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Tensions and Balances, Costs and Rewards: the Sentence Discount in Scotland

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Since 1995 the practice of sentence discounting in the Scots criminal courts has been undergoing a process of review. The operation and justifications of sentence discounting have been given detailed consideration in recent case-law. Once in force, section 20 of the Criminal Procedure (Amendment) (Scotland) Act 2004 will require judges to take an early plea of guilty into account in determining an appropriate sentence, and to give reasons in open court if a discount is not applied. This article evaluates these recent developments in the context of the theoretical issues surrounding sentence discounting.

A. INTRODUCTION

Sentence discounting is the practice whereby, in the event of a guilty plea, an offender receives a lesser sentence than he or she would otherwise have done. The precise operation of sentence discounting schemes varies from jurisdiction to jurisdiction but, most commonly, the discount is a graduated one, varying according to factors such as the timing of the plea and the extent to which the plea spared vulnerable witnesses from having to give evidence. Sentence discounting, understood in this sense, is merely one of a number of ways in which an accused person can be “rewarded” for tendering a plea of guilty. In Scotland, for example, alongside the operation of sentence discounting, accused persons might also be informally rewarded for a guilty plea through a process of charge bargaining or fact bargaining.¹

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1 Charge bargaining refers to the practice whereby a prosecutor accepts a plea of guilty in exchange for the reduction or deletion of a charge on the indictment or complaint. Fact bargaining refers to the deletion or amendment of the narrative contained in the charge. In both instances, the hope for the accused is that the changes will be reflected in a lesser sentence. The process is entirely dependent on informal negotiations between the prosecution and the defence. Judges have no involvement in plea bargaining in

Traditionally, there has been a certain antipathy towards the practice of sentence discounting in Scotland. Between the mid 1980s and mid 1990s, sentence discounting was not formally operated, after the Appeal Court in *Strauchorn v McLeod*² disapproved the practice. This can be contrasted with the position in England and Wales where, during the same period, sentence discounting appears to have been regarded as relatively unproblematic, with courts commonly applying sentence discounts of up to one third in exchange for guilty pleas.³ However, the attitude towards sentence discounting in Scotland is undergoing a process of change. The process started in 1995, when permissive legislation on sentence discounting came into force.⁴ Following on from this, two key developments have recently taken place. First, as a result of Lord Bonyon's *Review of the Practices and Procedures of the High Court of Justiciary*,⁵ the Scottish Executive has, in the Criminal Procedure (Amendment) (Scotland) Act 2004,⁶ enhanced the role of sentence discounting in Scottish criminal cases. Whereas the 1995 legislation provided only that an intention to plead guilty *may* be taken into account by judges in sentencing, it is now proposed that sentencers are *required* to take this into account in arriving at an appropriate sentence, and must give reasons in open court if a discount is not applied. Second, the operation and justifications of sentence discounting have been considered in detail for the first time by the Scottish Appeal Court in *Du Plooy, Alderdice, Crooks and O'Neil v HMA*.⁷

This article considers these recent developments in the context of the theoretical issues surrounding sentence discounting. Various justifications have been advanced in favour of sentence discounting, the three most common being: that it is justified on the basis of the remorse of the accused; that any victim is spared the ordeal of testifying in court; and/or efficiency savings are gained if a trial is avoided.

Scotland and therefore any "discount" cannot be guaranteed (unless the bargain means that the court's sentencing powers are reduced because, for example, the offence to which the accused eventually pleads guilty has a maximum sentence). See S Moody and J Tombs, *Prosecution in the Public Interest* (1982), ch 2. 2 1987 SCCR 413.

3 Although sentence discounting was not recognised in statutory form in England and Wales until 1994 (in s 48 of the Criminal Justice and Public Order Act 1994), the practice was approved in a line of cases running from *R v Harper* [1968] 2 QB 108 to *R v Buffrey* (1993) 14 Cr App R (S) 511, where the general guidance was given (at 515) that a guilty plea normally merited a discount of one third from the sentence that would otherwise have been imposed.

4 Initially in s 33 of the Criminal Justice (Scotland) Act 1995 and now in s 196 of the Criminal Procedure (Scotland) Act 1995.

5 Lord Bonyon, *The 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2002) (available at <http://www.scotcourts.gov.uk/bonyon/reportHTML/ch01.asp>), henceforth "the Review".

6 At the time of writing, the Act was not yet in force.

7 2003 SLT 1237. For detailed comment on the case, see F Leverick, "Making sense of sentence discounting: *Du Plooy, Alderdice, Crooks and O'Neil v HMA*" 2003 SLT (News) 267; D J C Thomson, "Discount of sentencing following a guilty plea" 2004 SLT (News) 1.

The first two of these are regarded here as particularly unconvincing. It will be argued here that in the vast majority of cases sentence discounting is very difficult to justify on anything but efficiency grounds and that this should be more explicitly recognised. The question then is whether or not such efficiency justifications outweigh the principled objections that can be made against sentence discounting, namely that it unfairly penalises those who exercise their right to go to trial and that it might encourage innocent people to plead guilty.

In the remainder of the article, the history of sentence discounting in Scotland is outlined and placed in context; the justifications for and arguments against sentence discounting are considered in more detail; and the recent Scottish developments are assessed in the light of these theoretical concerns.

B. SENTENCE DISCOUNTING IN SCOTLAND

(1) Historical development and the present position

The practice of sentence discounting was not formally recognised in Scottish legislation until 1995, initially in section 33 of the Criminal Justice (Scotland) Act 1995, which was almost immediately consolidated into the Criminal Procedure (Scotland) Act 1995.⁸ This is not to say that prior to 1995 the fact and the timing of a guilty plea were never taken into account in sentencing decisions. In *Khaliq v HMA*,⁹ for example, the sentence was reduced from three to two years' imprisonment on appeal on the basis that the trial judge gave insufficient weight to the fact that the pleas of guilty "were tendered [by the accused] at least partly because they wished to spare the children the further pain of giving evidence".¹⁰ *Khaliq* is not an isolated example. In *Sweeney v HMA*,¹¹ the trial judge imposed a sentence of ten years upon an offender convicted of the rape of a number of children. He would, he stated, have imposed a sentence of twelve years had the offender not pled guilty thus allowing the children to avoid having to give evidence. The sentence was upheld on appeal. Indeed, in research undertaken in six sheriff courts in 1982, a number of the sheriffs interviewed stated that the timing of any guilty plea was a factor they regularly took into account in sentencing.¹²

However, the explicit recognition given to sentence discounting for guilty pleas in *Khaliq* and *Sweeney* represented something of a rarity prior to 1995. Moody and

8 In s 196. Henceforth "the 1995 Act".

9 1984 SCCR 212.

10 At 215.

11 1990 GWD 25-1385.

12 J Bennett and K Miller, *Delay in Summary Criminal Proceedings: A Study of Six Sheriff Courts* (1990). Although not published until 1990, the research was undertaken in 1982, prior to the decision in *Strawhorn v McLeod*.

Tombs, in their 1982 book *Prosecution in the Public Interest*,¹³ devote a whole chapter to the issue of “the negotiation of guilty pleas” in the Scottish criminal justice system but make no mention of sentence discounting. Indeed, in *Strawhorn v McLeod*,¹⁴ decided in 1987, the practice of routinely discounting in the event of an early guilty plea was specifically disapproved by the Appeal Court.

In *Strawhorn*, the offender appealed against his sentence on the basis that the sentencing sheriff, in sentencing him to a fine of £200, had inappropriately taken into account the lateness of his plea of guilty. In his report the sentencing sheriff stated that he and the other sheriffs in his court operated a practice of routinely discounting sentence for early pleas of guilty. On appeal, the Lord Justice Clerk specifically disapproved such a practice, stating that it was “objectionable”, “ought not to be followed”, and that “no such inducement should be offered to accused persons”.¹⁵ He continued:¹⁶

In this country there is a presumption of innocence and an accused person is entitled to go to trial and leave the Crown to establish his guilt if the Crown can. It is wrong therefore than an accused person should be put in the position of realising that if he pleads guilty early enough he will receive a lower sentence than he would otherwise receive for the offence.

Despite the disapproval of sentence discounting expressed in *Strawhorn*,¹⁷ however, there is at least some evidence that judges continued to take the fact and timing of a guilty plea into account in sentencing decisions. In his *Review*,¹⁸ Lord Bonyon noted that, in 1995, at least one serving judge, Lord McCluskey, had expressed the view that legislative change to permit sentence discounting was unnecessary because, contra *Strawhorn*, judges already routinely took into account the stage at which a guilty plea was tendered when sentencing.¹⁹

Legislative change, however, was to follow. In 1993 the then Scottish Office issued a consultation paper, *Improving the Delivery of Justice*,²⁰ that reported on the results of a review of criminal evidence and procedure, the aim of which was to

13 See note 1 above.

14 1987 SCCR 413.

15 At 415.

16 At 415. See also *Young v HMA* 1995 SCCR 418 where the Appeal Court made it clear that it should not be held against the accused in sentencing that he took his case to trial.

17 And by other commentators at the time. See, e.g., the critical comments made in C G B Nicholson, *The Law and Practice of Sentencing in Scotland* (1981), at 219. These were repeated (albeit in a slightly watered-down version) in the second edition, C G B Nicholson, *The Law and Practice of Sentencing in Scotland*, 2nd edn (1992) at 191.

18 See note 5 above.

19 See Hansard, Criminal Justice (Scotland) Bill, HL Debs 16 Jan 1995, cols 457-472, and 6 Feb 1995, col 51.

20 Scottish Office, *Improving the Delivery of Justice in Scotland: 1993 Review of Criminal Evidence and Criminal Procedure* (1993).

“secure practical improvements in the effectiveness, efficiency and economy with which criminal business is processed”.²¹ The consultation paper sought views on, among other things, the issue of sentence discounting for guilty pleas.

The resulting White Paper, *Firm and Fair*,²² decided against a formal or mandatory system of sentence discounting in Scotland, but accepted the principle that in at least some cases it might be appropriate to reduce sentence on account of a guilty plea. Its legislative recommendations are now contained in section 196 of the Criminal Procedure (Scotland) Act 1995, which provides that:²³

In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court *may* take into account: (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and (b) the circumstances in which that indication was given.

At the time of writing, section 196 still represents the law in Scotland. It is essentially a permissive provision, entitling judges to take account of the timing and circumstances of a guilty plea in sentencing but it does not make this mandatory, even when a plea is tendered at the earliest possible opportunity. That judges are under no obligation to discount is clear from the subsequent case-law.²⁴ Likewise, there is no obligation to refer in open court to any discount given (or not given). The Scottish position can be contrasted with that in England and Wales. There, sentence discounting was first introduced in statutory form by section 48 of the Criminal Justice and Public Order Act 1994, but the relevant provisions are now contained in section 152 of the Powers of Criminal Courts (Sentencing) Act 2000, which provides that:²⁵

In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court *shall* take into account: (a)

21 At 6.

22 Scottish Office Home and Health Department, *Firm and Fair: Improving the Delivery of Justice in Scotland* (Cm 2600: 1994).

23 Emphasis added. For a fuller discussion of the debate leading to the 1995 legislative changes, and the way in which the changes in relation to sentence discounting were linked to the introduction of intermediate diets, see P Duff, “Intermediate diets and the agreement of evidence: a move towards inquisitorial culture?” (1998) JR 349.

24 See *Docherty v McGlenan* 1998 GWD 4-176; *Tennie (Maxwell Andrew) v Munro* 1999 SCCR 70; *Gardiner v HMA* 1999 GWD 16-763.

25 Emphasis added. The English provisions on sentence discounting have recently been re-enacted in s 144 of the Criminal Justice Act 2003, but at the time of writing this section was not yet in force. The substance of the provisions remains unchanged from those in the Powers of Criminal Courts (Sentencing) Act 2000. In a parallel development, the issue of sentence discounting has recently been given detailed consideration by the English Sentencing Advisory Panel in its *Consultation Paper on Reduction in Sentence for a Guilty Plea* (2003). The consultation period ended in February 2004. At the time of writing, the Panel had not yet published its advice to the Sentencing Guidelines Council, the body that issues sentencing guidelines in England and Wales.

the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty; and (b) the circumstances in which this indication was given.

Thus, on the face of it, the English legislation seems to go further than the present Scottish legislation, stating that the court “shall” rather than “may” take into account the stage in proceedings at which an offender pleaded guilty. The appropriate size of the discount is not specified in the English legislation, but English case-law indicates that a discount of around one third is normally appropriate.²⁶ In general, the earlier the guilty plea is tendered, the greater will be the discount.²⁷

Unlike the Scottish legislation, the English legislation also contains a requirement that, if the court does impose a lesser sentence under section 152 than it would otherwise have done, this must be stated in open court.²⁸ However, in neither of the two jurisdictions at present is there any requirement to indicate in open court that a sentence discount has *not* been given or to provide reasons for this.

(2) The decision in *Du Plooy* and the Criminal Procedure (Amendment) (Scotland) Act 2004

Two developments have recently taken place in relation to sentence discounting in Scotland. First, in *Du Plooy*, the High Court, for the first time, has given detailed consideration to the rationale for sentence discounting and clarified various matters in relation to its practical operation. Guidance was provided, for example, on the size of the discount in sentence that might be awarded for a guilty plea (it should normally not exceed one third)²⁹ and the circumstances in which it may be appropriate to award only a small discount, or indeed no discount at all, even for an early plea of guilty.³⁰

Second, section 20 of the Criminal Procedure (Amendment) (Scotland) Act 2004 makes provision for a change in the law in relation to sentence discounting.³¹

26 *Buffrey*, note 3 above, at 515.

27 See, for example, *R v Hussain* [2002] 2 Cr App R (S) 59 at para [17].

28 Powers of Criminal Courts (Sentencing) Act 2000, s 152(2). The Criminal Procedure (Scotland) Act 1995 contains no such requirement. However, even though it is mandatory in England for the sentencing judge to state in open court that he or she has taken account of a plea of guilty if a lesser sentence is passed on this basis, a sentence does not automatically fall on appeal when this has not been done. See *R v Wharton* [2001] EWCA Crim 622.

29 *Du Plooy*, at para [26].

30 At paras [16] to [21]. On these and other practical matters dealt with in *Du Plooy*, see Leverick, “Making sense of sentence discounting”, note 7 above. *Du Plooy* was swiftly followed by three further sentencing appeals based on the application of sentence discounting principles: *Hussain v HMA* 2004 SCCR 77; *Low v HMA* 2004 SCCR 82; and *Smith v HMA* 2004 SCCR 85. However, none of these cases added any further substantial guidance. The manner in which the Appeal Court justified sentence discounting in *Du Plooy* will be discussed in the following section of this paper.

31 The Act was not yet in force at the time of writing.

The Act stems from Lord Bonomy's *Review*,³² one aspect of which focussed on the issue of how the likely outcome of pleading guilty might be made clearer to an accused, with a view to encouraging him or her to do so at as early a stage as possible.³³

After rejecting an open system of plea bargaining, Lord Bonomy concluded that the Scottish legislation should be changed from "may" to "shall" in line with the English position. This change should be introduced alongside a requirement that the defence should receive full details of the Crown case prior to the preliminary diet. If this were to occur, Lord Bonomy could see no justification for rewarding those who do not plead guilty until the trial diet stage. Thus he also recommended that the legislation be amended to include a provision that the court in sentencing "may leave these factors [the stage in proceedings at which a guilty plea was tendered and the circumstances in which it was given] out of account if no indication of the intention to plead guilty was given prior to the date assigned for the trial".³⁴

Lord Bonomy's recommendations were considered by the Scottish Executive in its White Paper, *Modernising Justice in Scotland*.³⁵ Lord Bonomy's suggestion of changing "may" to "shall" was adopted, but the conclusions reached by the Scottish Executive differed from those of Lord Bonomy in two respects. First, Lord Bonomy's suggestion that the wording of the legislation be changed to state specifically that pleas on the day of the trial might be ignored as a relevant factor in sentencing was rejected. While the Executive expressed sympathy with his concerns, it considered that leaving such a plea entirely out of account could "encourage accused persons to go to trial when they may otherwise have pled guilty".³⁶

Second, the Executive proposed not only that the sentencing judge should be required to state in open court that a discount *has* been granted but, where *no* discount has been granted, reasons should be given for this in open court.³⁷ Thus,

32 See note 5 above.

33 The Review was concerned solely with the High Court. The issue of sentence discounting was also considered by the McInnes Committee in relation to summary justice: see the Summary Justice Review Committee's *Report to Ministers* (2004) (henceforth "the McInnes Report"). However, the Scottish Executive appears to have usurped the McInnes Committee in this respect, as the Criminal Procedure (Amendment) (Scotland) Act 2004 provisions on sentence discounting relate not just to the High Court but to all levels of Scottish criminal procedure, despite being passed before the McInnes report was published. None the less, the Act is consistent with the McInnes Committee's recommendations (see paras 14.12 to 14.21), which were broadly in line with those of Lord Bonomy's *Review*.

34 Para 7.21.

35 Scottish Executive, *Modernising Justice in Scotland: The Reform of the High Court of Justiciary* (2003), henceforth "the White Paper".

36 The White Paper, para 112.

37 The McInnes Committee went further and recommended that the reasons for, and extent of, any discount, or the reasons for withholding a discount, should be minuted in court records (the McInnes Report, para 14.18).

once section 20 of the Criminal Procedure (Amendment) (Scotland) Act 2004 comes into force, the Scottish legislation will actually go *further* than the English legislation, which contains no requirement either to note or to provide reasons in open court for any decision to *withhold* a discount.³⁸

On the face of it, section 20 might seem to be a fairly major change in practice. On closer examination, however, the shift is perhaps less dramatic than it seems initially. In *Du Plooy*, the Appeal Court accepted that there is no practical difference between the use of the term “may” in the present Scottish legislation and the use of the term “shall” in the English provisions.³⁹ While the use of “may” certainly seems to suggest that a sentencing judge is not obliged to take a guilty plea into account in sentencing, since the advent of section 196 in 1995 it has been possible to appeal against sentence in Scotland on the basis that the sentencing judge gave insufficient regard to a plea of guilty.⁴⁰

In addition, it was suggested in *Du Plooy* that a sentencer is already required to give reasons when an allowance is not given for an early plea of guilty.⁴¹ In support of this, the Appeal Court pointed to *Cleishman v Carnegie*,⁴² where the offender successfully appealed against his sentence on the basis that the sentencing sheriff had given no adequate reasons for failing to take into account the early guilty plea. In this respect, note might also be taken of *McCall v Vannet*,⁴³ where the sentencing sheriff stated in her report that she had taken account of an early guilty plea but was not in the circumstances in favour of reducing sentence. This, the Appeal Court stated, “[did] not...constitute a clear reason properly explained”.⁴⁴

Indeed, it might be concluded from the fact that contested trials are rare in the Scottish criminal justice system that the system of incentives for encouraging guilty pleas is already operating effectively. In the period April 2001 to March 2002,⁴⁵ 66% of High Court cases were disposed of by a guilty plea. In sheriff court solemn proceedings, the figure was 73%. In summary proceedings, the figure was

38 As opposed to the situation when a discount *is* given, when the court does have an obligation to state this in open court (s 152(2) of the Powers of Criminal Courts (Sentencing) Act 2000).

39 At para [5]. It made no reference to the Criminal Procedure (Amendment) (Scotland) Act 2004, which was progressing through Parliament at the time *Du Plooy* was decided.

40 For examples of successful appeals on this point, see *Deeney v HMA* 1997 SCCR 361; *McCall v Vannet* 1997 SCCR 778; *O'Reilly v Lees* 1998 GWD 9-1486; *Dickson v HMA* 1998 GWD 29-1486; *Nicol v HMA* 2000 JC 497; *McLeod v HMA* 2002 GWD 25-812; *McIntyre v HMA* 2003 SLT 229. It might also be said that regardless of whether the term used is “may” or “shall”, it is relatively easy for a judge who does not wish to reward a guilty plea to construct satisfactory reasons for not doing so.

41 At para [5].

42 1999 GWD 36-175.

43 See note 40 above.

44 At 780.

45 The most recent for which figures are available.

even higher, at 91% in the sheriff courts and 96% in the district courts.⁴⁶ These figures do not, though, tell the complete story. The vast majority of the guilty pleas in the High Court were tendered on the day of the trial. The proportion of cases settled by a guilty plea on the day of the trial was lower in the sheriff and district courts but still amounted to a substantial number of cases.⁴⁷

There is, then, still at least some scope for encouraging those who are eventually going to plead guilty to do so at an earlier stage in proceedings, and it is perhaps wrong to conclude that the legislative proposals will make no difference whatsoever in this respect. Even if there is, as the Appeal Court claims, an existing requirement to give reasons for a failure to take account of an early guilty plea, there is no requirement that such reasons are given *in open court*. It is sufficient that, in the event of an appeal, an explanation is given by the sentencing judge in his or her report to the Appeal Court. Thus where the proposed legislative changes *will* make a difference is in terms of visibility. Sentencing judges will be obliged to refer to the fact of a guilty plea in open court and, in the event of making no allowance for it, to explain in open court why this was the case. This alone should make it easier for legal professionals to demonstrate the existence of the practice to their clients and for offenders to appeal against a sentence on the basis that the sentencing judge did not give appropriate weight to the timing and circumstances of any guilty plea.

All in all, then, there has been at least a certain change in emphasis as far as sentence discounting in Scotland is concerned. Once section 20 of the Criminal Procedure (Amendment) (Scotland) Act 2004 comes into force, the stage at which a guilty plea is tendered becomes a factor that must be taken into account and any failure to impose a discount must be explained in open court. It might be concluded, following the comments in *Du Plooy*, that the changes are little more than symbolic and will not make much difference to existing practice, especially as section 20 still requires the court only to “take account” of the stage at which a guilty plea was tendered. There is no obligation actually to *give* a discount, even for a guilty plea tendered at the earliest stage of proceedings.⁴⁸ But the requirement to give reasons in open court for a failure to discount means that, at the very least, the practice of sentence discounting should become more visible to those whom it is

46 Crown Office and Procurator Fiscal Service, *Annual Report and Accounts 2001-2002* (2002), at 30.

47 In the period Apr 2001 to Mar 2002, 62% of High Court cases were settled by a guilty plea on the day of the trial, a total of 602 cases. The figure was 29% for the sheriff solemn courts (857 cases); 23% for sheriff summary courts (18,375 cases); and 9% for the district courts (3,706 cases). See Crown Office and Procurator Fiscal Service, note 46 above, at 30.

48 As has already been noted, the Scottish Courts have consistently stated that there is no obligation to give a discount (see note 24 above) and there is nothing in the 2004 Act or in *Du Plooy* to suggest that this will change.

intended to influence: accused persons and, perhaps more to the point, their legal advisers.

This article now considers how the practice of sentence discounting might be justified, and indeed how it has been justified by the Appeal Court and the Scottish Executive.

C. JUSTIFICATIONS FOR SENTENCE DISCOUNTING

The first point to be made is that very little by way of justification for sentence discounting is provided either in Lord Bonomy's *Review* or in the White Paper. In the *Review*, consideration of why we might wish to engage in a practice of sentence discounting merits a mere five short sentences.⁴⁹ In the White Paper, the justification for sentence discounting is easy to miss entirely, comprising a mere line and a half of text.⁵⁰

The failure of either the *Review* or the White Paper to give serious consideration to this issue is regrettable. Sentence discounting is a practice that requires convincing justification. If one considers two offenders who have committed the same offence, the one who is found guilty after a trial is likely to receive a sentence up to 50% greater⁵¹ than the offender who pleads guilty at the earliest opportunity, based merely on the fact of that early plea. This is particularly starkly illustrated in cases involving co-accused where one or more of the co-accused pleads guilty and the others are found guilty of the same offence.⁵²

Indeed, in England, where an early guilty plea can, in borderline cases, make the difference not only to the length of a sentence but also to the *nature* of the sentence,⁵³ the point is even more graphically illustrated. The case of *R v Hollyman*⁵⁴ is a good example. Here two co-defendants who pled guilty to theft received two-month suspended sentences of imprisonment, whereas a third co-defendant, whose circumstances differed only in the fact that he contested the case, received a three-month sentence of imprisonment, not suspended. In *Du Plooy*, the Appeal

49 Paras 7.15 to 7.17.

50 At the start of para 106.

51 To take the example of two offenders convicted of rape, the offender who is found guilty after trial might receive a sentence of, say, six years, whereas, assuming that an early plea of guilty receives a discount of up to one third, the offender who pleads guilty at the earliest opportunity might receive a sentence of four years. The sentence of the offender who took his case to trial is 50% greater than that of the offender who pled guilty.

52 As such, it is arguable that it offends against the principle of comparative justice between co-accused developed by the Appeal Court in recent years (see, e.g., *Graham v HMA* 2000 GWD 29-1140; *Kelly v HMA* 1999 GWD 15-711).

53 *R v Okimikan* (1993) 14 Cr App R (S) 453, at 457; *R v Howells* [1998] Crim LR 836, at 836.

54 (1979) 1 Cr App R (S) 289.

Court confirmed that an early guilty plea can also have a bearing on the nature of the disposal in Scotland.⁵⁵

Fortunately the justification for sentence discounting did receive some attention from the Appeal Court in *Du Plooy*. There are perhaps three main ways in which sentence discounting can be justified: on the grounds that it indicates remorse; on the basis that it spares victims and witnesses the ordeal of a court appearance; and/or on the grounds of efficiency.⁵⁶ All three are drawn upon to some degree by the court in *Du Plooy* and each will be considered in turn.

(1) The remorse justification

The remorse argument was the traditional justification for sentence discounting in English law.⁵⁷ The argument is that a plea of guilty should be rewarded because it is evidence that the offender feels remorse and accepts responsibility for his or her actions, whereas the offender who takes his or her case to trial does not do so. This, it is argued, is a moral distinction between the two offenders that justifies a difference in sentence.

While the remorse justification might have offered the accepted rationale in the past, it is no longer taken seriously, at least among academic writers.⁵⁸ There are two main difficulties with the remorse argument: first, it is by no means clear why remorse justifies a lower sentence; and, second, even if one accepts that it does, the guilty plea is not necessarily evidence of remorse.

55 At para [27]. If this is the case, it is difficult to see how this relates to the Appeal Court's statement earlier in *Du Plooy* (at para [26]) that the discount should not normally exceed one third of the sentence which would otherwise have been imposed, but discussion of this point is beyond the scope of this article.

56 There are, perhaps, other possible justifications, such as the fact that encouraging an accused to plead guilty does at least ensure the conviction, whereas if the case had gone to trial there would always have been the chance of an acquittal due to a perverse jury or a missing witness. This is, of course, only a convincing justification if the accused actually *is* guilty. It may also be that the accused who goes at once to the police and confesses to the crime provides the only substantial evidence of an offence that would otherwise have gone undetected and a sentence discount is justified on that basis, or on the basis that an accused has co-operated with the police in, for example, leading them to stolen property (on this, see *Du Plooy*, at para [22]). These justifications would, however, only operate in these rather narrow, specific, circumstances. The three most common justifications of remorse, "sparing the victim", and efficiency are assumed to operate on a more universal basis and will therefore receive more detailed attention here.

57 See, e.g., *Harper*, note 3 above (at 110); and *R v Turner* [1970] 2 QB 321 (at 326) where the remorse justification is the *only* justification advanced. Other older English cases mention remorse as one of the possible justifications for sentence discounting: see *Hollyman*, note 54 above, at 290; and *R v Fraser* (1982) 4 Cr App R (S) 254, at 257. It is more difficult to discern the justifications for sentence discounting in older Scottish cases since the practice was not formally accepted as it was in English law, at least until the 1995 Act.

58 See A Sanders and R Young, *Criminal Justice*, 2nd edn (2000) at 401; P Darbyshire, "The mischief of plea bargaining and sentencing rewards" [2000] Crim LR 895, at 901; J Baldwin and M McConville, "The influence of the sentence discount in inducing guilty pleas", in J Baldwin and A K Bottomley (eds), *Criminal Justice: Selected Readings* (1978) 116, at 117.

In relation to the first point, Andrew Ashworth has raised the question of whether the mere fact of the offender's acceptance of his or her wrongdoing means that a lesser punishment is justified.⁵⁹ Drawing on the traditional justifications for punishment, it is difficult to see why this might be the case. It is certainly not explicable on the ground of general deterrence. There is perhaps an argument to be made that the offender who feels remorse for his or her actions is less likely to re-offend, and therefore a lesser punishment is justified on the grounds of public protection or individual deterrence. However, the mere fact that an offender is sorry and regrets his or her actions does not automatically mean that he or she is less likely to repeat the behaviour in question. Or perhaps one could argue that a lesser punishment is morally justified in that the remorseful offender is less deserving of moral condemnation although it is difficult to see why, as the mere fact of remorse does not take away from the nature of the offence committed.

In relation to the second point, the difficulty is that, even if it is accepted that remorse justifies a lesser sentence, the fact of a guilty plea by itself is simply not a reliable indication of remorse. There may be *some* accused persons who plead guilty because they genuinely regret their behaviour and the distress it has caused to others. However, it is far more likely that the majority of accused persons will plead guilty in order to obtain a reduction in their punishment, and the courts have no way of distinguishing between the two categories.

Given these reservations, it is surprising to see that the remorse argument appears at one point to have been accepted in *Du Plooy*, with the court stating that section 196 "enables the sentencer to make allowance for the acceptance of guilt which is involved in the plea of guilty".⁶⁰ However, the court does concede later that a guilty plea is not necessarily evidence of remorse and "the accused may have a number of reasons for pleading guilty which have little, if anything, to do with genuine regret or a wish to make amends".⁶¹

Remorse is one of the (albeit brief) justifications for sentence discounting advanced by Lord Bonomy in the *Review*. Lord Bonomy suggests that a plea of guilty indicates "acceptance of guilt and acknowledgement of responsibility",⁶² and states that the earlier a plea is tendered, "the more likely it is to indicate an acceptance of responsibility and to justify the highest degree of credit".⁶³ The remorse explanation is also enjoying something of a renaissance in England, where

59 A Ashworth, *Sentencing and Criminal Justice*, 3rd edn (2000) at 143.

60 At para [16].

61 At para [22].

62 Para 7.15.

63 Para 7.19. See also *HMA v Forrest* 1998 SCCR 153 where the Lord Justice General (Rodger) substituted a nine-year sentence of detention for one of six years and in doing so hinted that a guilty plea unaccompanied by any additional evidence of remorse should not be given great weight.

four recent Court of Appeal cases have described it as one of the major justifications for the sentence discount.⁶⁴

As already noted, there is very little discussion of the rationale for sentence discounting in the White Paper, but the remorse argument does not form part of the limited justification put forward. If it can be concluded from this that the Scottish Executive is unconvinced by the remorse justification, then this is to be welcomed. It is, as Sanders and Young describe it, “a singularly unconvincing rationale” in the vast majority of cases.⁶⁵

(2) The “sparing the victim” justification

If the remorse justification is to be rejected, then a second possible justification for sentence discounting centres around claims that an early guilty plea spares the victim (or indeed other witnesses) from the ordeal of having to give evidence. The “sparing the victim” justification has found much favour in Scotland. It is drawn upon in *Du Plooy*, with the court stating that a plea of guilty is likely to “avoid inconvenience to witnesses or, in certain types of cases, avoid additional distress being caused by their being required to give evidence or be precognosed for that purpose”.⁶⁶ Indeed, as we have already seen, this was the argument used by the Appeal Court in *Khaliq* and *Sweeney* to justify the imposition of a discounted sentence. Likewise, the “sparing the victim” justification is one of the two briefly mentioned in the White Paper, where it is stated that early guilty pleas are “helpful to vulnerable victims and witnesses”.⁶⁷ It is also relied upon by Lord Bony in the *Review*, which suggests that an early guilty plea “enables witnesses to be set at ease and advised that they will not require to re-live what for many are events they wish to forget”.⁶⁸

The “sparing the victim” justification has found considerable favour in English law.⁶⁹ Indeed, it has been put forward as the *primary* justification for sentence discounting in one of the most recent English Court of Appeal cases to consider the principle, *R v Millberry*.⁷⁰

64 *R v Smith and others* [2001] EWCA Crim 1812, at para [34]; *Hussain*, note 27 above, at para [17]; *R v March* [2002] EWCA Crim 551, at para [22]; *R v Millberry and others* [2002] EWCA Crim 2891, at para [28].

65 At 401.

66 At para [16].

67 Para 106. See also the Policy Memorandum that accompanied the Criminal Procedure (Amendment) (Scotland) Act 2004 when it was progressing through the Scottish Parliament: “[i]f the accused pleads guilty early this spares any victims and witnesses from having to listen to or give evidence” (para 57).

68 Para 7.16.

69 See, for example, *R v Barnes* (1983) 5 Cr App R (S) 368, at 370; *R v Billam* (1986) 8 Cr App R 347, at 350; *Smith*, note 64 above, at [34]; *Hussain*, note 27 above, at [17]; *March*, note 64 above, at [22].

70 Note 64 above, at paras [27] to [28].

In considering whether or not the “sparing the victim” justification is convincing, however, it is important to establish exactly what is being argued. If the argument is that a guilty plea saves *vulnerable* witnesses and victims the ordeal of giving evidence,⁷¹ then sentence discounting would only be justified in those cases where there are, in fact, vulnerable victims or witnesses. This will not always be the case.⁷² Victims and witnesses will not always be vulnerable and indeed in some cases the victim might not be required to give evidence, or there might not even be a victim at all.⁷³ In many cases, especially at the summary level, where driving offences, drugs offences, minor crimes of dishonesty and breach of the peace comprise the vast majority of cases,⁷⁴ most witnesses will be police witnesses or expert witnesses. It is surely a very weak argument that a sentence discount is justified in order to spare police officers or expert witnesses from the ordeal of giving evidence: is this not, after all, arguably part of their job?⁷⁵

Even in those cases where there is a vulnerable victim, and that victim would have to give evidence in the event of a contested trial, the “sparing the victim” justification is not a convincing one. It is simply *assumed* in the White Paper that sentence discounting is in the interests of victims because they are spared the ordeal of giving evidence at a trial. However, as Fenwick has pointed out in the English context,⁷⁶ the issue is much more complex than that.

For one thing, at least some victims might actually wish to go through the ordeal of giving evidence because it gives them the opportunity to be heard within the criminal justice system.⁷⁷ Although the experience of giving evidence at trial might not be best suited to allowing the victim the opportunity to “put their view”, it is, at

71 As the White Paper states.

72 In *McGaffney v HMA* (unreported, 6 May 2004, available at <http://www.scotcourts.gov.uk/opinions/XC1327.html>), the maximum discount was recently withheld by the Appeal Court on the basis that there were no vulnerable witnesses involved who would have given evidence if the case had gone to trial (at para [11]). A similar stance was taken by the English Court of Appeal in *Hussain*, note 30 above, at para [14].

73 As in the case of so-called victimless crimes, but also in the case of homicides, where the victim is dead.

74 For example, in the Districts Courts in 2001, the total number of proven offences comprised theft or another minor offence of dishonesty in 13% of cases; a drugs offence in 4% of cases; breach of the peace in 16% of cases; speeding in 21% of cases; a vehicle excise or licence offence in 11% of cases; and another form of motor offence in 13% of cases. See Scottish Executive, *Costs, Sentencing Profiles and the Scottish Criminal Justice System 2001* (2003) at 16.

75 There may be an argument that sentence discounting is justified on the basis that it saves the *cost and time* of police and expert witnesses who would otherwise have had to give evidence (as opposed to sparing them the *mental distress* of doing so), but this argument relates more to efficiency, which is considered in the next section.

76 H Fenwick, “Procedural rights of victims of crime: public or private ordering of the criminal justice process?” (1997) 60 *MLR* 317; H Fenwick, “Charge bargaining and sentence discount: the victim’s perspective” (1997) 5 *International Review of Victimology* 23.

77 On this, in addition to Fenwick, see Darbyshire, note 58 above, at 905; Sentencing Advisory Panel, note 25 above, at para 12.

least, an opportunity of sorts and prevents the victim from being entirely marginalized within the criminal justice system. It might be argued that the introduction of victim statements into the Scottish criminal justice system means that the opportunity exists for the victim's views to be heard in court, even in the face of a guilty plea.⁷⁸ However, there is another reason why victims might wish to choose the contested trial over the guilty plea: avoiding the trauma of giving evidence is purchased at the price of seeing "their" offender receive a lesser sentence than he or she would otherwise have done.⁷⁹

Against this might be balanced the fact that a guilty plea does at least secure a conviction, which might not have been the case following a contested trial, even if the accused did, in fact, engage in the conduct constituting the offence. Trials can fail to convict the factually guilty for all sorts of reasons, such as missing or unconvincing witnesses or procedural irregularities. The point is, though, that victims have no influence over whether or not a guilty plea is accepted and thus whether or not a sentence discount is given.⁸⁰ The sentence discount occurs regardless of whether or not the victim wished to be "spared" or, in the knowledge of the possible risks of doing so, would have preferred to take his or her chances with a contested trial.

Like the remorse justification, the "sparing the victim" justification is an unconvincing justification in the vast majority of cases. There may be some cases involving particularly vulnerable victims or witnesses in which the experience of giving evidence would be damaging, and if they are spared this by a guilty plea, then there may be some justification for rewarding the plea with a lesser sentence. However, the point could also be made that if the experience of giving evidence is indeed such an ordeal, then the most appropriate solution to this is to focus on improving this experience so that it is not as traumatic⁸¹ or perhaps to explore ways of lessening reliance on victim testimony.⁸²

78 Pilot victim statement schemes commenced in Scotland on 25 Nov 2003. Whether or not, in their present form, they will satisfy the wishes of victims to be heard within the criminal justice system is open to question. The English experience suggests that they might not. See A Sanders et al, "Victim impact statements: don't work, can't work" [2001] Crim LR 447; and J Chalmers, "What impact for victim statements?" (2003) 8 SLPQ 159.

79 See A Ashworth, *The Criminal Process: An Evaluative Study*, 2nd edn (1998) at 283; Fenwick "Procedural rights of victims of crime", note 76 above, at 327; R Henham, "Bargain justice or justice denied? Sentence discounts and the criminal process" 62 MLR 515 at 537.

80 Although see *Fox v HMA* 2002 SCCR 647, where the family of the victim was consulted over the acceptability of a plea bargain, a practice that was criticised by the Appeal Court.

81 On this, see the Scottish Executive policy statement, *Vital Voices: Helping Vulnerable Witnesses Give Evidence* (2003), and the resulting Vulnerable Witnesses (Scotland) Act 2004.

82 For one example of how this might be achieved, see L Ellison, "Prosecuting domestic violence without victim participation" (2002) 65 MLR 834.

At the start of this section, it was said that it is important to establish exactly what is being argued by those who rely on the “sparing the victim” argument to justify sentence discounting. Thus far, it has been assumed that the justification lies in sparing the victim the distress of giving evidence at trial. An alternative justification is not to focus on the *distress* the victim is spared, if he or she does not have to give evidence, but on the *inconvenience* to victims and other witnesses of having to do so. However, this is perhaps more closely related to the next argument, that of efficiency, and thus it will be considered in the following section.

(3) The efficiency justification

The third main justification for sentence discounting is made in terms of the efficiency benefits guilty pleas bring to the criminal justice system. If the accused pleads guilty, the time and expense of a trial are avoided. Again, it is important to establish exactly what is being argued here, as the cost and time justifications have a slightly different basis.

There is little doubt that a guilty plea results in considerable cost savings for the criminal justice system and that the earlier it is made, the greater these savings. The most up-to-date Scottish figures on the court costs of guilty pleas compared to the court costs of contested trials are from 2001 and are shown in Table 1 below.

Table 1: Court costs of case by stage of conclusion in 2001

Type of case ⁸³	Stage of case conclusion	Average cost per case
High Court	Plea at first diet	£317
	Plea at trial diet	£317
	Case concluded at trial	£13,892
Sheriff solemn	Plea at first diet	£108
	Plea at trial diet	£774
	Case concluded at trial	£4,710
Sheriff summary	Plea at first diet	£72
	Plea at trial diet	£180
	Case concluded at trial	£1,005

Source: Scottish Executive.⁸⁴

83 No figures are available for the costs of District Court cases.

84 *Costs, Sentencing Profiles and the Scottish Criminal Justice System*, note 74 above, at 8.

As Table 1 shows, guilty pleas result in considerable cost savings, especially where they are made at a preliminary diet. Table 1 is concerned solely with court costs – the costs of accommodation, paperwork, court staff and judges – but guilty pleas also result in considerable savings in prosecution costs. Here, the difference in cost between an *early* guilty plea and a contested trial is even starker, as the case-preparation costs are not incurred. For example, the average prosecution costs for a High Court case in 2001 were £1,699 for a plea at first diet, £9915 for a plea at trial diet, and £12,203 for a contested trial.⁸⁵ Likewise, guilty pleas are likely to result in considerable savings in defence costs, and consequently in public money, given the number of accused whose defence costs are met by legal aid.⁸⁶

Aside from pure cost savings, however, guilty pleas, especially those made at an early stage, result in time savings for courts, prosecutors, defence solicitors and other personnel involved in the conduct of cases, such as witnesses. Apart from the personal benefits this might involve, for example in sparing witnesses having to forego other activities in order to attend court, there is also a knock-on effect in terms of the time freed up for those who choose to contest their cases. Delay in the Scottish criminal justice system has been an issue of some considerable recent concern.⁸⁷ If a significant proportion of accused can be persuaded through the offer of a sentence discount to plead guilty at an early stage, then this could go some way to tackling such delays in the system and sparing both accused and witnesses from the experience of a lengthy wait before their case is heard.

Somewhat surprisingly, this justification has recently been entirely rejected in England. In *Millberry*, Lord Woolf CJ stated categorically that “saving court time and costs and allowing the defendant to manipulate the system in his favour... is not, however, the reason why the [English] courts are prepared to and should reduce sentences in a case in which the offender pleads guilty”.⁸⁸

By contrast, the efficiency justification appears to have been accepted in Scotland. Without reservation, the court in *Du Plooy* stated that it is appropriate to reward the tendering of a plea of guilty because it “is likely to save public money

85 See *Costs, Sentencing Profiles and the Scottish Criminal Justice System*, note 74 above, at 8.

86 85,915 accused were granted legal aid in the period 2002-03, at a total cost of £80.4 million (Scottish Legal Aid Board, *Annual Report 2002-03* (2003) at 13).

87 As evidenced by the string of Scottish cases in which Art 6 has been held to have been breached because a trial did not take place within a reasonable time. See, e.g., *Dyer v Watson* 2002 SC (PC) 89; *Mills (Kenneth Anthony Paton) v HMA* (No 2) 2003 SC (PC) 1; *Gillespie (Stewart) v HMA* (No 2) 2003 SLT 210.

88 At para [27]. This is despite the efficiency rationale having previously gained some currency in the English system in a line of cases stemming from *R v Boyd* (1980) 2 Cr App R (S) 234 at 234; through to *R v Fraser* (1982) 4 Cr App R (S) 254 at 258; *Buffrey*, note 3 above, at 515; *R v Archer* [1998] 2 Cr App R (S) 76 at 78-79; *Hussain*, note 27 above, at para [17]; and *March*, note 64 above, at para [22].

and court time”.⁸⁹ The court also expressed its approval of a passage in the Australian High Court case of *Cameron v The Queen*,⁹⁰ where Kirby J stated that:⁹¹

It is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delay the hearing of such trials as must be held. It also encourages the clear-up-rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws.

Efficiency is mentioned by Lord Bonomy, who refers to the contribution made by sentence discounting to the “efficiency of the criminal justice system”.⁹² In addition, it is mentioned, albeit rather obliquely, in the White Paper, where it is stated that guilty pleas are “beneficial to the system in terms of avoiding unnecessary hearings”.⁹³

It has sometimes been suggested that the efficiency justification, like references to remorse and to “sparing the victim”, is an unconvincing justification for sentence discounting. Darbyshire, for example, makes the point that other jurisdictions seem to manage perfectly well without it and indeed without recognising the guilty plea at all, at least in relatively serious cases.⁹⁴ However, she perhaps ignores the fact that the majority of jurisdictions that do not have a system of sentence discounting are inquisitorial systems of criminal justice where trials are shorter because of their lesser reliance on oral testimony.

It might also be said that Scotland managed perfectly well until 1995 (when the permissive legislation was passed) without sentence discounting. However, this neglects the point made earlier that sentence discounting was probably occurring before 1995. Perhaps more importantly, even if sentence discounting was not a major element of the criminal justice system pre-1995, the system still relied heavily on other informal forms of sentence reward for a plea of guilty, such as fact and charge bargaining, without which the criminal justice system probably would have collapsed under the weight of contested trials.⁹⁵

There is another question that can be raised in relation to the efficiency

89 At para [16].

90 (2002) 209 CLR 339.

91 At para [67] of *Cameron* and para [11] of *Du Plooy*. Kirby J’s judgement was actually a dissenting judgement, a fact that was not acknowledged by the court in *Du Plooy*. The somewhat bizarre way in which the majority in *Cameron* justified sentence discounting is considered later in this paper.

92 Para 7.17.

93 Para 106. See also *Hamilton v HMA* 1997 SCCR 611, where Lord Prosser approved the Sheriff’s decision to apply a sentence discount on the basis that “the plea of guilty had resulted in a considerable saving of court time, witness time and public money” (at 615).

94 Darbyshire, note 58 above, at 105. See also J Langbein, “Land without plea bargaining: how the Germans do it” (1979/80) 78 *Michigan Law Review* 204.

95 See Moody and Tombs, note 1 above, at 120-121.

justification for sentence discounting, however, and that is the extent to which sentence discounting is actually *effective* in encouraging early guilty pleas. If it is not, however great the time and cost savings that early guilty pleas provide, the justification is unconvincing.

Firm evidence of the success of sentence discounting in obtaining early guilty pleas is difficult to obtain. In research undertaken between 1987 and 1988, Robertshaw did find that there was a statistically significant relationship between the size of sentence discounts and the rate of guilty pleas in the English Crown Courts.⁹⁶ Hedderman and Moxon⁹⁷ interviewed 282 convicted defendants in the English Crown Court and concluded that decisions to plead guilty were largely based on a realistic assessment of the chances of acquittal and the potential benefits of doing so in terms of sentence severity. Zander and Henderson report similar findings.⁹⁸

Both studies indicate that defendants' decisions to plead guilty were not taken independently, the vast majority doing so on the basis of advice from their solicitors. It has been pointed out that guilty pleas have efficiency benefits for defence solicitors just as they have for the court system as a whole.⁹⁹ It has therefore been suggested¹⁰⁰ that defence solicitors and prosecution work together, as far as is possible within the constraints of professional codes of conduct, for their mutual benefit to obtain as many guilty pleas as possible. In research by Baldwin, few defence solicitors thought that they would have difficulty in persuading a client to plead guilty if necessary.¹⁰¹ In this way, it is possible to construct a slightly more cynical view of the role of the sentence discount in encouraging guilty pleas. The significance of the sentence discount is perhaps not so much that it is effective in encouraging accused persons to plead guilty. Rather it is a device that defence solicitors can draw on to justify their actions when advising clients that a guilty plea is in their best interests.

Regardless of precisely how this occurs, it can probably be safely assumed that the sentence discount is effective in encouraging guilty pleas in at least some cases. Where real questions might be raised about the effectiveness of sentence discounting in securing guilty pleas, however, is at the lower end of the sentencing hierarchy. The debate over sentence discounting in Scotland to date has been

96 P Robertshaw, "Plea, sentence discount and cracked trials" (1993) 143 *NLJ* 577.

97 C Hedderman and D Moxon, *Magistrates' Court or Crown Court? Mode of Trial Decisions and Sentencing* (1992) (Home Office Research Study 125).

98 M Zander and P Henderson, *Crown Court Study* (1993) (Royal Commission on Criminal Justice Research Study 19).

99 G Fisher, "Plea bargaining's triumph" (2000) 109 *Yale Law Journal* 857 at 1063.

100 See, e.g., J Baldwin, *Pre-trial Justice: A Study of Case Settlement in Magistrates' Courts* (1985); M McConville and C Mirsky, "The State, the legal profession and the defence of the poor" (1988) 14 *Journal of Law and Society* 342; Moody and Tombs, note 1 above, ch 6.

generally conceived of in terms of custodial sentences, which is understandable given that Lord Bonomy was specifically charged with reviewing the procedures of the High Court, where, as Table 2 indicates, custodial sentences are the norm.

Table 2: Disposals for Charges Proved in Scottish Courts 2001 (%)

Type of court	Custody	Fine	Community service	Probation	Other ¹⁰²
High Court	86	–	3	6	5
Sheriff solemn	69	4	11	12	4
Sheriff summary	17	54	6	10	13
Stipendiary magistrate	20	66	–	3	11
Lay district	1	87	–	1	12

Source: Scottish Executive.¹⁰³

However, as Table 2 also shows, in the district and sheriff summary courts, the vast majority of disposals are non-custodial. In 2001, 54% of disposals in the sheriff summary courts were financial penalties, with the average level of fine being £277.¹⁰⁴ In the district courts during the same period, 87% of disposals were fines, with the average amount of fine imposed being £98.¹⁰⁵ Whether even a 30% discount in sentence for an early guilty plea has the same motivational effect in these cases as it does in relation to custodial disposals is at least open to question.¹⁰⁶

It is probably reasonably safe to assume on the basis of the limited evidence available that, at least towards the top of the sentencing hierarchy, sentence discounting is an important influence on the decision of the accused to plead guilty. Or, perhaps more accurately, it is effective in enabling defence solicitors to convince their clients to plead guilty by persuading them that they are “getting a good deal”. If this assumption is accepted, given the objections raised to the other two main justifications for sentence discounting (remorse and “sparing the

101 Baldwin, note 100 above, at 89.

102 Primarily admonishments.

103 *Costs, Sentencing Profiles and the Scottish Criminal Justice System*, note 74 above, at 12.

104 *Costs, Sentencing Profiles and the Scottish Criminal Justice System*, note 74 above, at 34.

105 *Costs, Sentencing Profiles and the Scottish Criminal Justice System*, note 74 above, at 47.

106 Although the more cynical might conclude that as long as defence solicitors are able to convince their clients that they are getting a good deal, the fact that the discount is relatively small in reality is of little importance.

victim”), efficiency is the *only* convincing justification for sentence discounting in the vast majority of cases. Whether it is convincing *enough* as a justification, however, has to be weighed in light of the various objections to sentence discounting.

D. THE PRINCIPLED OBJECTIONS TO SENTENCE DISCOUNTING

There are at least two major objections in principle to sentence discounting: that it unfairly penalises those who exercise their right to go to trial and that it might encourage innocent people to plead guilty.¹⁰⁷ Both have been rehearsed extensively in the English context¹⁰⁸ and this discussion will be drawn upon here.

(1) Sentence discounting encourages the innocent to plead guilty

The first objection that might be made to sentence discounting is that, by providing an incentive to do so, it encourages the innocent to plead guilty. It may be that an innocent accused person, faced with a choice between pleading guilty and contesting the prosecution case, will cut his or her losses, rather than risk receiving a sentence up to 50% higher than otherwise would have been imposed.¹⁰⁹ The conviction of the innocent, if indeed this is occurring, is harmful to society and to victims, if nothing else, on the basis that the “real” offender remains at large.

Whether or not this is a real risk is very difficult to assess, given that up-to-date research is limited in this area. In 1977, Baldwin and McConville interviewed a sample of 121 defendants who had pleaded guilty at Birmingham Crown Court and 58% were still protesting their innocence.¹¹⁰ Of these, 47% (57 cases) were what Baldwin and McConville described as “substantial claims”, that is, not merely token protests. It was claimed the major factor influencing their decision to plead guilty was the sentence discount. However, it is perhaps a natural human instinct to continue to claim innocence in this way and it is difficult to assess whether or not those pleading guilty are innocent merely on the basis of their own accounts. Indeed, Baldwin and McConville themselves admit that some of these claims were “scarcely believable” or “far-fetched”.¹¹¹

107 Other arguments against sentence discounting have been made. For example, it has been argued in the English context that it is racially discriminatory, given that black defendants are more likely to plead not guilty than white defendants. This point is noted but will not be considered in detail here. See R G Hood and G Cordovil, *Race and Sentencing: A Study in the Crown Court* (1992).

108 See in particular Ashworth, *The Criminal Process*, note 79 above, and Sanders and Young, *Criminal Justice*, note 58 above.

109 See Ashworth, *The Criminal Process*, note 79 above, at 283; M McConville, “Plea bargaining: ethics and politics” (1998) 25 *Journal of Law and Society* 562, at 565. The calculation behind the 50% figure is explained in note 51.

110 J Baldwin and M McConville, *Negotiated Justice: Pressures to Plead Guilty* (1977) at 63.

111 At 63.

Baldwin and McConville did, however, ask independent assessors to analyse the committal papers in the 57 substantial claim cases and they concluded that the prosecution case was weak, at the very least, in 21% of them. Similarly, in 1992 Zander and Henderson conducted a two-week study of all Crown Court cases in England and Wales by asking the barrister involved in each case whether or not he or she was concerned that an innocent defendant had pleaded guilty in order to obtain a sentence discount.¹¹² In 6% of cases involving guilty pleas (53 cases) the answer was yes. If these figures are accepted,¹¹³ this would be an annual total of almost 1400 cases in the Crown Court alone in which innocent defendants were pleading guilty to obtain a sentence discount. Zander himself does not appear to see this as an issue of great importance. In a subsequent article¹¹⁴ he referred to the defendants in question as “the ‘innocent’ (?) who plead guilty” and stated that “few are thought to be a cause for concern”.¹¹⁵ This is perhaps unsurprising given that, as Mulcahy has pointed out,¹¹⁶ criminal justice professionals arguably function on the assumption that the vast majority (if not all) defendants are, in fact, guilty, however much they protest otherwise. Some have viewed the issue rather differently though. McConville and Bridges, for example, conclude that the findings demonstrate “barristers accept guilty pleas even where defendants assert innocence and artificially amend their accounts to make the plea consistent with its ‘factual’ basis”.¹¹⁷

The Royal Commission which recommended the introduction of statutory authority for sentence discounting in England accepted the risk that innocent defendants would plead guilty in order to obtain a sentence discount. Indeed, it suggested that it would be “naive” to suppose that this never occurred. It concluded, however, that this risk must be balanced against the efficiency benefits that sentence discounting brings to the criminal justice system.¹¹⁸

Whether or not this is an acceptable balancing exercise is questionable. Field and Thomas described it as “extraordinary” that such a statement should be made by the Royal Commission without further discussion.¹¹⁹ Sanders and Young draw a

112 Zander and Henderson, *Crown Court Study*, note 98 above.

113 Zander and Henderson’s research methods have been subject to criticism. See M McConville and L Bridges, “Pleading guilty whilst maintaining innocence” (1993) 143 NLJ 160; Royal Commission on Criminal Justice, *Report* (Cm 2263: 1993) at para 43.

114 M Zander, “The ‘innocent’ (?) who plead guilty” (1993) 143 NLJ 85.

115 At 85.

116 A Mulcahy, “The justifications of justice: legal practitioners’ accounts of negotiated case settlements in magistrates’ courts” (1994) 34 BJ Crim 411.

117 McConville and Bridges, note 113 above, at 161. See also the concerns expressed by Mulcahy, note 116 above, at 413-414.

118 Royal Commission, note 113 above, at para 7.45.

119 S Field and P Thomas, “Justice and efficiency? The Royal Commission on Criminal Justice” (1994) 21 *Journal of Law and Society* 1, at 9. For further criticism of the Royal Commission on this point, see A Ashworth, “The Royal Commission on Criminal Justice: (3) Plea, venue and discontinuance” [1993]

parallel with the principle that that police must not induce suspects to confess and if inducements are offered the resulting confession is likely to be considered inadmissible on the ground of unreliability.¹²⁰

What is clear is that there is no discussion whatsoever of this issue by the court in *Du Plooy* or in either of Lord Bonomy's *Review* or the White Paper.¹²¹ The omission by the Appeal Court is perhaps forgivable, given that it is bound by the terms of section 196, under which sentence discounting is clearly permissible. The omission by Lord Bonomy and by the Executive in the White Paper is less so.

(2) Sentence discounting penalises those who exercise the right to go to trial

The second principled objection that might be made against sentence discounting is that it unfairly penalises those who exercise their right to take their case to trial, by imposing a greater sentence on them than on an otherwise identical accused person who pleaded guilty. Andrew Ashworth has perhaps been the leading critic of sentence discounting on this point. According to Ashworth, if it is accepted that an accused person has the right to be presumed innocent until proven guilty, this carries with it a right to make the prosecution prove its case at trial. Sentence discounting, by rewarding those who "waive" this right imposes an unfair disincentive to its exercise.¹²² Sanders and Young note that if the state were to offer a defendant £10,000 to induce him or her to plead guilty to theft then this would be seen as an appalling attempt to negate his or her rights.¹²³ Yet, they argue, this is exactly how the sentence discount works in practice.¹²⁴

Crim LR 830. Extraordinary it may be, but the Royal Commission's approach does at least have honesty in its favour.

120 Sanders and Young, note 58 above, at 432.

121 Or the McInnes Report. It is mentioned very briefly in the Scottish context in the discussion paper leading up to the 1995 legislation (see *Improving the Delivery of Justice*, note 20 above, at para 112), although not in the resulting White Paper, *Firm and Fair*, note 22 above.

122 Ashworth, *The Criminal Process*, note 79 above, at 284. See also Sanders and Young, note 58 above, at 427; Darbyshire, note 58 above, at 901; Henham, "Bargain justice or justice denied?", note 79 above, at 515; E Colvin, "Sentencing principles in the High Court and the PSA" (2003) 3 *Queensland University of Technology Law and Justice Journal* 1 at 12.

123 Sanders and Young, note 58 above, at 432.

124 This is perhaps not quite accurate as, in relation to fines, the amount of the discount would rarely be as high as £10,000, given that the average level of fine imposed in the Scottish courts in 2002 (the most recent year for which figures are available) was £200 (Scottish Executive, *Criminal Proceedings in Scottish Courts 2002* (2004) at para 7.9). One exception to this is cases involving corporate offenders (e.g. in breach of health and safety legislation), where it would not be unheard of for a fine of £30,000 or more to be imposed. See Health and Safety Executive, *Health and Safety Offences and Penalties 2002/03: A Report by the Health and Safety Executive* (2004) (available on-line only at <http://www.hse.gov.uk/enforce/off02-03.pdf>). For an example of a case where a £35,000 fine was imposed on a corporate offender, see *Balmoral Group Ltd v HMA* 1996 SLT 1230.

The whole notion that sentence discounting penalises those who take their case to trial is sometimes disputed on the basis that the discount principle rewards those who plead guilty rather than punishing those who contest their case. In this way the guilty plea is seen simply as a mitigating factor in sentencing, and the fact that a case was taken to trial is not regarded as an aggravating factor.¹²⁵ This was the approach taken by the European Commission of Human Rights in *X v United Kingdom*,¹²⁶ a case where an English defendant claimed that the difference between his sentence and those of various co-defendants violated his right to a fair trial under Article 6. One of the grounds of his claim was that the sentencing judge took into account a confession made by one of the co-defendants. However, the Commission declared the application inadmissible and described the confession as a “mitigating circumstance” that could rightly be taken into account in sentencing.¹²⁷

But whether the sentence discount is described as a penalty or a mitigating circumstance is merely a matter of semantics.¹²⁸ The effect is the same: two identical accused, apart from the fact of a guilty plea by one of them, receive different sentences. Now, it may be that this difference is justified in some cases. The view *might* be taken that where there is overwhelming evidence against an accused, it is appropriate to penalise him or her for “wasting” state resources and insisting upon taking the case to trial.

The trouble is that the sentence discount *does not* discriminate solely against these types of accused. The sentence discount also penalises the accused whose guilt or innocence is *genuinely* in doubt and who takes his or her case to trial for this reason. An example might be the accused charged with assault who used force in self-defence in the belief that it was necessary to prevent an attack, and the issue in dispute is whether or not this belief was a reasonable one. It is difficult to see why this person, if found guilty at trial, should receive a greater sentence than the accused who pleaded guilty at an early stage for a similar assault in which there was no question that he or she acted in self-defence.

It might have been expected that the issue of penalising those who take their case to trial would receive some attention in either Lord Bonomy’s *Review* or in the White Paper but it does not.¹²⁹ Like the issue of the innocent who plead guilty, it is entirely neglected in both documents. The point does get at least a mention in *Du*

125 This is the view taken in the Australian cases of *Siganto v The Queen* [1998] 194 CLR 656 at 663; and *Cameron*, note 90 above, at 343. It also appears to be the view taken by the English Sentencing Advisory Panel, note 25 above, at para 13.

126 (1972) 3 DR 10.

127 This appears to be the only occasion upon which either the Commission or the European Court of Human Rights has addressed the issue and even here it was not the central issue in the case.

128 Colvin, note 122 above, at 12.

129 Likewise, the issue is ignored in the McInnes Report.

Plooy, with the court acknowledging that “[i]t may be claimed that the making of an allowance involves the penalisation of accused persons who, for whatever reason, elect to go to trial”.¹³⁰ For this reason, the court stated, such an allowance must be made for “relevant reasons” and must be “proportionate”.¹³¹ It can only be presumed that the court considered efficiency, alongside the rather less persuasive “sparing the victim” and remorse considerations, to amount to “relevant reasons” sufficient to outweigh any concerns about penalising those who take their case to trial.

E. TENSIONS AND BALANCES

Where, then, does this leave us? From the discussion so far, it can be concluded that, in the vast majority of cases, the only plausible justification for sentence discounting is that of efficiency. The question then is whether or not the cost and time savings which guilty pleas undoubtedly produce are convincing *enough* as a justification, in light of the principled objections to sentence discounting: that it might encourage innocent people to plead guilty and that it discriminates against those who exercise their right to go to trial. Whatever view one takes on this issue, it can be stated beyond doubt that this balancing exercise simply has not taken place within the context of the English or Scottish criminal justice system. This is due in part to the tendency of the legal establishment in both jurisdictions to cling to the fiction that sentence discounting is justified on remorse or “sparing the victim” grounds, either in addition to (in Scotland) or instead of (in England) efficiency grounds.

The reluctance of the English courts to accept the efficiency justification for sentence discounting has led to some awkward tensions. This is most obvious in relation to the so-called “caught red-handed” exception to the sentence discounting principle, under which a defendant who pleads guilty in the face of overwhelming evidence against him or her is entitled either to no sentence discount at all or to only a very small discount.¹³² On the basis of the “caught red-handed” exception, a number of defendants have received no or only very little discount in their sentences, despite pleading guilty at an early stage of proceedings.¹³³

130 At [9].

131 At [9].

132 *Billam*, note 69 above, at 350; *R v Costen* (1989) 11 Cr App R (S) 182 at 185. The “caught red-handed” exception was recently approved by the English Court of Appeal in *March*, note 64 above, at para [22], and *R v Najeeb* [2003] EWCA Crim 194 at para [25].

133 See, for example, *R v Morris* (1988) 10 Cr App R (S) 216; *R v Reay* (1992) 13 Cr App R (S) 533; *R v Hastings* [1995] Crim LR 661; *R v Landy* (1995) 16 Cr App R (S) 908; *R v Fearon* [1996] 2 Cr App R (S) 25.

Given the way in which the English courts have justified sentence discounting, the “caught red-handed” exception is entirely logical. As we have already seen, in *Millberry*, the English Court of Appeal rejected the notion that sentence discounting is justified on efficiency grounds, preferring to link it either to evidence of genuine remorse or contrition or to a real desire to spare the victim from giving evidence. But the primary justification for rewarding the offender who pleads guilty in the face of overwhelming evidence is one of efficiency. Indeed, it might be said that those who are “caught red-handed” are *precisely* the types of offender who should be encouraged in the interests of efficiency to plead guilty at an early stage. After all, their guilt is in little doubt and their only reason for maintaining a not guilty plea would be the hope that they can escape conviction through, for example, the non-appearance of a key witness. Encouraging them to plead guilty at an early stage saves the cost of what might be regarded as an unnecessary trial.

Until *Du Plooy*, the stance taken by Scots law on the accused who was caught red-handed was unclear. It might have been thought from *Forrest*¹³⁴ that, like the English Courts, the Appeal Court found it persuasive. In *Forrest*, the accused pleaded guilty to rape and robbery and received a sentence of six years’ detention, with the sentencing judge stating that he had taken the accused’s early guilty plea into account in arriving at this sentence. The Crown appealed on the ground that this was unduly lenient, and a sentence of nine years was substituted. Amongst other factors, the Appeal Court took into account its belief that, in the circumstances of the case, which included DNA and other powerful evidence against the accused, the guilty plea was not a factor that should have been given great weight by the sentencing judge.

In *Du Plooy*, however, while not explicitly rejecting the “caught red-handed” exception, the court stated that it “cannot be pressed too far”.¹³⁵ It recognised that the accused against whom there is overwhelming evidence is not compelled to plead guilty and that “the utilitarian benefits to the criminal justice system deriving from a plea of guilty remain real, whatever might have been the strength of case against the accused”.¹³⁶ Of course, such reasoning is possible because, unlike the English Court of Appeal, the Scottish Appeal Court has not rejected the efficiency justification for sentence discounting.¹³⁷

134 Note 63 above.

135 At para [21].

136 At para [21].

137 For further discussion on the approach taken in *Du Plooy* to the “caught red-handed” exception and to other possible exceptions to the sentence discounting principle, see Leverick, “Making sense of sentence discounting”, note 7 above.

Discomfort with the notion that discrimination in sentencing is acceptable purely on the pragmatic ground of cost efficiencies has recently led the Australian High Court to engage in a somewhat surreal justification exercise in *Cameron*.¹³⁸ Here, the majority concluded that sentence discounting could not be justified on the “pragmatic and objective ground that the plea has saved the community the expense of a trial”.¹³⁹ Rather, they concluded, sentence discounting is acceptable only if it can be justified on the basis of some subjective difference between accused persons. Rejecting remorse as a possible basis for this, the High Court none the less concluded that subjective differentiation was possible on the basis that “a guilty plea evidences *a willingness to facilitate the course of justice*”.¹⁴⁰

This is quite simply nonsense. The accused is no more likely to plead guilty motivated by “a willingness to facilitate the course of justice” than to plead guilty motivated by genuine feelings of remorse. Indeed, some of the lower Australian criminal courts have already disassociated themselves from the view of the High Court, making it clear that, in their view, the sentence discount is justified on purely utilitarian grounds.¹⁴¹

The tensions in the law are clear. The desire to reward only the deserving offender with a sentence discount has led to a wilful blindness on the part of at least some courts to the efficiency justification for sentence discounting. Instead, the courts have gone to great lengths to justify sentence discounting solely in terms of the accused’s remorse or a desire on the part of the accused to spare the victim (in England) or a willingness on the part of the accused to facilitate the course of justice (in Australia). In English law this has led to the rather absurd result that those who are caught red-handed do not merit a sentence discount, when it is these very people who, on the grounds of efficiency, should be encouraged to plead guilty at the earliest possible stage. Fortunately, in *Du Plooy*, Scots law has not gone down this line.

Yet if efficiency *is* accepted as the primary justification for sentence discounting, as it seems to have been in *Du Plooy*, this leads to a different set of tensions. Efficiency alone is a rather weak justification when weighed against the principled objections to sentence discounting: that it might encourage the innocent to plead

138 Note 90 above.

139 At 343.

140 At 345 (emphasis added).

141 See *R v Sharma* [2002] 54 NSWLR 300; *R v Place* [2002] 81 SASR 395. See also the judgement of Kirby J in *Cameron*, who did not dissent from the majority in terms of the outcome of the case (which is not relevant for the purposes of this paper), but who did issue a separate judgement in which he made it clear that he did not accept the subjective willingness to facilitate the course of justice argument. For further criticism of this aspect of *Cameron*, see J Shaw, “*Cameron v The Queen*: A consideration of sentencing principles applicable to pleas of guilty” (2002) 2 *Queensland University of Technology Law and Justice Journal* 292.

guilty and that it discriminates against those who exercise their right to go to trial. The latter of these two objections is especially troubling when one considers that it is those whose guilt is genuinely in doubt who are likely to contest their trial and, if found guilty, to receive a sentence that is significantly higher than that of another individual who differs only in that he or she pled guilty at the first available opportunity.

F. CONCLUSION

The provisions relating to sentence discounting contained in section 20 of the Criminal Procedure (Amendment) (Scotland) Act 2004 represent something of a change for Scottish criminal justice. Previously only a factor that a judge may take into account in sentencing, the stage at which a guilty plea is tendered has become a factor that must be taken into account, and any failure to impose a discount must be explained in open court. Although it might be argued that these changes will make little practical difference, on paper, at least, the Scottish criminal justice system has moved beyond anything in the present English legislation, which contains no requirement either to note or to provide reasons for any decision to *withhold* a discount. This change has come with very little by way of discussion of the rationale for sentence discounting, beyond repetition without critical reflection of the traditional remorse, “sparing the victim”, and efficiency justifications.

At first sight, it might seem that this omission is rectified in *Du Plooy*, the first case in which the Appeal Court has given any detailed attention to the rationale behind the sentence discounting principle in Scotland. To an extent it is. The court refers to all three of the possible justifications for sentence discounting, and, unlike the English courts, seems to regard the efficiency argument as the most convincing. What the court in *Du Plooy* does not do explicitly is recognise that, as this paper has demonstrated, in the vast majority of cases, efficiency is the *sole* convincing argument in favour of sentence discounting. By failing to do this, it has prevented debate as to whether efficiency alone is a sufficiently convincing justification for the practice, given the principled objections that can also be made, namely that sentence discounting encourages the innocent to plead guilty and that it unfairly penalises those who exercise their right to go to trial.

It is argued here that, rather than attempting to dress up sentence discounting in more acceptable terms, we *should* be honest and accept that, in the vast majority of cases, the efficiency justification for sentence discounting *is* the only convincing one. We should also be honest about the difficulties sentence discounting presents. Sentence discounting as it operates in Scotland at present is a blunt instrument. In rewarding those who plead guilty, not only do we reward some undeserving cases,

who plead guilty motivated purely by the reduction in sentence, and not by any genuine contrition, we also punish the very people whose guilt or innocence is in genuine doubt. Set against this concern, efficiency is, in the writer's view, a very weak justification indeed.

It may be, though, that there *is* a way of encouraging those against whom there is an overwhelming body of evidence to plead guilty, without punishing those with a more reasonable basis upon which to take their case to trial. One way of doing this might be to award the same sort of sentence discount that would have been received by an accused pleading guilty at an early stage to an accused who is found guilty after trial but who *did* have a reasonable basis for maintaining his or her not guilty plea. In this way, the sentence discount would be withheld only from those who insisted on a trial without having some reasonable basis for doing so.

Indeed a proposal of this nature was considered by the Thomson Committee on Criminal Procedure¹⁴² as long ago as 1975, as part of the debate leading up to the Criminal Procedure (Scotland) Act 1980.¹⁴³ Here it was suggested that an accused who maintained a plea of not guilty when the defence was "of no substance" might have an award of costs made against him or her.¹⁴⁴ The proposal was ultimately rejected by the Committee on a number of grounds, not least the difficulty in defining satisfactorily a "defence of no substance". Whether this would present as many problems as the Committee seemed to think is open to question. Certainly the English courts appear to have had little difficulty in identifying those against whom there was an overwhelming weight of evidence, in the context of withholding the sentence discount from the accused who is "caught red-handed".

If a workable solution of this nature cannot be found, however, then we are left with the difficulty posed by the law as it stands at present: that those who do have a reasonable basis upon which to take their case to trial are penalised for doing so. In this event, assuming that we do not wish to abandon the system of sentence discounting altogether, this rather unpalatable side-effect might just be a tough result that, on the grounds of efficiency, we have to accept.

142 Thomson Committee, *Criminal Procedure in Scotland (Second Report)* (Cm 6218: 1975).

143 No overt consideration was given to sentence discounting by the Thomson Committee and there is no provision for sentence discounting in the 1980 Act.

144 Para 20.06. Sanctions of this type have also been considered, although ultimately rejected, in relation to a failure to agree uncontroversial evidence. See *Improving the Delivery of Justice in Scotland*, note 20 above, at paras 82-88.