing and Punishment**

**The following is a suggested solution to the problem on pages 353–354. It represents an answer of an above average standard.**

**The ILAC approach to problem-solving as set out in the ‘How to Answer Questions’ section of the preliminary pages of the *Criminal Law Guidebook, Second Edition* has been used in devising this solution.**

1. In sentencing an offender, a sentence imposed by a court must be proportionate to the gravity of an offence measured by its objective circumstances, and a sentencing judge or magistrate can seek to achieve any of the purposes of sentencing within the parameters of the proportionate sentence<sup>1</sup>. In each jurisdiction, there is a legislative statement of the purposes for which a court may impose a sentence on an offender<sup>2</sup>. These include protection of the community, specific and general deterrence, retribution or adequate punishment, rehabilitation, and denunciation. Any one, or a combination of, these purposes may be used by a court to impose a sentence that is proportionate to the gravity of the offence and the circumstances of the offender.

In order to rate Andrew’s overall level of criminality for the ‘assault’ offence committed upon Barry, there must be an assessment of the objective seriousness of the offence on the basis of the harm caused to Barry and the blameworthiness, or moral culpability of Andrew.

On the question of the harm caused to Barry, the facts state that Andrew, who had been drinking heavily and was thus under the influence of alcohol, threw several punches at Barry, only one of which connected with Barry’s mouth, causing a slight swelling of Barry’s bottom lip for which he did not seek medical treatment. It seems Andrew desisted, or was stopped, after the one punch connected with Barry’s mouth and there is no evidence of physical retaliation by Barry. The charge is ‘assault’, so Andrew’s criminality for the purpose of assessing an appropriate punishment is on the basis of using force to make a single, unlawful physical contact with Barry, and not on the basis of any injury. On this basis, the harm caused to the victim by the offence is minor.

As to Andrew’s level of culpability, the defence in New South Wales and Victoria would argue that the applicable mental element is recklessness, as Andrew ‘struck out foreseeing or knowing that he might hit somebody and not caring if he did’<sup>3</sup>. This mental element is not applicable to assault in South Australia, as the statutory requirements are that the accused ‘intentionally applies force’<sup>4</sup>, or ‘intentionally makes physical contact with the victim knowing that the victim might reasonably object to the contact in the circumstances’<sup>5</sup>. The prosecution in each jurisdiction is likely to argue that it was an intentional application of force, but in New South Wales and Victoria it is likely that the defence would have negotiated the guilty plea on the basis of recklessness, which is arguably a less culpable state of mind

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<sup>1</sup> *Veen v The Queen [No 1]* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 464. Also, see Richard Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 495.

<sup>2</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10.

<sup>3</sup> *R v Williams* (1990) 50 A Crim R 213.

<sup>4</sup> *Criminal Law Consolidation Act 1935* (SA) s 20(1)(a).

<sup>5</sup> *Criminal Law Consolidation Act 1935* (SA) s 20(1)(b).

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in these circumstances. Further, the verbal altercation between Andrew and Barry immediately prior to the assault suggests that Barry may have provoked Andrew to some extent. This may mitigate Andrew's culpability and overall criminality. The incident seems to have principally arisen through Andrew's level of intoxication, as he had been involved in 'a heavy drinking session' due to the recent breakdown in a relatively long-term relationship. It is arguably an example of binge drinking, which provides some explanation for Andrew's conduct, without necessarily increasing his overall level of criminality.

Using an intuitive synthesis methodology<sup>6</sup> to take into account those objective and subjective factors relating only to the offence, and without regard to the subjective factors relating solely to the offender<sup>7</sup>, I would rate Andrew's overall criminality as indicated by the shaded box below.

<b>Very Low</b>	<b>Low</b>	<b>Moderate</b>	<b>High</b>	<b>Very High</b>
<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>

It may be contended by the prosecution that Andrew's objective criminality was higher than that and should be rated at 'moderate' or between 'low' and 'moderate', but it is strongly arguable that there was not a high level of criminality involved in this offence.

2. Andrew's alcohol consumption in this scenario is a significant factor in determining his overall level of criminality:

<b>Strongly Disagree</b>	<b>Disagree</b>	<b>Neutral</b>	<b>Agree</b>	<b>Strongly Agree</b>
<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>

In agreeing that Andrew's alcohol consumption is a significant factor in determining his overall level of criminality, it is clear that it cannot be used to excuse his criminal behaviour. However, it can be used to explain conduct that may ordinarily be out of character for Andrew. Alcohol consumption can be a mitigating or aggravating factor depending on the particular circumstances of the case<sup>8</sup>. Andrew is a binge drinker, but has no previous convictions for violent conduct. On this particular occasion, he had been involved in a heavy drinking session and then engaged in violent conduct with a complete stranger, which did not continue after the victim was struck once in the mouth. This violent behaviour seems to be out of character for Andrew and can be explained by his heavily intoxicated condition, which was the reaction of a 22-year old man to the recent breakdown in what may be described as a long-term relationship given his young age. Arguably, in all these circumstances, Andrew's alcohol consumption mitigates the objective seriousness of the assault upon Barry, and demonstrates that Andrew may have a problem with alcohol for which he needs some form of treatment. Therefore, it is a significant factor to be weighed in the intuitive synthesis of determining Andrew's overall level of criminality.

<sup>6</sup> *Markarian v The Queen* (2005) 215 ALR 213; *Muldock v The Queen* (2011) 244 CLR 120, 131–2.

<sup>7</sup> These factors are relevant only to penalty and not the objective seriousness of the offence.

<sup>8</sup> *R v Coleman* (1990) 47 A Crim R 306, 327; *R v Jerrard* (1991) 56 A Crim R 297, 301–302. Further it should be noted that intoxication cannot be used to negate the mental element in this case as it was apparently 'self-induced' and 'assault' is not an offence of 'specific intent' – *Crimes Act 1900* (NSW) ss 428B–428D.

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3. The level of injury caused to the victim is a significant factor in determining Andrew's overall level of criminality:

<b>Strongly Disagree</b>	<b>Disagree</b>	<b>Neutral</b>	<b>Agree</b>	<b>Strongly Agree</b>
<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>

This is a harm consideration, which is relevant to overall criminality and is significant only to the extent that it shows the degree of unlawful force used in the assault. Injury is not an element of this offence, and any actual injury must have been transient or trifling because the police did not charge Andrew with a more serious offence.<sup>9</sup> The victim did not seek medical attention and the swelling to the bottom lip was described as only 'slight', which probably abated soon after the incident. It demonstrates that Andrew used only a minor degree of force in punching Barry, and this assists in locating this particular 'assault' at the lower end of the spectrum of criminality for this offence type.

4. The other relevant factors in determining Andrew's overall level of criminality are the opportunistic nature of the crime; the apparent fact that this was a reckless, rather than intentional act of violence; and the absence of a lengthy fight or sustained acts of violence.

First, this was an opportunistic crime that was not premeditated or planned. It arose from a spontaneous verbal altercation between strangers, after a heavy drinking session in a hotel. This is relevant in reducing the level of Andrew's criminality and would be given some weight in the intuitive synthesis of weighing the relevant factors. Using this methodology, it is not appropriate to assign numerical values to the 'weight' of individual factors<sup>10</sup>. It is an important, but not a principal factor in determining Andrew's overall level of criminality.

Second, the applicable mental element is a principal factor in determining Andrew's overall level of criminality. As briefly discussed above<sup>11</sup>, Andrew swung several punches at Barry, after yelling abuse at him, so there could be an inference that he intended to make unlawful physical contact with Barry. Equally the 'swinging and missing' may be characteristic of recklessness, where Andrew simply realised the possibility of unlawful physical contact, but proceeded with his actions indifferent to the risk. A finding of recklessness in New South Wales and Victoria would reduce Andrew's criminality, which arguably carries significant weight in the sentencing process, and would certainly outweigh the harm to the victim in this scenario. In South Australia, it is not possible to make a finding of 'reckless assault' due to the statutory constraints<sup>12</sup>, and it is likely that the act of Andrew would be characterised as an intentional application of force and his criminality would be measured accordingly in this jurisdiction.

<sup>9</sup> Such as 'Assault occasioning actual bodily harm' under *Crimes Act 1900* (NSW) s 59 or 'Assault causing harm' under *Criminal Law Consolidation Act 1935* (SA) s 20(4) or 'Intentionally or recklessly causing injury' under *Crimes Act 1958* (Vic) s 18.

<sup>10</sup> *R v Young* [1990] VR 951; *Markarian v The Queen* (2005) 215 ALR 213.

<sup>11</sup> See above at the fourth full paragraph in the answer to question 1.

<sup>12</sup> See above notes 4 and 5.

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Third, the incident was seemingly circumscribed in time and had no immediate effect on other patrons, as it happened when both men were leaving the licensed premises. Arguably, it was a brief, isolated incident of violent behaviour, with minimal impact on the victim and community. This factor has some importance, and the Legal Aid solicitor should be able to persuade the magistrate to give it weight in reducing Andrew's overall level of criminality for the assault.

5. Once the objective seriousness of the offence and the overall criminality of Andrew's conduct have been determined as 'low' on the spectrum of assault offences, then all the relevant subjective features of Andrew as supplied by the Legal Aid solicitor to the court must be taken into account in deciding the appropriate sentence. There are some very strong factors in Andrew's favour that would mitigate the penalty to be imposed, and it is most unlikely that the magistrate would consider a custodial sentencing option as appropriate. Andrew is still young and relatively immature<sup>13</sup> at twenty-two years of age and he entered a guilty plea at what appears to be the first opportunity. His early plea is arguably a sign of contrition for his actions, in addition to the utilitarian value it has for the criminal justice process, so it will be contended that there should be a significant discount on sentence to reflect this<sup>14</sup>. There is no apparent continuing animosity towards Barry, who was a stranger to Andrew before this incident. The impact on Barry seems to have been minimal, and he is unlikely to provide a victim impact statement to the court.

Andrew's income appears to be limited as he is an unskilled labourer with seasonal variation in his employment. He has a commitment to paying rent in share accommodation and would have associated living expenses, so that the Legal Aid solicitor would argue that Andrew has little or no capacity to pay a fine. He has no family commitments, although he was clearly emotionally disturbed by the recent breakdown in an eighteen-month relationship with his girlfriend. His reaction to this was a heavy drinking session, which arguably illustrates his level of immaturity and the need for guidance in making better choices. Andrew has only one previous conviction, which has some significance in that it is alcohol-related. It did not, however, involve an offence of violence, and does not show 'a continuing attitude of disobedience of the law'<sup>15</sup>. A reasonably lenient punishment was imposed for the drink-driving offence and this conviction does not disentitle Andrew to some degree of leniency for his current offence<sup>16</sup>.

The magistrate would be likely to identify Andrew as having a potential problem with alcohol, and there appears to be no information available to the Legal Aid solicitor that this has been recognised by Andrew, or that he has sought counselling in this regard. The evidence on sentence is that he is a binge drinker and this must be recognised as a problem for this young man, considering that there is potential for more serious harm to occur from his binge drinking if it continues. Arguably, this is an indication that Andrew requires some monitoring to get him through those potentially difficult years for young men from the ages of about 18 to 25 years, to ensure an informed effort is made to avoid Andrew ending

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<sup>13</sup> *R v GDP* (1991) 53 A Crim R 112, *R v Hearne* (2001) 124 A Crim R 451.

<sup>14</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22; *Sentencing Act 1991* (Vic) ss 5(2)(e) and 6AAA; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(g); *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383; *Cameron v The Queen* (2002) 76 ALJR 382, [70].

<sup>15</sup> *Veen v The Queen (No 2)* (1988) 164 CLR 465, 477.

<sup>16</sup> *Ryan v The Queen* (2001) 206 CLR 267.

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up in prison<sup>17</sup>. It would be prudent for the Legal Aid solicitor to enquire about available alcohol counselling and treatment programs, and Andrew's willingness to participate in such programs, as there is an important argument to be made that rehabilitation should be a primary purpose in sentencing Andrew.

On the basis of all the relevant objective and subjective factors, I consider it would be appropriate to convict Andrew and order his release on a good behaviour bond<sup>18</sup>, or upon adjournment<sup>19</sup>, for a period of 18 months, conditional on his accepting the supervision of a community corrections or probation and parole officer, together with counselling and/or treatment as necessary in relation to alcohol abuse. The supervision may only be necessary for a short time, to ensure Andrew does something by way of rehabilitation to address his apparent problem with alcohol consumption. This sentence is arguably proportionate to Andrew's criminality and subjective features. It has a strong rehabilitative purpose, but at the same time represents adequate punishment, sufficiently denounces Andrew's crime, and attempts to specifically deter Andrew from committing such crimes in the future. Andrew would be warned that in the event of a breach of his conditional release, he would face the prospect of a more severe penalty including a sentence of imprisonment.

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<sup>17</sup> *R v GDP* (1991) 53 A Crim R 112, 116; *R v Mills* [1998] 4 VR 235, 241–242; *R v Hearne* (2001) 124 A Crim R 451; *R v Phung* (2003) 141 A Crim R 311, 319–322; *R v DM* [2005] NSWCCA 181.

<sup>18</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 39.

<sup>19</sup> *Sentencing Act 1991* (Vic) s 72.