

Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

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SC(18)JAN08 - Manslaughter
Tim Holroyde
Ruth Pope
0207 071 5781

1 ISSUE

1.1 The Council is asked to consider the responses to the gross negligence manslaughter guideline from the consultation and road testing (in which 14 judges ‘sentenced’ gross negligence manslaughter cases).

1.2 This is the second consideration of the guideline post-consultation (unlawful act was considered in December; loss of control will be considered in March and diminished responsibility in April). The Council will have the opportunity to review the whole and sign off the definitive guideline in May 2018. The guideline can then be published in early September 2018 and come into force in December 2018. This timetable will enable training on the definitive guideline to take place at the Serious Crime Seminar in September 2018.

1.3 Dr Adrian Grounds has kindly agreed to address the Council at its April meeting on the role of mental health reports in sentencing, in relation particularly to diminished responsibility.

1.4 As agreed at the December Council meeting, transcripts from 2016 cases are being obtained and analysed to obtain an up-to-date picture of sentencing practice – therefore the issue of sentence levels will not be considered in detail at this meeting.

2 RECOMMENDATION

2.1 That the Council considers the consultation responses to the gross negligence manslaughter guideline and the results of the road testing exercise (summarised at **Annex C**) and considers the amendments proposed at **Annex A** (additions are underlined and deletions struck through). The consultation version of the guideline is reproduced for information at **Annex B**.

3 CONSIDERATION

3.1 Of the 44 responses to consultation, 32 addressed the gross negligence manslaughter guideline; it was, by far, the guideline which provoked most comment. The responses can be divided into three broad groups: those concerned with offending in the workplace, those concerned with offending in a medical setting and those taking a more general view.

3.2 A brief summary of the positions of the respondents is set out at paragraphs 3.3 to 3.6 below, with a more detailed consideration of the responses to each question from paragraph 3.7 onwards.

Workplace deaths

3.3 Those representing employees (eg trade unions) and families of victims of workplace deaths broadly welcomed the guideline and the prospect of higher sentences where profit has been put ahead of safety. Some suggested additional factors to be taken into account where the offender is an employee with little control over the workplace and subject to poor workplace practices, lack of training or over work etc.

3.4 Those representing employers and managers were concerned that the guideline would lead to much higher sentences for gross negligence manslaughter in the workplace. Several expressed the view that it was not possible to include workplace deaths in a general guideline and/or that special factors should be included for such cases.

Medical deaths

3.5 Those representing doctors were concerned that the guideline did not take account of the realities of clinical practice, the context of seriously ill patients, the pressures that clinicians can be working under and the team environment in which they work. They were concerned that the guideline would lead to higher sentences and defensive practice.

General

3.6 Judges and general criminal practitioners were broadly content with the structure of the guideline, though there were suggestions for some additional factors. Some respondents repeated concerns raised in relation to the unlawful act guideline, which the Council has already considered. In road-testing judges were able to categorise culpability easily, though some questioned particular factors. In general judges in road-testing were happy with the sentence they arrived at using the draft guideline.

Culpability

Consultation question 9: Do you agree with the proposed approach to the assessment of culpability? Please give reasons where you do not agree.
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3.7 Kennedys (H&S lawyers) disagree with the approach. They draw attention to the very high threshold for gross negligence manslaughter (quoting from R v Misra) and say that you cannot have lower culpability in context of gross negligence manslaughter. They point out that two levels of culpability would echo the Corporate Manslaughter guideline.

In our view there are too many categories involved. We believe there should be a simple Level 1/Level 2 depending upon whether the conduct relates to act as opposed to omission.

3.8 Pinsent Mason (H&S lawyers) suggest just one level of culpability with aggravating and mitigating factors on which more detailed guidance could be given.

3.9 BLM (H&S lawyers) express concern about what they characterise as a formulaic approach in cases involving fatal workplace incidents and query whether such an approach can be applied to this particular offence which is committed relatively infrequently and in many different circumstances.

3.10 The only other respondent to question the structure of the guideline was the Criminal Bar Association (CBA) (supported by the Howard League) who repeated their objection to four levels of culpability and the very high culpability category in particular.

3.11 Road testing did not reveal any problems with the structure of the guideline and the division into four levels of culpability.

Question 1: Does the Council agree to retain the structure of the guideline?

The subjective awareness of the offender

3.12 The consultation version of the guideline includes the following culpability factors:

High culpability: *The offender was clearly aware of the risk of death arising from the offender's negligent conduct.*

Low culpability: *The offender did not appreciate the risk of death arising from the negligent conduct*

3.13 In order for the offence of gross negligence manslaughter to be made out there must be an obvious risk of death from the negligent conduct – but this in an objective test, there is no requirement to prove that the offender was actually aware of that risk. The draft guideline sought to distinguish between those cases where an offender was aware of the risk and persisted regardless and those where the offender had not appreciated the risk. These two factors were the source of much critical comment from respondents to the consultation and, to a lesser extent, judges in road-testing.

3.14 The Health and Safety Lawyers Association (HSLA) states:

The 'awareness of risk' culpability factor is also a poor indicator of High Culpability for workplace cases. Workplace managers in positions of authority and responsibility would be expected to be aware that their breach could cause a safety risk; indeed, a grossly negligent manager with awareness of the risks might in many circumstances be less, rather than more, culpable than another grossly negligent manager who was ignorant of the risks.

3.15 Other respondents suggest that in the case of workplace deaths if the low culpability factor applied it was highly unlikely that a prosecution would be brought at all and that the high culpability factor would apply in almost all cases.

3.16 From the viewpoint of victims of workplace deaths there is concern that the low culpability factor could be inappropriately applied. 'The test must relate to the control of the job and what the person effecting that control should have known, should be expected to know. Disabling safety guards yet claiming not to appreciate the risk of death should not be a credible mitigation.'

3.17 Responses on behalf of medical professionals express concern that the high culpability factor could be applied in medical negligence cases where the patient was highly likely to die with or without the intervention of the medical practitioner.

3.18 In road testing one judge criticised the high culpability factor saying that it potentially muddles the test of gross negligence manslaughter. Another said that the factor did not make sense: 'Once you start putting clearly aware in a guideline you're indicating that in relation to other matters, in some way less than clear would be appropriate.'

3.19 One reason for including the high culpability factor was to capture cases such as those where an offender is playing with a loaded gun and it accidentally goes off killing another. In circumstances where the gun was legally held, none of the other high culpability factors would apply. In 2014 such a case attracted a sentence of 12 years before plea. The same issue might apply in some motor manslaughter cases. In most other factual circumstances where a significant sentence was appropriate other high culpability factors would apply.

3.20 The low culpability factor is likely to apply only in rare cases and its main function in the guideline is to balance the high culpability factor.

3.21 In view of the many objections to these factors and the narrow range of cases for which they are needed, it is proposed to delete them. There is, however, still a need for a factor to capture those cases where the offender has acted in a way that is so blatantly dangerous as to indicate high culpability. There are several suggestions at Annex A:

- The negligent conduct displayed a reckless disregard for the safety of other(s)
- The negligent conduct gave rise to a glaringly obvious and very high risk of death
- The negligent conduct was particularly serious in all the circumstances of the case

3.22 The first two suggestions may still be subject to the criticism that they merely state what is an element of the offence. The third is very general, but may provide sentencers with a high culpability factor in appropriate cases where no other factors apply.

Question 2: Does the Council agree to remove the factors relating to the awareness of the risk of death?

Question 3: Does the Council wish to add an alternative high culpability factor to capture acts of glaringly obvious dangerousness and if so, how can this be worded?

‘The negligent conduct persisted over a long period of time – weeks or months’

3.23 This high culpability factor was criticised by those representing doctors and by health and safety lawyers as potentially occurring in a wide range of cases and not necessarily being indicative of high culpability. The HSLA states:

Health and safety breaches by their nature tend to persist for a period of weeks or more before any accident occurs. A less serious and less culpable breach might take longer to emerge as an accident and might therefore have persisted longer than a more serious and culpable breach that causes an accident in a matter of days. The “negligent conduct” in workplace cases is usually an omission, so an omission that persists for weeks before it is manifest as a fatal accident is not necessarily more culpable than an omission that manifests itself more quickly.

3.24 This factor was aimed primarily at cases of neglect. An example that the Council considered during the development of the guideline was a case where a mother neglected her two young children for a period of months resulting in the death of a three year old girl in horrific circumstances.¹ She received a sentence of 18 years before plea. Several members of the Council expressed the view that this case should have been prosecuted as unlawful act manslaughter, but such cases (which are thankfully rare) seem to be prosecuted as gross negligence manslaughter. The factor was aimed at distinguishing between those cases where a child dies as a result of a single incident (such as being left unattended in the bath²) or a relatively short period of neglectful parenting (such as a case where a mother neglected her child over a 7 day period³) and those where the neglect was of long standing.

3.25 The point made by the HSLA that in some factual scenarios the length of time over which the negligent conduct persists is not a good indicator of culpability seems to be a valid one. There is a real danger that the factor could push cases into high culpability that would be more appropriately categorised as medium culpability. The mischief that this factor was designed to address relates more to the motivation for the negligent conduct and to the suffering of the deceased – both of which can be addressed by other factors. It is therefore proposed to remove this factor.

Question 4: Is the Council content to remove the factor ‘the negligent conduct persisted over a long period of time’?

¹ R v Sabrina H [2009] EWCA Crim 397 (18 years before plea)

² R v Reeves [2012] EWCA Crim 2613 (5 years before plea)

³ R v Olney [2004] EWCA Crim 1383 (9 years before plea)

The suffering of the deceased

3.26 Concern was expressed about this factor by those representing medical professionals. For example the Medical Defence Union state:

This could apply to a medical setting but the explanation does not specify any connection between the breach of duty and suffering, which we believe is material and should be specified. For example, in a patient's best interests, a doctor may have to perform a procedure that will cause that patient considerable suffering and distress. That suffering may arise irrespective of any breach of duty. It may simply be a consequence of the patient's underlying condition.

3.27 An amendment is proposed to the factor to leave no room for doubt that the suffering must be connected to the negligent conduct to be relevant:

- The offender persisted in the negligent conduct in the face of the obvious suffering caused to the deceased by that conduct

Question 5: Does the Council agree to amend the factor relating to the suffering of the victim?

Role

3.28 Several respondents (including the Royal College of Physicians) were concerned that the high culpability factor 'the offender was in a dominant role if acting with others' would have the effect of pushing doctors in particular into high culpability. The Medical Defence Union argue that it would open up consultants and even specialist registrars to greater severity unfairly in circumstances where each doctor has an equal professional duty to the patient irrespective of seniority.

3.29 In road testing a couple of judges also queried the use of 'dominant role' in culpability B. One judge suggests using 'leading role' as in other guidelines, particularly as this is the word that sentencers are now familiar with and that the word 'dominant' would not be relevant to a medical gross negligence case; 'dominant' does not compare with the terms 'lesser and subordinate' as used in the lower culpability factor. Another judge suggested "managerial, senior or something like that" instead of dominant role as these cases are usually committed in structured or semi-structured businesses.

3.30 MDDUS (representing doctors and dentists) asks if the low culpability factor 'the offender was in a lesser or subordinate role if acting with others' could be clarified as to whether it covers situations where a supervising consultant/line manager is not on site at the time of the alleged offence by a junior.

3.31 The intention behind these factors was to distinguish the role of offenders in a variety of factual circumstances not necessarily in a work setting. For example between two parents

in a case where medical assistance was not obtained for a seriously ill child. The use of the term 'dominant' was designed to indicate that the offender had a level of control over the actions of others thereby increasing culpability. The Council may prefer to use the term 'leading' to be consistent with other guidelines.

Question 6: Does the Council wish to make any changes to the treatment of role in the guideline?

Mental disorder

3.32 The caveat in relation to mental disorder has been removed from the low culpability factor as agreed for the unlawful act manslaughter guideline.

The approach to culpability

3.33 The CPS suggests that in addition to the instruction to have regard to the *Causing death by dangerous driving guideline* the guideline should include an instruction to give consideration to culpability factors associated with other offences.

The CPS – whilst appreciating the difficulty in drafting a guideline broad enough to encompass all of the relevant factors for assessing culpability – retains some concern that the guideline as drafted could give rise to inconsistency. A road traffic fatality charged as gross negligence manslaughter might feasibly – absent of any factor beyond “clear awareness of the risk of death” – come out as only ‘high’ culpability. If charged as ‘Causing Death by Dangerous Driving’, the offender’s conduct would have to be assessed according to a fuller set of culpability factors, which would be likely to yield a different sentence. Inevitably, there is a risk that this inconsistency may give rise to the tactical offering of pleas (‘guideline shopping’).

It is noted that the guideline includes an instruction referring the sentencer to the ‘Causing Death by Dangerous Driving’ guideline, to ensure that similar cases would not receive a lighter sentence if charged as gross negligence. However, the CPS would have welcomed a more wide-reaching instruction, referring sentencers to culpability factors found in a number of other offence-specific guidelines. This would give extra reassurance that all applicable factors as to an offender’s culpability receive due consideration.

3.34 In view of the undoubted difficulty in framing culpability factors that will apply fairly to all of the factual circumstances in which gross negligence manslaughter can be committed, it is proposed that additional text is added above the culpability factors to indicate that the factors may not apply in all situations. (see Annex A)

Question 7: Does the Council agree to the additional wording above the culpability factors?

Question 8: Does the Council wish to include further references to other guidelines?

Consultation question 10: Are there any aggravating or mitigating factors that should be removed or added? Please give reasons

Aggravating factors (taken in the order they appear in the guideline)

3.35 Although not specifically raised in connection with gross negligence manslaughter, as with the unlawful act guideline the word 'significant' has been removed from the factor 'history of violence or abuse towards victim by the offender'.

3.36 Several respondents including the Law Society suggest an additional factor of 'Offender ignored previous warnings'. This could apply in a wide range of factual situations.

3.37 Many respondents are concerned that the aggravating factor 'Blame wrongly placed on other(s)' could be applied to any offender who runs a defence based on others being responsible for the fatal incident. Most gross negligence manslaughter convictions for workplace or medical deaths follow a trial. The Council has already agreed the following additional information for the Seriousness guideline:

- Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious.
- This factor will not be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending.

3.38 The above explanation could be made available as a digital link to the guideline and in the context of gross negligence manslaughter it may be appropriate to add a further bullet point to the additional information:

- This factor will not be engaged merely because an offender has run a valid defence that alleged that other(s) were at fault instead of or as well as the offender.

3.39 A few respondents are concerned about the aggravating factor: 'The duty of care arose from a close or familial relationship where the deceased was dependent on the offender'. To clarify that the factor does not apply to a doctor patient relationship, it is proposed that the word 'personal' is added.

3.40 The CPS suggests that sentencers should be directed to refer to the aggravating and mitigating factor associated with other (similar) offences such as corporate manslaughter.

Question 9: Does the Council wish to adopt any of the suggestions for aggravating factors?

Mitigating factors

3.41 'Attempts to assist the victim' and 'mental disorder, learning disability have been added to the mitigating factors in the unlawful act manslaughter guideline; they could also apply to gross negligence manslaughter.

3.42 Several respondents to the consultation suggested the addition of mitigating factors to reflect the difficult circumstances that may have contributed to the offending. For example, Thompsons Solicitors suggest the following mitigating factors:

- a lack of training/failure to refresh training;
- pressures to meet deadlines;
- any inadequate or missing equipment;
- a lack of any adequate supervision;
- any poor practice known to but not adequately addressed by the employer;
- any staff shortages that impact on the delivery or safety of the task[s] being undertaken;
- any excessive working hours;
- any employers failing to address concerns raised with them before the incident in the subject of the prosecution; and
- any inadequate or unclear management instruction.

3.43 The Law Society suggest the following factors:

- Lack of proper training;
- Previous exemplary conduct as a positive mitigating factor;
- Personal circumstances affecting judgement, e.g. recent breakdown, bereavement, anxiety;
- Overworked or stressed due to matters outside the offender's control;
- Took advice from senior colleague;
- Followed internal guidance;
- Early acknowledgement of responsibility or whistle-blowing.

3.44 Suggested factors to cover these points are:

- The offender lacked the necessary expertise, equipment or training (for reasons outside the offender's control) which contributed to the negligent conduct
- The offender was subject to stress or pressure outside the offender's control which contributed to the negligent conduct

Question 10: Does the Council wish to adopt any of the suggestions for mitigating factors?

Sentence ranges and starting points

3.45 The Council will not be asked to consider sentence levels at this meeting; an analysis of 2016 cases is ongoing to obtain a clearer picture of current sentencing practice. The majority of comments on sentence levels from respondents to the consultation related more

to the categorisation resulting from the application of the culpability factors than the sentence levels themselves, which were broadly accepted. Once the culpability factors have been agreed further work will be done to assess the likely impact of the guideline on sentencing practice for gross negligence manslaughter.

Ancillary orders

3.46 Two respondents (Unite and the TUC) suggest recommending disqualification from acting as a director in appropriate cases. At step seven the guideline currently refers to ancillary orders in general and mentions Serious Crime Prevention Orders in particular. While director disqualification will not be appropriate in the majority of cases, there are occasionally cases where it would apply.

Question 11: Does the Council wish to include further guidance on ancillary orders?

4 RISKS AND IMPACT

4.1 The draft resource assessment anticipated an increase in sentence levels for some gross negligence manslaughter cases (specifically some of the more serious health and safety type cases). When further evidence is available from the analysis of 2016 cases the Council will be asked to consider the resource impact of the guideline.

4.2 One interesting point made by Kennedys was that in the case of gross negligence manslaughter a defendant can never be expected to plead guilty because the assessment of whether the behaviour amounts to gross negligence manslaughter is a matter for the jury.

4.3 In the 2014 sample of 16 gross negligence manslaughter cases there were only five guilty pleas – four in cases involving the death of a child in the care of parents and one involving ‘playing’ with a loaded shotgun. There were three workplace cases and two medical cases in the sample – all were found guilty after a trial. There are a few examples of workplace and medical cases where guilty pleas have been entered (although most seem to be quite late in the process) but the majority of these types of case appear to go to trial.

4.4 Sentence levels in guidelines are always pre-guilty plea, but in assessing the resource impact of a guideline the guilty plea rate is a relevant factor.

GROSS NEGLIGENCE MANSLAUGHTER

Common law

**Triable only on indictment
Maximum: Life imprisonment**

Offence range: 1 – 18 years' custody

This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.

This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

The type of manslaughter (and thereby the appropriate guideline) should have been identified prior to sentence. If there is any dispute or uncertainty about the type of manslaughter that applies the judge should give clear reasons for the basis of sentence.

STEP ONE
Determining the offence category

CULPABILITY	
<ul style="list-style-type: none"> The characteristics set out below are indications of the level of culpability that may attach to the offender’s conduct; the court should balance these characteristics to reach a fair assessment of the offender’s overall culpability in the context of the circumstances of the offence. The court should avoid an overly mechanistic application of these factors <u>particularly in factual situations to which the factors do not readily apply.</u> 	
A- Very High Culpability	<p>Very high culpability may be indicated by:</p> <ul style="list-style-type: none"> the extreme character of one or more culpability B factors and /or a combination of culpability B factors
B- Factors indicating high culpability	<p>The offender persisted in <u>continued or repeated</u> the negligent conduct in the face of the obvious suffering <u>caused to</u> of the deceased <u>by that conduct</u></p> <hr/> <p>The negligent conduct was in the context of other serious criminality</p> <hr/> <p>The negligent conduct displayed a <u>reckless disregard for the safety of other(s)</u></p> <hr/> <p>The negligent conduct gave rise to a <u>glaringly obvious and very high risk of death</u></p> <hr/> <p>The negligent conduct was <u>particularly serious in all the circumstances of the case</u></p> <hr/> <p>The negligent conduct was motivated by financial gain (or avoidance of cost)</p> <hr/> <p>The negligent conduct persisted over a long period of time (weeks or months)</p> <hr/> <p>The offender was in a dominant <u>leading</u> role if acting with others</p> <hr/> <p>The offender was clearly aware of the risk of death arising from the offender’s negligent conduct</p> <hr/> <p>Concealment, destruction, defilement or dismemberment of the body (where not separately charged)</p>
C- Factors indicating medium culpability	<p>Cases falling between high and lower because</p> <ul style="list-style-type: none"> factors are present in high and lower which balance each other out and/or the offender’s culpability falls between the factors as described in high and lower
D- Factors indicating lower culpability	<p>The offender did not appreciate the risk of death arising from the negligent conduct</p> <hr/> <p>The negligent conduct was a lapse in the offender’s otherwise satisfactory standard of care</p> <hr/> <p>The offender was in a lesser or subordinate role if acting with others</p> <hr/> <p>The offender’s responsibility was substantially reduced by mental disorder*, learning disability or lack of maturity</p>

~~*Little, if any weight should be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice~~

HARM

For all cases of manslaughter the harm caused will inevitably be of the utmost seriousness. The loss of life is taken into account in the sentencing levels at step two

STEP TWO

Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

- **Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.**

Culpability			
A	B	C	D
Starting Point 12 years' custody Category Range 10 - 18 years' custody	Starting Point 8 years' custody Category Range 6 - 12 years' custody	Starting Point 4 years' custody Category Range 3 - 7 years' custody	Starting Point 2 years' custody Category Range 1 - 4 years' custody

In cases of motor manslaughter regard should be had to the *Causing death by dangerous driving* definitive guideline to ensure that the sentence for manslaughter does not fall below what would be imposed under that guideline

Note: The table is for a single offence of manslaughter resulting in a single fatality. Where another offence or offences arise out of the same incident or facts concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the *Offences Taken into Consideration and Totality* guideline and step six of this guideline.

Below is a **non-exhaustive** list of additional elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

Care should be taken to avoid double counting factors already taken into account in assessing culpability

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
(See step five for a consideration of dangerousness)
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

Other aggravating factors:

- History of ~~significant~~ violence or abuse towards victim by offender
- Offender ignored previous warnings
- Involvement of others through coercion, intimidation or exploitation
- Significant mental or physical suffering caused to the deceased
- Commission of offence whilst under the influence of alcohol or drugs
- Offence involved use of a weapon
- Other(s) put at risk of harm by the offending
- Death occurred in the context of dishonesty or the pursuit of financial gain
- Actions after the event (including but not limited to attempts cover up/ conceal evidence)
- Blame wrongly placed on other(s) [additional information will clarify this point]
- The duty of care arose from a close personal or familial relationship where the deceased was dependent on the offender.
- Offence committed on licence or post sentence supervision or while subject to court order(s)

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions **or** no relevant/recent convictions
- Remorse
- Attempts to assist the victim
- The duty of care was a temporary one created by the particular circumstances
- The offender lacked the necessary expertise, equipment or training (for reasons outside the offender's control) which contributed to the negligent conduct
- The offender was subject to stress or pressure outside the offender's control which contributed to the negligent conduct
- Good character and/or exemplary conduct
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Mental disorder, learning disability
- Age and/or lack of maturity
- Sole or primary carer for dependent relatives

STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE

Dangerousness

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

STEP SIX

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the Offences Taken into Consideration and Totality guideline.

STEP SEVEN

Compensation and ancillary orders

In all cases the court should consider whether to make compensation and/or other ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP EIGHT

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

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Gross negligence manslaughter

Common law

Triable only on indictment
Maximum: Life imprisonment

Offence range: 1 – 18 years' custody

This is a serious specified offence for the purposes of sections 224 and 225(2) (life sentences for serious offences) of the Criminal Justice Act 2003.

This is an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentence for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

The type of manslaughter (and thereby the appropriate guideline) should have been identified prior to sentence. If there is any dispute or uncertainty about the type of manslaughter that applies the judge should give clear reasons for the basis of sentence.

Draft guideline - not in force

STEP ONE
Determining the offence category

CULPABILITY

- The characteristics set out below are indications of the level of culpability that may attach to the offender’s conduct; the court should balance these characteristics to reach a fair assessment of the offender’s overall culpability in the context of the circumstances of the offence.
- The court should avoid an overly mechanistic application of these factors.

A – Very high culpability	Very high culpability may be indicated by: <ul style="list-style-type: none"> • the extreme character of one or more culpability B factors and /or • a combination of culpability B factors
B – Factors indicating high culpability	The offender persisted in the negligent conduct in the face of the obvious suffering of the deceased The negligent conduct was in the context of other serious criminality The negligent conduct was motivated by financial gain (or avoidance of cost) The negligent conduct persisted over a long period of time (weeks or months) The offender was in a dominant role if acting with others The offender was clearly aware of the risk of death arising from the offender’s negligent conduct Concealment, destruction, defilement or dismemberment of the body (where not separately charged)
C – Factors indicating medium culpability	Cases falling between high and lower because: <ul style="list-style-type: none"> • factors are present in high and lower which balance each other out and/or • the offender’s culpability falls between the factors as described in high and lower
D – Factors indicating lower culpability	The offender did not appreciate the risk of death arising from the negligent conduct The negligent conduct was a lapse in the offender’s otherwise satisfactory standard of care The offender was in a lesser or subordinate role if acting with others The offender’s responsibility was substantially reduced by mental disorder,* learning disability or lack of maturity

**Little, if any weight should be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice*

HARM

For all cases of manslaughter the harm caused will inevitably be of the utmost seriousness. The loss of life is already taken into account in the sentencing levels at step two.

Draft guideline - not in force

STEP TWO
Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

- Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features.

Culpability			
A	B	C	D
Starting point 12 years' custody	Starting point 8 years' custody	Starting point 4 years' custody	Starting point 2 years' custody
Category range 10 – 18 years' custody	Category range 6 – 12 years' custody	Category range 3 – 7 years' custody	Category range 1 – 4 years' custody

In cases of motor manslaughter regard should be had to the *Causing death by dangerous driving* definitive guideline to ensure that the sentence for manslaughter does not fall below what would be imposed under that guideline.

Note: The table is for a single offence of manslaughter resulting in a single fatality. Where another offence or offences arise out of the same incident or facts concurrent sentences **reflecting the overall criminality** of offending will ordinarily be appropriate: please refer to the *Offences Taken into Consideration and Totality* guideline and step six of this guideline.

On the next page is a **non-exhaustive** list of additional elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.

Draft guideline - not in force

Care should be taken to avoid double counting factors already taken into account in assessing culpability

Factors increasing seriousness

Statutory aggravating factors:

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction
(See step five for a consideration of dangerousness)

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity

Other aggravating factors:

History of significant violence or abuse towards victim by offender

Involvement of others through coercion, intimidation or exploitation

Significant mental or physical suffering caused to the deceased

Commission of offence whilst under the influence of alcohol or drugs

Offence involved use of a weapon

Other(s) put at risk of harm by the offending

Death occurred in the context of dishonesty or the pursuit of financial gain

Actions after the event (including but not limited to attempts to cover up/conceal evidence)

Blame wrongly placed on other(s)

The duty of care arose from a close or familial relationship where the deceased was dependent on the offender

Offence committed on licence or post sentence supervision or while subject to court order(s)

Factors reducing seriousness or reflecting personal mitigation:

No previous convictions **or** no relevant/recent convictions

Remorse

The duty of care was a temporary one created by the particular circumstances

Good character and/or exemplary conduct

Serious medical conditions requiring urgent, intensive or long-term treatment

Age and/or lack of maturity

Sole or primary carer for dependent relatives

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STEP THREE

Consider any factors which indicate a reduction for assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR

Reduction for guilty pleas

The court should take account of any reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE

Dangerousness

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

STEP SIX

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality* guideline.

STEP SEVEN

Compensation and ancillary orders

In all cases the court should consider whether to make compensation and/or other ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

STEP EIGHT

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Draft guideline - not in force

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Gross Negligence Manslaughter

A series of 28 phone and face to face semi structured interviews took place with 23 Crown Court judges and five High Court judges. Fourteen judges re-sentenced their own manslaughter cases and/or sentenced scenarios (which can be found at the end of this paper) using the Gross Negligence guideline. The research will provide valuable information to support development of the manslaughter guideline. There are limitations to the work, as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

Key findings

Sentence Levels

- When comparing the new sentences from using the draft guidelines and the actual sentence given by the judge (for re-sentencing their own cases and sentencing the scenarios) the findings were mixed.
- Scenario one (health and safety case) found that sentences had increased between 3-5 years from the actual sentence given, this follows what was expected by policy colleagues. It should be noted that only a limited number of judges sentenced this scenario and therefore caution should be given when using these findings.
- Scenario two (father who did not seek medical help due to religious reasons) found that two judges increased the sentence from the actual sentence by 2-3.5 years and one judge decreased the sentence by 2 years (again these findings need to be treated with caution, only three judges took part in this sentencing exercise). This was not as expected by policy colleagues who anticipated the guideline would result in the same sentence as the actual sentence.
- For judges own cases in three instances judges increased the sentence from their actual sentence, four judges kept the same sentence and one judge decreased their sentence by a year. A further look into this analysis found that the increases were across different types of gross negligence cases¹ and therefore the guideline is not specifically increasing one type of gross negligence manslaughter.
- The sentencing tables can be found at the end of this paper.

Consistency

- Judges were generally consistent in their interpretation of the guideline for the health and safety case in scenario one. They all placed the offender in the same culpability category (B, as expected by the policy team) and largely considered the same culpability, aggravating and mitigating factors².
- There was some variability with how judges sentenced the father who did not seek medical help because of religious reasons in scenario two. Two judges considered this to be a culpability B case due to the offender being clearly aware of the risk of death but gave different sentences – 6 years and 7.5 years. The higher sentence judge saw this case as possibly on the cusp of very high culpability and therefore justified starting the sentence slightly higher than the culpability B starting point. One judge considered this scenario to be a culpability D case suggesting that the offender appears to have been a good and caring parent, there was gross negligence for not calling for medical assistance immediately but this is balanced out by trying to help the baby.

¹ A health and safety case, a case which involved a bouncer putting the victim in a chokehold to stop him entering a building and a case where best friends were playing with a gun and one was fatally shot.

² Culpability factors were financial gain, aware of the risk of death and over a long period of time. The consistent aggravating factor was others at harm of risk and the consistent mitigating factor was no pre-cons.

None of the judges sentenced as expected by policy colleagues who put this as a culpability C case due to factors being present in higher and lower which balance each other out. The judges who categorised this case as culpability B did not feel there were any factors in the lower category, particularly they did not see 'a lapse in the offender's otherwise satisfactory care' as being relevant which is the factor that policy colleagues expected to be deemed relevant by judges when assessing the offender's culpability. It should be noted that only a limited number of judges sentenced this scenario and therefore caution should be given when using these findings.

Culpability

- Overall, most judges felt they could categorise the culpability easily and pull out the relevant factors to justify the placement. There were also no issues reported with the structure of the culpability step e.g. the presence of four culpability levels. However, one judge did suggest that three levels and a 'get out clause' would be an alternative option.
- A few judges queried what was meant by 'negligent conduct was in the context of serious criminality'. This was particularly relevant in the health and safety cases being sentenced in the interviews. Generally, judges questioned what serious criminality involved and required more advice about when multiple health and safety incidences amounted to 'serious criminality'. One judge strongly disagreed with the term 'serious criminality' in the context of health and safety cases explaining that other judges and barristers may not see "whole scale" ignoring of health and safety regulations and warnings as serious criminality, whereas this is actually central to the gross negligence manslaughter guideline for health and safety cases.

"This guideline, at the moment I don't think links ignoring warnings to culpability, it should do. Ignoring warnings is at the heart of culpability...You'll get silver tongued barrister who'll say well regulatory offences, the Council couldn't have meant regulatory offences, the failing to comply with the planning or the building regulations, couldn't have meant that, but those are the things that are designed to protect public safety". (Gross Negligence own case)

- (continued from bullet above) This is also supported by another judge sentencing a health and safety case in the interview who suggested including 'ignoring the warnings of others' as a factor in culpability. Consideration might therefore be given to either sharpening the terminology around 'serious criminality' for health and safety cases or including a different culpability factor that will cover this.
- A couple of judges also queried the use of 'dominant role' in culpability B. One judge suggests using 'leading role' as in other guidelines, particularly as this is the word that sentencers are now familiar with and that the word 'dominant' would not be relevant to a medical gross negligence case. They further explained that 'dominant' does not compare with the terms 'lesser and subordinate' as used in the lower culpability factor. Another judge suggested "managerial, senior or something like that" instead of dominant role as these cases are usually committed in structured or semi-structured businesses. However, it should be noted that another judge specifically mentioned that they understood why the use of 'management' would not be appropriate as it is not relevant to medical gross negligence.
- A few judges felt that the culpability factors referring to being 'clearly aware of/did not appreciate the risk of death' (culpability B and D) did not fit with the requirement of being charged with a gross negligence offence where there must be an obvious risk of death from negligent conduct. One judge suggested that this potentially muddles the objective test of a gross negligence manslaughter and another judge said that the factor did not make sense.

“Once you start putting clearly aware in a guideline you’re indicating that in relation to other matters, in some way less than clear would be appropriate”. (Gross Negligence own case)

- Other culpability issues attracted less comment but included³:
 - In culpability B, a judge stated they would prefer ‘the negligent conduct persisted over a long or significant period of time’ instead of ‘the negligent conduct persisted over a long period of time (weeks or months)’.
 - A judge queried ‘the offender persisted in the negligent conduct in the face of the obvious suffering of the deceased’ factor in culpability B stating that they were unsure what this meant and it would be helpful if this could be rephrased.

Harm

- All judges that expressed a view were happy with the one level of harm in the guideline and felt that this was the right approach. A few judges mentioned that there could be particularly ghastly circumstances in which an individual has died which needs to be accounted for, however, judges were generally happy that this would be covered in other areas of the guideline.

Mitigating and aggravating factors

- Judges were largely content with this section in the guideline, however, a couple of judges suggested adding in vulnerability of the deceased as an aggravating factor.
- Other aggravating and mitigating factor issues which attracted less comment included⁴:
 - One judge suggested including significant mental or physical suffering to the deceased’s relatives or close family as an aggravating factor.
 - One judge suggested including prosecuted by summons rather than ‘on bail’ as this would include health and safety summons.
 - A few of the aggravating factors were considered by a judge to not be relevant to gross negligence manslaughter and had the feel of being ‘copied and pasted’ from other guidelines. These were ‘history of significant violence or abuse towards victim by offender’, ‘involvement of others through coercion, intimidation or exploitation’ and ‘offence involved use of a weapon’.
 - There was a suggestion to insert ‘before death’ at the end of ‘significant mental or physical suffering caused to the deceased’ in the aggravating factors section.
 - Employment and landlord/tenant are not on the list as aggravating factors in any form, one judge suggested that this needs to be reconsidered but did not provide any detail as to how.
 - One judge queried why ‘close or familial relationship’ was worse than any other circumstance in the ‘the duty of care arose from a close or familial relationship where the deceased was dependent on the offender’ aggravating factor (for example why would it be different if it was an employee) and suggested just striking this part out.
 - The same judge also queried why ‘temporary’ was relevant in the ‘the duty of care was a temporary one created by the particular circumstances’ in the mitigating factors section, the judge question why it mattered how long it was.
 - There was a suggestion to include contributory fault of others e.g. social services involvement as a mitigating factor.

³Each of these issues were raised by just one judge only.

⁴Each of these issues were raised by just one judge only.

Starting points, ranges and final sentences

- Most judges were happy with the starting point. One judge felt that the sentence felt a little high and one judge strongly felt that the sentences were too low. The judge that felt sentences were too low suggested that in some cases “you would have to be really going in a bit to give somebody a year” and that in situations where somebody has died one year in custody is a difficult sentence to give. The judge that felt the sentence was a little high did so because it was nearly double what they had actually given, they did not provide any views about the sentencing range of gross negligence manslaughter overall.
- As with the starting point, most judges were generally comfortable with the final sentence, however, the same judges who thought that the starting points were too high/low felt the same about the final sentences.

Sentencing Table – Own Cases

Judge	Actual sentence	Culpa bility	Culpability factors	Starting point	Aggravating factors	Mitigating factors	Final sentence
8 – L	3 years and 3 months	B	Role within the business, motivated by financial gain, long period of time, clearly aware of risk, conduct was a lapse in offender's otherwise satisfactory care (D factor)	7 years	Other workers at risk and blame wrongly placed on others	Exemplary conduct and character, no previous health and safety issues.	6-6.5 years
11 - M	4 years	C	Factors either side of C. B factors = long period of time & clearly aware of risk of death. D factor = conduct was a lapse in offender's otherwise satisfactory care.	4 years	None	No pre-cons, maybe remorse (but not taking responsibility)	3.5-4 years
14 – C	3 years	D	Did not appreciate risk of death, conduct was a lapse in offender's otherwise satisfactory care.	2 years	Possible physical suffering, under influence of alcohol and drugs, deceased was dependant on offender	No pre-cons, remorse, good character, serious medical condition	2 years
16 - D	11 years (slight assumption due to the judge reducing for guilty plea and then mitigating)	A	Clearly aware of risk of death	14 years	Under the influence of alcohol	No pre-cons, remorse	12 years
31 – C	5 years	C	Case falling between higher and lower	4 years	Pre-cons, subject of a court order at the time	None	5 years
38 - M	4 years	B/C	Not a momentary lapse, query over long period of time	B – 8 C - 4	Possibly blame wrongly placed on others	No pre-cons, good character	4 years
46 - N	2 years suspended	D	Didn't appreciate risk of death, lapse in offender's otherwise satisfactory care.	2 years	None	Dependent relative	Implied it would be the same as actual

48 - W	6 years	B	Aware of risk of death, possibly aware of deceased suffering.	8 years	None	God character, remorse	7 years
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Sentencing table - Scenario 1 – Sentencing J (actual sentence was 5 years)

J aged 48, ran a renovation and decorating business. He employed a number of inexperienced young men at low rates of pay to work on various projects which involved working at heights. He ignored concerns when they were brought to his attention, for example the owner of a cherry picker having observed young men working at dangerous heights off ladders was brushed aside in his attempts to persuade J to use a cherry picker. J rarely carried out any of the physical work himself – he was often seen to be either sleeping or smoking in his van while the young men he employed worked on ladders and roofs, more often than not in highly dangerous situations. He ignored all the information freely available on the Health and Safety Executive website relating to issues of health and safety, and in particular issues relating to working at heights. He took the view that those who worked for him were self employed, and therefore responsible for their own safety. At the earliest possible stages of their employment the young men were exposed almost immediately to the risk of death. J never carried out risk assessments and didn't plan the work. He provided no training. He didn't provide health and safety equipment, and gave no thought to issues of health and safety.

The victim aged 18 fell from a ladder carrying out work for J, painting the eaves of a property from a ladder at a height of 6.7 metres. He died of head injuries caused by the fall. J was convicted of gross negligence manslaughter after a trial. He pleaded guilty to health and safety offences for which he received a concurrent sentence of 12 months' imprisonment. J had no previous convictions or cautions.

Judge	Culpability	Culpability factors	Starting point	Aggravating factors	Mitigating factors	Final sentence
4 - BA	B	Financial gain and aware of risk	8 years	Others at harm of risk	No pre-cons	8 years
6 - R	B	Financial gain, aware of risk and long period of time.	8 years	None	No pre-cons and good character	10 years
45 - G	B	Serious criminality (multiple H&S breaches) and financial gain	8 years	Others at harm of risk	No pre-cons and remorse	9 years
<i>Sentencing council</i>	<i>B</i>	<i>Financial gain and long period of time.</i>	<i>8 years</i>			<i>9 years</i>

Sentencing Table – Scenario 2 – Sentencing K (actual sentence was 4 years)

K, aged 36, and his wife pleaded guilty to the offence of gross negligence manslaughter. The victim was their baby son aged 6 months. He was found to have been suffering from florid rickets resulting from severe vitamin D deficiency. From birth the victim had medical problems. A care plan was put in place for visits by Social Services and Community Midwives. K said they would bring him to hospital if he was unwell. The victim's vitamin D deficiency was not diagnosed, nor was K or his wife given advice about taking supplements, which would have been important.

From the age of three months it was appreciated by K and his wife that their son was unwell. However, his health fluctuated over the next two months. Relatives, who were medical professionals, expressed concerns more than once and asked K's wife to consult her GP. She said that she would do so but would speak to her husband first. It is clear that because of their extreme religious beliefs they did not in fact seek medical assistance or advice.

On the day of the victim's death K arrived home around noon, having done a nightshift and was told that the victim was not feeding properly. He noticed that his son's health had deteriorated. He appreciated that this was something serious and that his son might be close to death. He thought he was suffering from low blood sugar and was dehydrated, so he prepared a solution of salt and water for him. The baby took this and straight afterwards breastfed. K went to bed at about 3pm and his wife laid the baby in bed next to him. K was woken by his wife who said the baby was lifeless. K took his son downstairs and tried CPR to no avail. K accepts that he realised when he returned from work that day that his son might die and decided not to call for medical assistance and that he advised his wife that it would be a sin in the eyes of God to call for medical assistance as he had made a vow that he would await guidance from God before doing so. K had no previous convictions, he and his wife were otherwise apparently good and caring parents of their son.

Judge	Culpability	Culpability factors	Starting point	Aggravating factors	Mitigating factors	Final sentence
13 - A	B	Aware of risk	8 years	None	No pre-cons, good character, exemplary conduct.	6 years
24 - L	D	Not stated	2 years	None	None	2 years
40 - F	B	Aware of risk of death, long period of time, obvious suffering of the deceased.	9 years	Been counted at culpability stage	No pre-cons, remorse	7.5 years
<i>Sentencing council</i>	<i>C</i>	<i>Case falling between higher and lower. B factors = long period of time and dominant role. D factor = lapse in offender's otherwise satisfactory care.</i>	<i>5 years</i>			<i>4 years</i>

