SENTENCING FOR SERIOUS TRAFFIC OFFENCES

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1. INTRODUCTION

Twelve months ago I presented a paper relating to sentencing for serious traffic offences in the Local Court.

A lot of what was said then remains the same but I have sought to update the paper in a number of areas, including breach of bonds, starting dates for disqualification periods and Intensive Corrections Orders.

An alternative title for this paper is “What to do when the Court asks for a PSR”. This is not meant to alarm advocates it is meant to assist by pointing them in the right direction. It helps to have an idea as to what the Court is thinking.

2. SERIOUS TRAFFIC OFFENCES?

A more accurate title for this paper could have been Sentencing for Serious Traffic Offences in the Local Court. I have not canvassed Culpable Driving or Manslaughter or matters of that kind that are regularly dealt with in the District Court. That is an area of sentencing of its own, dealing with far lengthier sentences and objectively dealing with more serious criminality.

For the purposes of the paper my comments are related to High Range PCA first offenders, repeat second offenders (especially within 5 years), third and more drink driving offenders, repeat Drive Whilst Disqualified and Drive Whilst Suspended matters and prosecutions under Section 42 of the *Road Transport (Safety and Traffic Management) Act 1999* of Negligent Driving Occasioning Death or Grievous Bodily Harm.

The length of any disqualification period is also hugely important as is the starting date of any disqualification.

There have been a number of recent cases on how Courts should deal with breaches of bonds and this can be very important when dealing with serious traffic offences.

Finally, I make some comments about Habitual Traffic Offender Declarations and the use of the Interlock program and Intensive Correction orders as a sentencing option.

3. PCA MATTERS/GUIDELINE JUDGMENT

There is no doubt since the delivery by the Court of Criminal Appeal in 2004 of the Guideline Judgment on High Range PCA that we have seen in Local Courts of New South Wales an increase in the use of more severe penalties and a reduction in the use of Section 10 for High Range PCA Offences.

For those that do not know, the Guideline Judgment is more commonly known as *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment concerning the offence of High Range Prescribed Concentration of Alcohol under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1993 (No 3 0f 2002) (2004) 61NSWLR 305.*

Since the delivery of the judgment over 6 years ago it has become regularly quoted, analysed, followed, not followed, criticised or at least read by practitioners, prosecutors and judicial officers alike.

I have not regurgitated the guideline itself as it is now commonly known and applied in Local Courts throughout New South Wales.

What I can do is again refer you to a number of papers that have analysed the impact of the Guideline Judgment on sentencing. The two papers are

(a) *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, being part of the Sentencing Trends and Issues series published by the Judicial Commission of New South Wales (No 35, September 2005) by Patrizia Poletti and;

(b) *The Impact of the High Range PCA Guideline Judgment on sentencing for PCA offences in NSW*, being part of the Crime and Justice Bulletin published by the New South Wales Bureau of Crimes Statistics and Research (No 123 November 2008) by Stephanie D'Apice.

The first of these papers analyses sentencing patterns both before the guideline judgment and after the guideline was delivered. The second of these papers examines the longer term impact of the guideline judgment on sentencing severity and overall penalties for the offence of High Range PCA.

For example, the second paper demonstrates that in relation to High Range PCA offences the use of Section 9 Bonds increased 19%, the use of Community Service Orders increased 153%, the use of suspended prison sentences increased 156%, the use of periodic detention increased 100% and full time custody increased 45%.

There is no doubt that the guideline judgment has had an effect on sentencing for not only High Range PCA offenders but repeat drink driver offenders particularly when the second offence is a High Range PCA offence.

The guideline seeks to set out a broad range of circumstances that need to exist in some way before a client can be categorised into a particular part of the guideline.

For example, paragraph 6 of the guideline provides that when the moral culpability of the offender of a second or subsequent High Range PCA offence is increased a sentence of any less severity than imprisonment of some kind

would generally be inappropriate and where any number of aggravating factors are present to a significant degree or where the prior offence is a High Range PCA offence a sentence of less severity of less severity than full time imprisonment would generally be inappropriate.

It is still my view that this still gives a Court a wide sentencing discretion in relation to particular offenders even when a person is a second offender and the prior offence is a High Range PCA offence. Where the prior offence is not a High Range PCA offence then the guideline gives some scope for alternatives to full time custody.

I feel that it is important to demonstrate that you are familiar with the guideline judgment and more importantly, where in the guideline your client may sit. However that is not the end of the road for your client and it should always be remembered that the sentencing by the Court is a balancing exercise.

It is always good to remember the observations by the CCA in *R v Whyte (2002) 134A Crim R* regarding the Guideline Judgment;

(a) Sentencing Courts are required to “take into account” a Guideline Judgment.

(b) Guideline Judgments should be expressed so as not to impermissibly confine the exercise of the sentencing discretion. They are to be taken into account as a “check” or “sounding board” or a “guide” but not as a “rule” or “presumption”.

(c) Numerical guidelines have a role to play in achieving equality of justice where, as a matter of practical reality, there is tension between the principle of individualised justice and the principles of consistency.

4. DRIVE WHILST DISQUALIFIED/DRIVE WHILST SUSPENDED/ DRIVE WHILST CANCELLED

Penalties under Section 25A of the *Road Transport (Driver Licencing) Act* 1998 can be severe, especially for repeat offenders.

In 2007 Drive Whilst Disqualified ranked 4th and Drive Whilst Suspended ranked 7th of the most common proven statutory offences in the New South Wales Local Court. Drive Whilst Disqualified was 5.1% of cases and Drive Whilst Suspended was 4.2% of cases.

Corrective Services statistics also show that the number of persons serving full time custody for Driving Whilst Disqualified constitute a large proportion of those persons in our gaol system.

How often do you hear Drive Whilst Disqualified being equated to contempt of court? Whilst not contempt, it is serious and is reflected in the fact that offenders have appeared in Court, have been disqualified for a particular period of time and usually warned by the Court not to drive but have done so in clear defiance of a Court imposed disqualification.

In 2009 Section 25A was amended to insert a new offence in Sub-Section (3A) of driving whilst suspended or cancelled under the Fines Act and providing for an automatic disqualification period of 3 months for a first offence.

This was a sensible amendment and reflected the fact that some Courts took a less serious view of Driving Whilst Suspended or Driving Whilst Cancelled when it occurred after fine default as opposed to driving after being disqualified by a Court or driving after being suspended by the Police or RTA.

The CCA in *Tsakonas v. R [2009]NSWCCA 258* at Para 39 (22 October 2009) reiterated that driving whilst disqualified involves a conscious and deliberate decision to flout the law.

You will recall that Section 25A was amended late in 2009 to overturn *DPP v Partidge [2009] NSW CCA75.*

In *Partridge* the Court of Criminal Appeal had held that the automatic period of disqualification for an offence under Section 25A is 12 months when the previous conviction within 5 years was not a similar 25A offence. In other words if the previous offence was a drink driving offence or other type of major traffic offence the increase in automatic disqualification period from 12 months to 2 years did not apply. The decision in *Partridge* clarified the Section as a number of District Court decisions had expressed different views and there were differing views in the Local Court.

However Road Transport Legislation Amendment (Miscellaneous) Act 2009 amended Section 25A to make it clear that the automatic period of disqualification for a second offence is 2 years. The amendments to Section 25A commenced on 14th December 2009.

5. NEGLIGENT DRIVING CAUSING DEATH/ NEGLIGENT DRIVING CAUSING GRIEVOUS BODILY HARM

Sentencing for these matters is still one of the most difficult sentencing exercises entrusted to the Local Court.

The offences arise out of the concept of driving a motor vehicle negligently but if death is occasioned a person can be imprisoned for up to 18 months and if a person suffers grievous bodily harm a person can be imprisoned for up to 9 months. In addition the offences carry disqualification periods similar to High Range PCA. i.e. automatic period of 3 years and minimum of 12 months.

The sentencing process is a difficult one because the criminality that the Section seeks to punish is negligence and the section seeks to distinguish between death and grievous bodily harm and simple negligent driving in which nobody is killed or suffers grievous bodily harm. This final category type of offence is usually dealt with by the issue of a Traffic Infringement Notice by Police.

Judicial commission sentencing statistics show that the whole range of penalties available in the Local Court are imposed for this types of offence. As the offence can cover a wide range of circumstances and driving such statistics are of limited value.

Last year I made reference to *Mitchell v R [2009] NSW CCA95* where the Court of Criminal Appeal dealt with an Appeal from a Sentence imposed for Section 42 matters in the District Court after the accused had been acquitted of culpable driving charges. The Court recognised the offences as serious, which in this case involved a collision involving a prime mover with a gross weight of 55 tonnes. Another motorist was killed and another suffered what was described as "catastrophic injuries". The sentencing Judge was of the opinion that the seriousness of the offences justified a sentence of full time imprisonment but that the matter could be dealt with by way of a Community Service Order. The decision relates more directly to the appropriate period of disqualification and the Court said,

"……an important component of punishment for [this offence] is the suspension of the offenders licence to drive. It is a salutary reminder that a licence to drive a vehicle is a privilege which will be removed when negligence occasions the death of another…..the Parliament anticipated that the suspension of a driver's licence would have social consequences for an offender".

The Court went on to hold that the automatic period of disqualification of three years was appropriate.

In 2006 then Deputy Chief Magistrate Henson had sentenced a 81 year old driver for an incident involving the death of two people and the grievous bodily harm to a third. The case is reported as *DPP v Foggo [2006] NSW LC39*.

In assessing the objective seriousness of the offence the Court did so against the background of the guideline judgments in *Jurisic and Whyte*. The Court acknowledged that these were guidelines in relation to the more serious offence under Section 52A of the Crimes Act which carried far greater maximum penalties then an offence under Section 42, however, the Court held that

"……*the identification of what constitutes a typical case in aggravating circumstances is pertinent to the approach to be taken on sentence for what is commonly described as the lessor offence of negligent driving occasioning death*".

The Court also made reference to the;

"level of moral culpability, even in prosecution under Section 42 and acknowledged that the object seriousness of this offence is demonstrably less, by reference to the maximum penalty available so that whilst the level of moral culpability can be high and the consequences aggravated by the fact of two fatalities, it must be abundantly clear that whilst a term of imprisonment is available and required to be considered, all other things being equal, it is less likely to be imposed from an offence in this category than in the more serious category under the Crimes Act 1900".

The Court went on to reject a submission that the matter be dealt with under Section 10 and said

"….*the role of the Court to protect the community through, at the very least, the recording of a conviction and imposition of a penalty is a responsibility no sentencing Court can readily abandon, even in the knowledge that it is punishing an honourable, decent and contributing member of society in circumstances where many will regard the outcome as harsh and uncaring.*

Ultimately, the interests of justice and what I perceive the need to promote the principles of general deterrence persuade me to the view that I should record a conviction".

In 2008 the now Chief Magistrate, Judge Henson passed sentence in another prosecution under Section 42 following the death of a three year old girl who was being carried by her mother at a pedestrian crossing when they were hit by a large lorry. The decision is *Police v Curkovic [2008] NSW LC1* from 16 January 2008.

After referring to matters under Section 21A of the Crimes Sentencing Procedure Act 1988 and the consideration of the facts the Court placed the offence in the upper range of seriousness of an offence of this category. The Court acknowledged that this type of offence is typically committed by people of otherwise good character with no or limited prior convictions. The Court again made reference to the issue of moral culpability and also recognised that

"…*when the prosecution relied on momentary inattention as being the identifiable cause of the accident, together with the nature of the offence, being one of less severity in the eyes of Parliament, it required a cautious approach by the Court when considering whether imprisonment is the appropriate penalty*."

The Court referred to Section 5 of the Crimes Sentencing Procedure Act 1999 but also held that the Sentence was one that must emphasise general deterrence and indicated that this was the approach generally adopted in relation to driving offences where death or serious injury occurs. The Court went on to say that

"*the protection of the community is the fundamental obligation of the Courts in the exercise of the criminal jurisdiction. General deterrence is an important objective in the pursuit of that ultimate outcome but not an objective to be emphasised as highly in relation to this category of offence as it is in relation to more serious driving offences. This is because the objective seriousness of the*

two categories of offences is significantly different. So too is the nature of the conduct required to be proven".

The Court decided that whilst a sentence of imprisonment was required it was appropriate for it to be suspended pursuant to Section 12. The Court reduced the period of disqualification from the automatic period of 3 years to 2 years.

In *Bonsu v R [2009] NSWCCA 316* (judgment delivered on 19 November 2009 but not reported until 30 March) Howie J (sitting as the CCA) made some comments regarding Section 42 matters. Mr Bonsu had been sentenced to a Community Service Order for a Section 42 matter by the District Court after being found not guilty of a culpable driving charge. On breaching the Community Service Order the offender was sentenced to 3 months imprisonment for the original offence. After referring to the statistics that showed a markedly lenient approach to sentencing for this offence, having regard to the maximum penalty, Howie J said;

"*I have difficulty in understanding how s10A or s9 of the Crimes (Sentencing Procedure) Act 1999 can be used for such an offence. It seems to me, that these statistics reveal that little regard or insufficient regard is being paid in the Local Court or the District Court on appeal to the fact that the offender being sentenced has caused the loss of life."*

He went on to refer to the Chief Magistrate's decision in *Curkovic* as an admirable judgment looking at the issues and concerns in sentencing for this type of offence. He concluded by emphasising that nothing that he had said should be taken in any way…to indicate that a good behaviour bond is an appropriate penalty for this offence. He felt the range of penalties being imposed for this offence is inadequate and fails to reflect the fact that offenders charged with this offence have taken a human life.

6. MATERIAL IN SUPORT OF YOUR PLEA

(i) Pre-Sentence Report

The importance of a Pre-Sentence Report from the Probation and Parole Service cannot be underestimated. It provides an assessment of your client's suitability for Community Service Work and/or Periodic Detention together with an assessment as to their need for supervision.

Many Local Courts now have a duty Probation and Parole officer in attendance, usually on a list day, where they can do the appropriate duty report without the need for matters to be adjourned for a full pre-sentence report.

It should be remembered that a pre-sentence report will not provide an assessment as to a client's suitability for a Home Detention. This is because Home Detention is not considered a pre-sentence option. It is not meant to lead to "net widening" and so therefore a Court is required to come to a decision that a period of full time custody is appropriate before adjourning the matter to allow a Home Detention assessment to take place.

Periodic Detention has now been abolished. Intensive Correction Orders took over from 1st October 2010.

Intensive Correction Orders are available when a Court expects to impose a period of imprisonment of less than 2 years. They are available for serious traffic offences.

Before imposing an ICO the Court must consider all the alternatives to imprisonment and decide that no other penalty is appropriate. Matters are then adjourned for assessment and offenders must be assessed as suitable before they can be sentenced. On return to Court after assessment and on being sentenced a non-parole period is not set and the Court orders that the period of imprisonment is to be served by way of ICO.

All ICO's must expire within 2 years of the date they are made and a Court is not obliged to sentence a person to an ICO just because they have been assessed as suitable. If assessed as suitable and the Court declines to sentence the person to an ICO they must give reasons for so doing.

A person cannot be referred for assessment for home detention at the same time they are being referred for assessment for an ICO. They can however be referred for a home detention assessment after a Court has decided not to impose an ICO.

I do not have any easy answer to how you deal with a bad pre-sentence report save asking that the author be called to give evidence and be cross-examined. I would suggest that this should be avoided. Your job of obtaining a good result is already difficult enough. It is not made any easier by having to embark on cross-examination of the author of a pre-sentence report.

(ii) References/ Statements

I am of the view that corroborative evidence of matters put to the Court in submissions can be provided via character references or more appropriately statements. This is especially so when evidence from the bar table may not carry sufficient weight.

Evidence of employment should come from an employer and evidence of your client's health or health of others e.g. aged parent, should come from a Doctor.

When arguing for an alternative to full time custody an appropriate Statement of remorse/contrition from your client can be helpful together with a more general

Statement from them about their current circumstances, why they should not go to jail and even an impassioned plea to be given one final chance.

Evidence of any type of counselling and or rehabilitation should, if possible, always be reduced to writing.

(iii) Psychiatrist/Psychologist Reports

A good Psychiatrist/Psychologist report can be gold. A report simply for the purpose of having such a report is of limited value.

I prefer a report from a Psychiatrist or Psychologist who has been seeing/treating your client for some time rather than a report from a one visit assessment.

I have never held the view that it is always necessary to obtain such a report when your client is facing a period of full time custody. A lot of the material in such reports is untested and their value can sometimes be limited. However, a report from a treating Psychiatrist/Psychologist can provide evidence of treatment to date but also set out an appropriate future treatment plan.

7. THE INTERLOCK PROGRAM

The program is administered by the RTA and there is a monthly cost involved. The benefit to your client is that they will be able to serve a shorter disqualification period then if they are disqualified in the usual way.

The Court firstly imposes a normal disqualification period and the Court then imposes a disqualification suspension order which is a suspension of the

original disqualification period. This then allows the person to serve a reduced period of disqualification (the disqualification compliance period) followed by a period on an Interlock Driver Licence. The various periods are set out in Sections 190 to 197 of the Road Traffic (General) Act 2005.

Section 193 of that Act does not allow the disqualification compliance period to be varied. The disqualification compliance period has to have expired before the RTA can issue an Interlock Licence.

However, the period in which the person drives with the Interlock Licence (Interlock Participation Period) can be extended by the Court from the minimum period set out in Section 192. However, it cannot be reduced.

As was said in the Second Reading speech when the amending legislation was introduced on 28 June 2002;

"*the Interlock Program is tailored to those offenders who are most at risk of crashing and re-offending. The Program targets first offenders convicted of the serious offence of High Range or Middle Range alcohol concentration or driving under the influence of alcohol offences. It also targets those convicted of a drink driving offence who have a prior drink driving conviction within the previous 5 years. The Courts will decide whether the new interlock sentence and penalty should be applied. Where a Court considers an interlocking sentencing option is appropriate it will order the interlock penalty as an alternative to a full disqualification period…..".*

Interlock licences are part of a sentencing option available to a Court, especially when dealing with repeat offenders and serious traffic offences.

Their support or use by Courts can vary greatly. It should be asked for if the client is interested. If granted it does not necessarily have to be taken up.

8. HABITUAL TRAFFIC OFFENDER DECLARATIONS

Sections 198 to 203 of the Road Transport (General) Act 2005 make provision for persons to be declared habitual traffic offenders who have committed three particular types of offences in a period of 5 years.

The offences include all major offences, speeding greater than 45km/h, second or subsequent unlicensed driving matters dealt with by a Court and Section 25A matters (drive whilst disqualified, suspended or cancelled).

Under Section 202(1) it is possible for a Court to quash a HTO declaration, either at the time or later, if the Court is of the view that the disqualification imposed by the declaration is a disproportionate and unjust consequence having regard to the total driving record of the person and the special circumstances of the case.

Under Section 201(3) it is also possible for the Court to reduce the period to no less than 2 years.

The quashing of a HTO declaration under Section 202 operates to set aside the disqualification imposed by the declaration on and from the day in which the Court makes the order that quashes the declaration. If the disqualification period has already commenced when the declaration is quashed, it does not operate to invalidate or otherwise affect the operation of the disqualification in its application to the habitual traffic offender at any time before the day on which the declaration is quashed.

Chief Magistrate Henson in *P v TePairi [2008] NSW LC17 (27 August 2008)* had dealt with an offender whose repeat offending meant that he faced four separate HTO declarations, which would have resulted in an additional 20 years disqualification. The Court, in quashing two of the declarations and reducing the third and fourth to 2 years, said

"*….whilst it is important to foster the principles of general and specific deterrence in relation to traffic offences, it is also important to promote an environment in which the prospect of rehabilitation is real rather than largely unobtainable".*

In *RTA V. Papadopoulos [2010] NSWSC 33 (19 February 2010)* the Court dealt with a number of issues, most of which have been now dealt with by various amending legislation. However, if it was ever in doubt, James J held at Para 56 that a Court in dealing with an application to quash a declaration is entitled to look at the driving record and the circumstances of the case at the time of the application and not just at the time the declaration is imposed.

I am still of the view that in many cases the quashing or reduction of a HTO declaration is better considered by a Court at the end of any Court imposed disqualification period. For repeat offenders and serious offences this has usually been a fairly lengthy period and allows your client the opportunity to provide evidence of rehabilitation and an ability to comply with the Court imposed disqualification. In the decision referred to above the Chief Magistrate indicated that a Court should be careful not to honour a discount for multiple offending, but to apply an approach predicated upon the principles of totality.

Amendments in 2009 to the Road Transport (General) Act 2005 now allow for "orphan" disqualification periods not to be left to be served at some future date and all different disqualification periods will automatically run consecutively.

Courts are also encouraged to make orders that disqualification periods "commence from the expiration of the current period of disqualification".

9.BREACH OF BONDS

In dealing with serious traffic offences we are sometimes required to deal with clients who are also in breach of their obligations pursuant to bonds under Section 9,10 or 12 of the crimes (Sentencing Procedure) Act 1999.

Since *DPP V Cooke [2007]NSWCCA 2* and *DPP V Novata [2009] NSWSC 72* the revoking of Section 12 bonds following a breach, pursuant to Section 98 of the Crimes (Sentencing Procedure) Act 1999 has become an important part of the sentencing process.

Section 98(3) provides that a Section 12 bond must be revoked unless the Court is satisfied that (a) the breach was trivial in nature or (b) there are good reasons for excusing the failure to comply.

In *R v Nicholson [2010] NSWCCA 80 (5 May 2010)* the CCA dealt with an offender that had been sentenced in the District Court whilst on a Section 12 bond from the Local Court. The Court was concerned that the offender had been sentenced in the District Court without any action being taken for him to be dealt with by the Local Court for the breach of the Section 12 bond until after.

Howie J expressed surprise and concern that this had occurred and made it clear that it is necessary to ensure that the breach of the Section 12 bond is dealt with before sentencing for the offence that has created the breach.

This is now common practice in the Local Court.

In Police v Larkins [2009] NSWLC 12 (1 October 2009) Chief Magistrate Henson had to deal with an offender who had breached both a Section 9 and Section 12 bond. After indicating that MPCA was not a trivial offence (98(3)(a)) he went on to consider 98(3)(b). He cited *Cooke (supra)* and said that

"…the focus must principally be upon the behaviour giving rise to the failure to comply with the conditions of the bond and whether that behaviour should be excused" and

"the subjective circumstances of an offender at the time of proceedings for revocation of the bond are irrelevant to a determination under Section 98(3)(b)".

However he noted that there may be extenuating circumstances of sufficient importance to explain the behaviour giving rise to the breach such that the court can exercise its discretion to take no action on the breach. He eventually held that 98(3)(b) did not apply and the mandatory provisions for revoking the bond had to be implemented.

Note however it is different for breaches of Section 9 and 10 bonds (as per Section 98(2)). The Court retains a discretion to revoke the bond. They may take no action on the breach, or amend the terms of the bond (eg extending it) or revoke and resentence (or convict and sentence if a Section 10 bond) (See Section 99 of the Act).

10 COMMENCEMENT OF DISQUALIFICATION PERIOD.

Sections 187 to 189 of the Road Transport (General) Act deal with licence disqualification and in *Jewel V DPP [2010] NSWDC195* Nicholson DCJ had cause to examine the sections and made some interesting comments about the attitude of the RTA towards Court imposed disqualification periods. In Jewel the RTA had amended the orders made by the Court without any entitlement to do so.

We should always be wary of the RTA and how they sometimes act. I always suggest to clients that they check with the RTA to make sure that their records accord with what a Court has done.

CONCLUSION

An examination of statistics will show that the Local Court in NSW is required to devote a large part of its time to sentencing offenders for serious traffic offences.

The Court has available to it a broad range of sentencing options and is still required by legislation to only impose full time custody when they have formed the view that no other option is suitable.

The options are well known to experienced practitioners and even newcomers would only need one or two serious matters to become familiar with the options and what sits on the rungs of the sentencing ladder.

What is important is for practitioners to be aware of some of the more general principles that apply and some of the recent legislative amendments that are relevant in this area.

Can I finish by saying something I have said before, both to this audience and others ;

"There is no harm in telling the Bench what you are seeking from the outset – many times you will be asked directly. If you want to make a bold submission then at least concede it is as much.

If the Bench indicates a particular outcome and it accords with what you are about to ask for then sit down. If you feel that it is more that what is required then continue your submissions with a view to the Court being convinced otherwise."

The Local Court deals with thousands of cases and in so doing ensures that those more serious matters, where full time custody is a real possibility, are dealt with appropriately.

If this continues then our client's interests are represented and at the end of the day we have done our job.

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