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Reflections on the manslaughter sentencing guidelines

Martin Wasik^{*}

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Journal Article

[Criminal Law Review](#)

Crim. L.R. 2019, 4, 315-332

Subject

Sentencing

Keywords

Diminished responsibility; Loss of control; Manslaughter by gross negligence; Sentencing guidelines; Unlawful act manslaughter

This article assesses sentencing guidelines recently issued by the Sentencing Council for the offence of manslaughter. The guidelines are considered in the context of escalating sentences for the offence generally, and the statutory reforms to manslaughter made by the [Coroners and Justice Act 2009](#). The article concludes that the guidelines are impressive, sophisticated, and likely to provide flexibility in practice, but that there are unanswered questions about the relationship between manslaughter sentencing and the murder minimum term starting points in Sch.21.

Introduction

The Sentencing Council has issued guidelines for sentencing adult offenders for the offence of manslaughter, which came into effect on 1 November 2018.¹ The guideline covers [four forms of manslaughter—unlawful act, gross negligence, loss of control](#)

and diminished responsibility. The Council states that it has not issued guidelines on manslaughter involving complicity in a suicide pact, because it is so rarely prosecuted. Corporate manslaughter is covered elsewhere.² The implication is that all forms of manslaughter have now been covered by guidelines, leading to the conclusion that other putative forms of manslaughter, such as reckless manslaughter,³ are no more than factual variations on the categories dealt with in the guidelines. In the past the judicial view has been that sentencing guidelines for manslaughter would be very difficult, and according to some impossible, to produce.⁴ This is for three main reasons. The first is that the four different forms of manslaughter reflect widely diverse factual situations in which the offence can arise. The second is the underlying tension between harm and culpability in the offence. The third is the problematic relationship between sentencing for manslaughter and sentencing for murder. In fact, the Council's predecessor body, the Sentencing Guidelines Council (SGC) did produce a guideline confined to provocation manslaughter in 2005, but that guideline was rendered out of date by the legislative changes made to the partial defence by the Coroners and Justice Act 2009, which replaced provocation by loss of control.⁵

As is to be expected, the manslaughter guidelines follow the now well-established layout of Sentencing Council guidelines. There is much to admire here, in the clarity of format. Draft guidelines were trialled on judges in advance and, we are told, occasioned no particular difficulty in practice. Indeed, the Council of Her Majesty's Circuit Judges regarded them as "particularly well-crafted".⁶ There is the usual stepped approach which judges are required to follow, with specified matters at step 1 to determine culpability and harm and then category range and starting point, followed by indicative non-exclusive aggravating and mitigating factors at step 2. That said, the manslaughter guideline contains some tweaks to the normal format, and these are examined further below. More generally, it is of interest to compare the format of the new guideline with that of the SGC guideline on provocation manslaughter. The latter was, in comparison, more discursive, explanatory, and nuanced. The style of Sentencing Council guidelines is to provide clear and succinct practical guidance, and that is an important virtue, but there is very little to set the guidelines in context or to explain the underlying policy choices upon which they are based.

Sentencing levels for manslaughter have increased greatly over the last 30 years,⁷ and especially since the watershed decision in Appleby, in December 2009.⁸ This increase has been put down to the need to maintain some proportion between sentencing for manslaughter and sentencing for other offences resulting in death, especially murder and causing death by dangerous driving. We have extremely high minimum terms set by legislation in the former case and a steady increase in maximum penalties in the latter. Appellate cases which followed Appleby made it clear that sentencing increases indicated in that case (for manslaughter involving street fights) applied across the board to all forms of manslaughter. Data published by the Sentencing Council show roughly a doubling of average custodial sentence length in manslaughter cases between 2008 and 2016, from four-and-a-half years to nine years.⁹ The Council has said that it expects no change to sentencing levels as a result of the guideline, so clearly the purpose is to consolidate that increase as well as to achieve some greater consistency in manslaughter sentencing.¹⁰ This is of course open to the criticism that the Council, as currently constituted, is always simply going to endorse the stance adopted by the Court of Appeal. As Sir Brian Leveson pointed out in Dyer,¹¹

"Given the composition of the Council, we doubt that substantial differences of approach [between the Court and the Council] are likely ever to emerge".

The Council's apparent acceptance of the inevitability of rising sentences has been the subject of criticism in this Review.¹²

Some structural issues

Comparisons across offences

There are separate and distinct guidelines for each of the four forms of manslaughter.¹³ That approach is obviously right, but there is nothing in the document which addresses the sentencing relationship within the quartet. All we have are the offence ranges. These are 1–24 years for unlawful act manslaughter, 1–18 years for gross negligence manslaughter, 3–20 years for manslaughter by loss of control, and 3–40 years for manslaughter by reason of diminished responsibility. There is no indication why these figures differ from one to another, apart from reflecting existing practice. There is no indication of how they relate to murder sentencing. There is no correlation between the manslaughter guidelines and the categories of culpability identified in sch.21, nor are the aggravating and mitigating circumstances the same. Nor is there any sense of how they relate to sentencing for other offences such as causing death by dangerous driving (which has an offence range of 2–14 years), causing death by

careless driving when under the influence of drink or drugs (3–14 years), causing or allowing a child to die¹⁴ (1–14 years) or, for that matter, attempted murder (6–35 years). Cross-offence comparisons are crucial to the coherence of any scheme of guidelines, especially where offence guidelines are issued one at a time rather than as a whole.

Cross-offence comparisons are important anyway, but the guideline for gross negligence manslaughter states, without further elaboration:

"Where the offender's acts or omissions would also constitute another offence, the sentencer should have regard to any guideline relevant to the other offence to ensure that the sentence for manslaughter does not fall below what would be imposed under that guideline."

This form of words does not appear in any other Sentencing Council offence guideline, but the Court of Appeal has made a similar point from time to time. Thus, in *Shallcross*,¹⁵ a case of burglary where the offender had attempted to inflict grievous bodily harm on the occupier, the court said that the judge properly applied the burglary guideline but should also have had an eye to the guideline on wounding with intent, to avoid the imposition of too low a sentence. Returning to manslaughter, presumably (the Council is not specific) the relevant comparators are other homicide offences. Causing death by dangerous driving,¹⁶ health and safety offences causing death, and arson in circumstances where death has resulted (see *Willoughby*¹⁷ where D was guilty of both) are obvious examples. If the manslaughter victim is a child, the guideline on causing or allowing a child to die might be relevant. Although the above warning is specified only in relation to gross negligence manslaughter, it is submitted that the same issue arises in relation to other forms of manslaughter. When sentencing a case of unlawful act manslaughter, it might be important to refer to the guideline for the assault, robbery, or other underlying offence.

Only one level of harm

The manslaughter guideline has just one level of harm—loss of life (described in the guidelines as "the utmost seriousness"). Clearly it is problematic to say that the harm implicit in one death is worse than in another, but there are difficult cases. What about the situation where D and three companions are engaged on a joint criminal enterprise and the gross negligence of D causes the deaths of the other three and the deaths of three entirely innocent bystanders?¹⁸ The lack of any distinction in the harm category also means that there is no separate categorisation of the death of a child, although that is a feature of *sch.21*. Significant mental or physical suffering caused to V before their death is an aggravating feature in relation to all four forms of manslaughter, as it is in murder.¹⁹

It might have been tempting to adopt a higher level of harm in the guideline where more than one death has resulted.²⁰ The starting points in *sch.21* do so in certain circumstances—if each of the murders has been planned, or each has involved abduction or "sexual or sadistic conduct", the result is to move the case from a 30-year minimum term starting point to a whole life minimum term starting point. Why not something similar in manslaughter, given the renewed emphasis on the harm element in manslaughter sentencing? Take the case of *Wacker*,²¹ where 58 deaths resulted from the gross negligence of the defendant lorry driver. Cases involving multiple deaths should, according to the manslaughter guideline, be accommodated through deploying concurrent sentences, enhanced to reflect the overall criminality of offending but subject to the principle of totality. It may well be that the Council has adopted the best approach to sentencing such difficult cases but, again, with the recent renewal of academic writing on this issue, it would be good to have had a brief explanation (somewhere) of why the Council has adopted it.²²

No mechanistic approach

At step 1 in three out of the four manslaughter guidelines, in relation to culpability, the Council has included the following general statement:

"The court should avoid an overly mechanistic application of these factors."

The Court of Appeal has criticised judges for adopting a "mechanistic or arithmetical approach"²³ when applying *sch.21* for murder, and has occasionally made similar remarks about Council guidelines—that guidelines are not to be interpreted as if they were an Act of Parliament,²⁴ and that what is required is "a careful evaluation of all the features of the offending, rather than a mechanistic approach by reference to factors identified in the guideline ..."²⁵ If the Council was intending simply to

adopt this warning within its guidelines generally, then it would have included it within the Child Cruelty guideline, issued after the manslaughter guideline, but it did not. It seems clear that it is the breadth of the offence range for manslaughter, and the wide range of factual circumstances in which the offence can be committed, which is the rationale. In the consultation guideline the Council included the wording just for unlawful act manslaughter, but by the time of the final guideline had also included it in gross negligence and loss of control manslaughter (but not diminished responsibility).

Adjustment from the starting point

→ Step 1 in Sentencing Council offence guidelines is the key locating provision, which identifies the appropriate category range and starting point, and step 2 allows for fine-tuning, usually up or down within the same category range or, less commonly, so as to justify moving above or below it. At step 2 (selection of starting point and category range) in three of the four manslaughter guidelines the Council states that:

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

This statement clarifies the point that in a case where (say) there are several features listed within "high culpability" in the guideline, but none of the features mentioned in medium or low culpability, it would be proper for a judge to adopt a starting point higher than that specified in the guideline, before adjusting further for aggravating and mitigating factors.

This kind of provision (which might here be characterised as a 2(a) step, then a 2(b) step) appears regularly in Sentencing Council guidelines, but its terms vary from one to another. The Theft guideline and the Offensive Weapons guidelines, for example, say that having determined the category at step 1 the court should "use the starting point to reach a sentence within the appropriate category range", a wording that does not separate out 2(a) and 2(b). The Fraud, Bribery and Money Laundering guideline and the Robbery guideline say that the court should consider "further features of the offence or offender that warrant adjustment of the sentence within the range including the aggravating and mitigating factors", a wording which again does not separate 2(a) from 2(b). Then we have the Sexual Offences guideline and the Terrorism Offences guideline, which refer to examples

"of particular gravity reflected by multiple features of culpability or harm in step one [which] could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features".

This formulation distinguishes 2(a) from 2(b), but only in an upward but not downward direction. These are minor differences, perhaps, but there seems to be no good reason for them.

The need to avoid double counting

Concerns that the judge has inadvertently weighted a particular factor twice when passing sentence are often argued by counsel on appeals against sentence, although they rarely gain much traction. The issue of double counting in guidelines is an important theoretical issue, but it has received little academic attention, and it is worth briefly sketching out the ground before considering the issue as it relates to manslaughter. A first and rather obvious point is that it would be wrong for a court to aggravate or mitigate the sentence because of a factor which is central to the definition of the offence itself. A warning to this effect can be found in the generic guideline on Sentencing Children and Young People, where the Council says²⁶:

"The court should also consider any aggravating or mitigating factors that may increase or reduce the overall seriousness of the offence. If any of these factors are included in the definition of the committed offence they should not be taken into account when considering the relative seriousness of the offence before the court."

如果這些因素中的任何一個包含在犯罪的定義中，在考慮法院審理犯罪的相對嚴重性時，不應考慮這些因素。

An example might be to deploy the standard aggravating factor of "commission of the offence whilst under the influence of alcohol or drugs" in a case of driving while under the influence of drink or drugs, or to increase sentence for "failure to comply with a current court order" when dealing with breach of a suspended sentence or community order.

The best-known general provision on double counting relates to the minimum term starting points for sentencing murder and is found in [sch.21, para.8](#):

"Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point."

Perhaps less well known, the issue of double counting is also provided for in the legislation which established the Sentencing Council. [Section 121 of the Coroners and Justice Act 2009](#) recommends how the Council should set out its offence guidelines.²⁷ [Section 121\(2\)](#) states that:

"The guidelines should, if reasonably practicable given the nature of the offence, describe by reference to one or more of the factors mentioned in subsection (3) different categories of cases involving the commission of the offence which illustrates in general terms the varying degrees of seriousness with which the offence may be committed".

Subsection (3) refers to culpability, harm and "such other factors as the Council considers to be particularly relevant to the seriousness of the offence in question". Then, [subs.\(6\)](#) states that the guidelines

"should (to the extent not already taken into account by categories of case described in accordance with subsection (2)) list any aggravating or mitigating factors ..."

Sentencing Council guidelines have not generated double counting problems to the same extent as in murder cases. This is probably because they are (with respect) better drafted than [sch.21](#). The issue is still there, though. Recently in [Collins](#),²⁸ an appeal against sentence in a fraud case, Treacy LJ (at the time the chairman of the Sentencing Council) commented that:

"Judges of course need to be alert to the need to avoid double-counting when passing sentence ... This normally occurs in order to avoid a step 2 aggravating factor duplicating a step 1 factor."

The manslaughter guideline is the only offence guideline issued so far in which the Council has provided a specific warning about double counting.²⁹

The issue of double counting has also arisen in Council guidelines in a subtler way—a judge may inadvertently adjust for a stage 2 factor which has been allowed for at stage 1 although the guideline does not say so. In the leading authority on sentencing historic sexual offences, [Lord Thomas CJ](#) said in [Forbes](#)³⁰ that judges must bear in mind that the specified starting points in the Sexual Offences guideline already reflect the "essential gravity" of the offence. So, in a case where D has taken advantage of an existing relationship with V to commit the offence, judges should be careful in using "abuse of trust" as a separate aggravating feature. It may already have been taken into account in the selection of the starting point, and "something much more" would be needed to establish abuse of trust as a separate aggravating factor. His Lordship also said that step 1 starting points and sentencing ranges already provide for the impact of the offence on V, as "the inevitable effect of this type of serious criminal behaviour". Accordingly, there must be "significantly more" before harm to V is taken into account "as a distinct and further aggravating factor" or before a judge makes a finding of extremely severe psychological or physical harm so as to justify placing the offence in the top category of harm or to justify placing the offence in a particular category of culpability.³¹ A different example has arisen in relation to drugs. In [Bondzie](#)³² the Court of Appeal explained that the prevalence of drug offending and the widespread harm caused by it across many localities in this country were matters which had been allowed for in the ranges and starting points set out in the Drugs guideline. Only very rarely would it be appropriate for a judge to increase sentence because of particular harm being caused by drug offending in the local area.³³

In [Collins](#), Treacy LJ said that a "positive warning" would be included in a Sentencing Council guideline if there was a perceived risk of double counting. The manslaughter guideline is the only offence guideline in which such a warning has so far been included, and in relation to all four species of manslaughter.³⁴ We turn now to consider briefly the four guidelines in turn.

The Unlawful Act Manslaughter Guideline

The offence range runs from 1 year to 24 years, reflecting the wide range of culpability which can apply in this offence, from mens rea just short of that which would constitute murder down to no intention to cause harm and no foresight of harm, and which in the absence of death would be unlikely to merit prosecution.³⁵ There are accordingly four (rather than the usual two or three) categories of culpability in the guideline: very high, high, medium and lower. Two respondents to the Council's consultation thought that three levels would have been better than four, but the Council observed that judges who had trialled the draft guideline had found no difficulty in applying the four levels.

According to the guideline *Very high culpability* (category range 11–24 years, starting point 18 years) may be indicated by the extreme character of one or more high culpability factors or a combination of high culpability factors.

Factors indicating high culpability (category range 8–16 years, starting point 12 years) are:

"Death was caused in the course of an unlawful act which involved an intention to cause harm falling just short of GBH, or

Death was caused in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender, or

Death was caused in the course of committing or escaping from a serious offence in which the offender played more than a minor role, or

Concealment, destruction, defilement or dismemberment of the body (where not separately charged)." ³⁶

The first two factors reflect gradations of culpability, and it seems that normally only one would apply in any given case. The first is culpability just short of murder, but the second includes both awareness and unawareness of obvious risk. Where the difference between the first and second factors, or the difference between conscious and inadvertent risk-taking in the second factor, would make a real difference to sentence outcome it would be for the judge to determine the factual basis for sentence. ³⁷ The third factor might overlap with the first or the second, and the fourth might arise alongside any of the others. In line with what has been said about adjustment from the starting point, one might expect that where the fourth factor arose in conjunction with any of the others the judge would adopt a higher than normal starting point within the relevant category range, or might move up to the very high culpability range.

Factors indicating medium culpability (category three to nine years, starting point six years) are those falling between high and lower culpability *including but not limited to*:

"Where death was caused in the course of an unlawful act which involved an intention by the offender to cause harm (or recklessness as to whether harm would be caused) that falls between high and lower culpability, or

Where death was caused in the course of committing or escaping from a less serious offence but in which the offender played more than a minor role." ³⁸

Factors indicating lower culpability (category range one to four years, starting point two years) are:

"Death was caused in the course of an unlawful act

which was in defence of self or other(s) (where not amounting to a defence) OR

where there was no intention by the offender to cause any harm *and* no obvious risk of anything more than minor harm OR

in which the offender played a minor role

The offender's responsibility was substantially reduced by mental disorder, learning disability or lack of maturity."

The Council originally suggested that in cases where D's responsibility was ostensibly reduced by mental disorder, but the offender had made matters worse by abusing alcohol or drugs or failing to follow medical advice the court should take a different view. Respondents to the consultation pointed out that there was a complex interaction between mental health issues and drug and alcohol misuse, so the caveat was removed in the final version of the guideline.

The Council rejected suggestions that the guideline would not work for cases of secondary liability. ³⁹ That would be a major shortcoming if the suggestion was correct, since issues of secondary liability certainly crop up frequently in the context of homicide. The guideline culpability levels refer to D playing either "more than a minor role" or "a minor role" in the unlawful act, and one of the standard aggravating factors is "leading role in a group". I am not convinced that the guideline properly

deals with the situations which may arise where D2 has assisted D1 in an unlawful act, and the act has led to death, whether harm was intended, foreseen or not. There is also the situation where D2 is alleged to be a secondary party to murder but where he is convicted of manslaughter on the basis that when D1 killed V D2 had no intent to assist in causing death or grievous bodily harm.⁴⁰ One wonders whether the issue of secondary liability is one which might be the subject of a generic sentencing guideline, perhaps along with the sentencing of inchoate offences.

Turning to the aggravating and mitigating features, most of these are either required statutory factors or are generic factors to be found in other offence guidelines. One issue which deserves further mention here is the inclusion of "history of significant violence or abuse towards the offender by the victim" as a mitigating factor. The use of the word "history" suggests violence or abuse which has occurred over a period of time, such as recurring domestic abuse, rather than something which occurs shortly before the offence. If that interpretation is correct, it follows that there is no mention of provocation/loss of control as a factor potentially reducing culpability in unlawful act manslaughter. This is strange. Since provocation is listed as a step 1 lower culpability factor in the *Assault guideline*⁴¹ logically it ought to be factored in (either at step 1 or step 2) to the unlawful act manslaughter guideline, where the assault has resulted in V's death.⁴² It is not hard to imagine a case where D suffers egregious taunts and abuse from V before losing his temper and hitting V, an assault which causes V's death.

Another issue is the aggravating factor "death occurred in the context of an offence which was planned or premeditated". It is clear that the "offence" referred to here is not the killing itself but rather the underlying offence in the course of which, or as a result of which, the death occurred. One can see why the deliberate nature of the underlying offence might be relevant to the sentence appropriate for the unintended death. Take the case where V is killed in consequence of an arson attack, or dies from injuries received as a result of being kidnapped. But this would not always be the case. An example would be where V, an elderly lady, is knocked to the ground in the course of D snatching her bag. She suffers injuries in the fall from which she does not recover. Another example would be a householder suffering a fatal heart attack during the course of a burglary, as in *Watson*.⁴³ In these examples it is hard to see why it should make a difference to the manslaughter sentence whether the robbery/burglary was planned or committed on the spur of the moment.

A third, perhaps less significant matter is the aggravating factor of "victim was performing a public service or performing a public duty at the time of the offence". The Council added the last six words at the suggestion of consultees, so that it now differs from the wording in the Assault guideline, which refers to "offence committed against those working in the public sector or providing a service to the public".⁴⁴ The revised terminology is at odds with the new statutory aggravating factor created by the Assaults on Emergency Workers (Offences) Act 2018. That Act states that where the victim of an offence is an "emergency worker" the court must treat that as an aggravating factor. For these purposes an emergency worker is someone who at the time of the offence was acting as such, or "who was not at work but was carrying out functions which, if done in work time, would have been in the exercise of functions as an emergency worker". The 2018 Act specifically applies to manslaughter, as well as to various forms of assault. The statutory provision is more narrowly drafted than the Council's aggravating factor in being confined to emergency workers, but is apparently wider in extending to those who were not actually on duty at the time.⁴⁵

Double counting was discussed above. As an example of potential double counting, "concealment *etc* of the body" is a factor indicative of high culpability (B), so it should not also be taken to aggravate the offence, although aggravating factors include "actions after the event (including but not limited to attempts to cover up/conceal evidence)".

The Gross Negligence Manslaughter Guideline

The offence range here runs from 1 year to 18 years, again reflecting the wide factual circumstances and range of culpability which can apply in an offence based on breach of a standard of care rather than on traditional mens rea. As with unlawful act manslaughter the Council has opted for four categories of culpability and a single level of harm, and again the Council has defended its approach by reference to the draft guideline scenarios trialled by judges. It is the Council's intention that sentences will rise "in the case of the more culpable offences arising from breaches of health and safety".⁴⁶

According to the guideline Very high culpability (category range 10–18 years, starting point 12 years) may be indicated by the extreme character of one or more high culpability factors or a combination of high culpability factors.

Factors indicating high culpability (category range 6–12 years, starting point 8 years) are:

"The offender continued or repeated the negligent conduct in the face of obvious suffering caused to the deceased by that conduct

The negligent conduct was in the course of other serious criminality

The offence was particularly serious because the offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct

The negligent conduct was motivated by financial gain (or avoidance of cost)

The offender was in a leading role if acting with others in the offending

Concealment, destruction, defilement or dismemberment of the body (where not separately charged)."

In contrast to the unlawful act manslaughter guideline, the first five factors listed here appear not to represent gradations of culpability but different factual manifestations of high culpability, and it is entirely possible that more than one might appear in any given case. In the case of *Wacker* referred to earlier the second, third and fourth factors would arguably all have applied. The sixth factor might conceivably be found along with any one or more of the others. In line with what has been said about adjustment from the starting point, one would expect that where more than one factor applies the judge would adopt a higher than normal starting point within the relevant category range or would move up to the very high culpability range.

Factors indicating medium culpability (category range 3–7 years, starting point 4 years) are those falling between high and lower culpability because:

"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."

Factors indicating lower culpability (category range 1–4 years, starting point 2 years) are:

"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 in the offending

The offender's responsibility was substantially reduced by mental disorder, learning disability or lack of maturity."

In the gross negligence manslaughter guideline there is the reference to the sentencer having regard to other guidelines. This was discussed above. The Council reports that its consultation version of the guideline "led to unintended increases in sentence levels" and changes were made to step 1 and step 2 factors were adjusted to try to avoid that. In one of the first reported cases to apply the guideline, *Rashid and Kuddus*, a trial at Manchester Crown Court, following the death of a 15-year-old girl who suffered an anaphylactic reaction after eating a takeaway meal supplied by the Ds' restaurant, the judge commented that she would have passed the same sentence before and after the guideline.⁴⁷ The restaurant had no policy, and had taken no action, to ensure that appropriate warning was given as to the presence of allergens in the meals supplied. So this was not a lapse in an otherwise satisfactory standard of care. Both defendants (D1 being the manager and D2 the assistant manager and chef) fell within medium culpability, the judge rejecting the prosecution's argument that they had showed a blatant disregard for a very high risk of death. Both Ds were convicted after a trial. For D1 (aged 38, who saw the customer's order indicating her allergy to nuts and prawns, but did not pass that on to the chef) a starting point of four years was reduced to three years for mitigation (clean record, remorse, some assistance to the authorities). For D2 (aged 41, who did not see the allergen indication on the order, but was mainly responsible for the company failure to introduce any system to deal with allergen control), a starting point of three years (at the bottom of the range) was reduced to two years for mitigation (lesser role, clean record, remorse). As a final point on culpability the judge said that, two years on from the death, now that the risks associated with food allergies have gained greater public attention, it may be that today a restaurateur who took no action in respect of allergies would be regarded as blatantly disregarding a high risk.

Turning to the aggravating and mitigating features, again most of these are either required statutory factors or are generic factors to be found in other offence guidelines. Of interest among the aggravating factors are "involvement of others through coercion, intimidation or exploitation", and "investigation has been hindered and / or other(s) have suffered as a result of being falsely

⁴⁷ "透過脅迫、恐嚇他人參與"

blamed by the offender". The latter was changed from "Blame wrongly placed on others" because some consultees thought that it could be misapplied to a defendant who had argued at trial that others had been responsible for a fatal accident.

Double counting was discussed above. As with the unlawful act manslaughter guideline "concealment etc of the body" is a factor indicative of high culpability (B), so it should not also be taken to aggravate the offence, although aggravating factors include "actions after the event (including but not limited to attempts to cover up / conceal evidence)". Also, and just in relation to this guideline, the offender's mental disorder, learning disability or lack of maturity features in lower culpability, but mental disorder or learning disability is also listed as a factor reducing seriousness or reflecting personal mitigation.

Of particular interest is the attention which the Council has given to the issue of gross negligence manslaughter prosecutions arising in the medical context. This issue was considered in detail in an important article by Quirk in this *Review*,⁴⁸ and much of her analysis has been taken on board. The Council reports that it held a meeting with medical professionals to allow them to explain more fully the issues which arose in a medical setting, and a number of the draft aggravating and mitigating factors were amended and new ones introduced in consequence. In particular, the following mitigating factors were added:

⇒ "(i) for reasons beyond the offender's control, the offender lacked the necessary expertise, equipment, support or training which contributed to the negligent conduct; (ii) for reasons beyond the offender's control, the offender was subject to stress or pressure (including from competing or complex demands) which related to and contributed to the negligent conduct; (iii) for reasons beyond the offender's control, the negligent conduct occurred in circumstances where there was reduced scope for exercising usual care and competence; and (iv) the negligent conduct was compounded by the actions or omissions of others beyond the offender's control."

The Council takes the view that such factors could also apply to other people working in high stress environments.

The Manslaughter by Reason of Loss of Control Guideline

The offence range runs from 3 years to 20 years with three categories of culpability in the guideline: high, medium and lower.

High culpability (category range 10–20 years, starting point 14 years):

"Planning of criminal activity (including the carrying of a weapon) *before* the loss of control

Offence committed in the context of other serious criminal activity

Use of a firearm (whether or not taken to the scene)

Loss of self-control in circumstances which only just meet the criteria for a qualifying trigger

Concealment, destruction, defilement or dismemberment of the body (where not separately charged)."

Medium culpability (category range 5–12 years, starting point 8 years):

"Cases falling between higher and lower because:

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."

Lower culpability (category range 3–6 years, starting point 5 years)

"Qualifying trigger represented a very high degree of provocation."

The high culpability factors appear to be different factual situations, and it is entirely possible that more than one might appear in any given case. In line with what has been said about adjustment from the starting point, one might expect that where more than one factor applies the judge would adopt a higher than normal starting point within the relevant category range or might

move up to the very high culpability range. The starting points and ranges are inevitably higher than those in the SGC guideline, since that guideline pre-dated the shift to more severe sentences for manslaughter in *Appleby* and the policy of the Council to reflect sentencing practice. The Justice Select Committee⁴⁹ expressed concern to the Council that sentencing levels would rise in loss of control cases, but the Council said that it was satisfied that the 14-year starting point for high culpability in particular "reflected current sentencing practice and was proportionate to the seriousness of the offending".

Following the replacement of the partial defence of provocation by loss of control by the 2009 Act, the Court of Appeal said in *Thornley*⁵⁰ that the SGC guideline must now be read in light of the re-casting of the partial defence and the indirect effect of sch.21 in murder sentencing, an approach followed in *Ward*⁵¹ where the court said that there was now a "higher threshold" for loss of control manslaughter (given the need for a "qualifying trigger" to be proved), that the old provocation guideline was still usable but that higher sentences than before were necessary, especially where a weapon such as a knife had been used. It remains to be seen whether the new loss of control guideline fully reflects the legislative changes. It is clear that the introduction of qualifying triggers narrows the scope of the partial defence, and some offenders will now be convicted of murder, when previously they would have benefited from the provocation defence. But the legislative change was not simply a raising of the threshold in all cases. It was a comprehensive reform of the defence, designed (among other things) to give greater weight to "provocation" in the form of protracted domestic abuse, and correspondingly less weight to loss of temper following real or perceived insult, especially in relation to sexual infidelity.⁵²

The Council has said that it expressly considered the scenario of the domestic abuse victim who uses a weapon to kill her physically stronger abuser. The difficulties in reaching a relatively lenient outcome in such a case (as was surely envisaged by the legislation) are, first, the guideline high culpability factor of "planning (including the carrying of a weapon)"⁵³ and the aggravating factor "use of a weapon". On the other hand, lower culpability is signalled by "Qualifying trigger represented a very high degree of provocation", and mitigating factors include "history of significant violence towards D by V" and "violence initiated by V". Then again there is the (unexplained) mis-match between the aggravating factor "history of violence or abuse towards V by D" and the mitigating factor "history of *significant* violence or abuse towards D by V". This is not an oversight. The Council originally had the word "significant" in both phrases, but removed it from the aggravating factor at the suggestion of consultees because "any history of violence or abuse towards V should be sufficient to be taken into account". The approach of the SGC guideline was to focus on the "degree of provocation" which occurred before the killing, assessing its nature and duration (including provocation which has "built up over a period of time"), and distinguishing between cases where the killing arose from "fear or desperation" on one hand and "anger, frustration or resentment" on the other. That guideline explained that while it would normally be more culpable if there has been a time gap between the provocation and the killing, or if a weapon had been used, there were circumstances in which these matters had to be seen in the context of the relationship between the parties, especially in "domestic" cases where there was an imbalance of power and a history of abuse. It is submitted that the SGC guideline provided better guidance for the judiciary in this context. This is one area where the style and format of Sentencing Council guideline is too terse, and the guideline would have benefited from a fuller explanation of how the revised wording of the loss of control defence should impact on sentencing outcomes.

The issue of possible double counting also arises here. As with the other guidelines "concealment etc of the body" is a factor indicative of high culpability (B), so it should not also be taken to aggravate the offence, although aggravating factors include "actions after the event" (including but not limited to attempts to cover up / conceal evidence). Also, carrying of a firearm is a high culpability factor and use of a weapon (of any description) is an aggravating factor.

The Manslaughter by Reason of Diminished Responsibility Guideline

The guideline explains that a conviction for this kind of manslaughter "necessarily means that the offender's ability to understand the nature of the conduct, form a rational judgment and / or exercise self-control was substantially impaired".⁵⁴ For sentencing purposes crucially the court "should determine what level of responsibility the offender retained". Logically this approach makes good sense, but determining the degree of retained responsibility in a given case is fraught with difficulty. The offence range runs from 3 to 40 years. There are three levels of culpability (or retained responsibility) and one level of harm. The three levels of retained responsibility are high (15–40 years, starting point 24 years), medium (10–25 years, starting point 15 years), or lower (3–12 years, starting point 7 years), but there is little further assistance for the court in deciding into which category the offender falls beyond enjoining the court to have regard to "the medical evidence and all the relevant information before the court". The difficulty of course is that in this form of manslaughter the expertise in the medical assessments is crucial to an understanding of the case but, on the other hand, the level of retained responsibility and the resulting sentence is the responsibility of the judge

and not the psychiatrists.⁵⁵ Those who responded to the consultation had very different views as to the value of this approach. The Council of Her Majesty's Circuit Judges were in favour of the flexibility afforded by it, noting that manslaughter of this form "arises in very many ways and is usually fact-specific", whereas the Criminal Law Solicitors' Association said that the lack of guidance

"renders the guideline of limited assistance either to sentencing judges or to those advising an offender ... it is difficult to see how the guideline will achieve any consistency in sentencing".

The Council's response⁵⁶ was to include some pointers to assessing the offender's responsibility suggesting that, depending on the facts, the court might need to consider whether the offender had made his mental disorder worse by abusing drugs or alcohol or failing to take medication or, on the other hand, where the mental disorder was undiagnosed or if the offender had sought help but not received appropriate treatment.

The list of aggravating factors increasing the seriousness of the offence contains few surprises. The inclusion of "history of violence or abuse towards victim by offender" and "victim was providing a public service or performing a public duty at the time of the offence" were discussed in relation to manslaughter by loss of control. Of particular note here is the standard aggravating factor of "commission of offence whilst under the influence of alcohol or drugs", which attracted criticism from the Royal College of Psychiatrists. The Council has responded⁵⁷ by amending the guideline so that it alerts the court to the possibility that the offender's abuse of alcohol or drugs might be related to the effect of the mental disorder upon the offender's ability to make informed judgements and exercise self-control. The list of "factors reducing seriousness or reflecting personal mitigation" is for the most part standard, but we may note the inclusion of "intention to cause serious bodily harm rather than to kill" (on which there is case law in relation to sentencing for murder⁵⁸), and "history of significant violence or abuse towards the offender by the victim" which was discussed above. Also of note are "offender made genuine and sustained attempts to seek help for the mental disorder" (which carries a risk of double counting with the assessment of retained responsibility at step 1), and "serious medical conditions requiring urgent, intensive or long-term treatment" which, it is submitted, is not a double-counting issue because it is meant to apply to conditions other than the mental disorder itself. Finally, it is a mitigating factor where there was a "belief by the offender that the killing was an act of mercy". *Webb*⁵⁹ is the classic case of a suspended sentence being imposed on appeal in relation to a mercy killing which on the facts was very close to an assisted suicide.

The guideline then departs significantly from the usual layout. Step 3 requires the court to consider the issue of dangerousness (life sentence or extended sentence) where applicable, then Step 4 which is consideration of disposals under the Mental Health Act 1983. This step requires the court to engage with the criteria for making a hospital order under s.37 (with or without a restriction order under s.41), and a hospital and limitation direction under s.45A. Step 4 is clearly designed to encapsulate the Court of Appeal guidance given in the leading case of *Vowles*,⁶⁰ as qualified and developed in *Edwards*.⁶¹ The choice to be made between a custodial sentence, a hospital order, and a hospital and limitation direction, is notoriously difficult. To reflect this there then a novel Step 5, at which point the court is required to "review the sentence as a whole" to see "whether [it] meets the objectives of punishment, rehabilitation and protection of the public in a fair and proportionate way". Relevant issues will include "the psychiatric evidence and the regime on release". This oblique reference to the "regime on release" conceals some disagreement in the appellate authorities as to whether a hospital order or a hospital and limitation direction affords greater protection to the public given the different criteria which apply in determining the release of the offender from hospital or from prison,⁶² and the differences inherent in the supervision arrangements following that release.⁶³ Step 5 allows considerable latitude for the judge, who is reminded that diminished responsibility manslaughter cases "vary considerably on the facts of the offence and the circumstances of the offender" and that an adjustment at Step 5 "may require a departure from the sentencing range identified at Step 2 above". The later Steps, including Step 7 (Reduction for Guilty Plea) and Step 10 (Giving of Reasons) then apply as usual.

Conclusion

It is a significant achievement that, at last, we have in place a set of sentencing guidelines for the offence of manslaughter. The way in which the Council has designed the levels of culpability for the different forms of manslaughter is sophisticated and impressive and, for the most part, the aggravating and mitigating features are clear and appropriate. It is always open to a judge to include a relevant aggravating or mitigating feature of a case which is not listed in the guideline itself, subject always to the issue of double counting. My impression is that considerable flexibility has been built in to all the guidelines. The Council has included a warning against taking a mechanistic approach, and has clarified that there can be a two-step adjustment from

the starting point in the category range. Flexibility is always attractive to the judiciary, but whether this desirable aim has been achieved at the expense of consistency (the main purpose of the Council, but with all the empirical problems of measuring it) remains to be seen. In the background to the manslaughter project lie some large and unanswered questions about the relationship between manslaughter sentencing and the murder starting points in [sch.21](#). The Council nods in the direction of [sch.21](#) when endorsing the escalated sentence levels for manslaughter established by the Court of Appeal, but does not engage with the details of that schedule. The guidelines are, again for the most part, clear and likely to be user-friendly for the judiciary. On the other hand, there are times when the criteria are, in my view, expressed so shortly that the reader may struggle to see the rationale for the rule.

Martin Wasik

Emeritus Professor of Criminal Justice

Keele University

Footnotes

- 1 For sentencing offenders aged under 18 the applicable guideline is Sentencing Children and Young People.
- 2 Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences.
- 3 F. Stark, "Reckless manslaughter" [2017] Crim. L.R. 763–784; but see *Lidar* [2000] 4 Archbold News 3, considered by J. Horder, *Ashworth's Principles of Criminal Law, 8th edn* (Oxford University Press, 2016), p.302.
- 4 See M. Wasik, "Sentencing in homicide" in A. Ashworth and B. Mitchell, *Rethinking English Homicide Law* (Oxford University Press, 2000), Ch.7.
- 5 Sentencing Guidelines Council, Manslaughter by Reason of Provocation.
- 6 Sentencing Council, Manslaughter Guideline: Response to Consultation, https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-consultation-response_WEB-1.pdf [Accessed 22 January 2019].
- 7 Sentencing practice in unlawful act manslaughter in the 1980s and 1990s was to impose the sentence which would have been appropriate for the underlying unlawful act, enhanced by a modest amount to reflect the fact of death. The usual sentencing bracket was around two to seven years, but in *Coleman (1991) 11 Cr. App. R. (S) 159* Lord Lane CJ said that in a case where V had been felled by a blow from D, and had suffered a skull fracture when his head hit the ground, resulting in V's death, the starting point on a plea of guilty was 12 months. From 2000 onwards, manslaughter sentences moved steadily upwards, though see *Furby [2005] EWCA Crim 3147*; [2006] 2 Cr. App. R. (S) 8; [2006] Crim. L.R. 259.
- 8 *AG's Reference (No. 60 of 2009) (Appleby)* [2009] EWCA Crim 2693; [2010] 2 Cr. App. R. (S) 46; [2010] Crim. L.R. 325.
- 9 <https://www.sentencingcouncil.org.uk/publications/item/manslaughter-data-tables> [Accessed 22 January 2019].
- 10 To "regularise practice" as the Council put it in the Consultation Guideline: https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter_consultation_paper_Final-Web.pdf [Accessed 22 January 2019].
- 11 *Dyer [2013] EWCA Crim 2114*; [2014] 2 Cr. App. R. (S) 11 at [15].
- 12 N. Padfield, "Guidelines galore" [2016] Crim. L.R. 301, who asks "Is it not the job of the Sentencing Council to try to counter the relentless increase in sentence lengths?" and see the reply by the then chairman of the Council, Treacy LJ at [2016] Crim. L.R. 489–490, commenting that this was "a misunderstanding of the role of the Sentencing Council".
- 13 The first page of each manslaughter guideline provides that the relevant type of manslaughter should be identified prior to sentence, and 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.
- 14 Domestic Violence, Crime and Victims Act 2004 s.5.
- 15 *Shallcross [2017] EWCA Crim 2060*; [2018] 1 Cr. App. R. (S.) 29.

See M. Hirst, "Causing death by driving and other offences: a question of balance" [2008] *Crim. L.R.* 339. *Willoughby* [2004] *EWCA Crim* 3365; [2005] *Crim. L.R.* 389.

This issue arose in *Noble* [2003] 1 *Cr. App. R. (S)* 312.

Schedule 21 para.10(c).

The sentencing implications of more than one death in diminished responsibility manslaughter has been the subject of different views in *Dighton* [2012] *EWCA Crim* 1227; [2012] 1 *Cr. App. R. (S)* 30; *AG's Ref (No. 34 of 2014) (Jenkin)* [2014] *EWCA Crim* 1394; [2014] 2 *Cr. App. R. (S)* 84; and *Dantes* [2016] *EWCA Crim* 733; [2016] 2 *Cr. App. R. (S)* 25.

Wacker [2003] *Q.B.* 1207; [2003] *Crim. L.R.* 108.

Sentencing Council, Definitive Guideline, Totality; for a critique see M. Wasik, "Concurrent and consecutive sentences revised" in L. Zedner and J.V. Roberts, *Principles and Values in Criminal Law and Criminal Justice* (Oxford University Press, 2012), Ch.17, and for a book-length investigation of the formidable theoretical and practical problems involved in sentencing an offender for multiple offences see J. Ryberg, J.V. Roberts and J.W. de Keijser, *Sentencing Multiple Crimes* (Oxford University Press, 2018).

Kelly [2011] *EWCA Crim* 1462; [2012] 1 *Cr. App. R. (S)* 56; [2011] *Crim. L.R.* 806; *Attorney-General's Reference (No. 12 of 2008)* [2008] *EWCA Crim* 1060; [2009] 1 *Cr. App. R. (S)* 97.

Abdeen [2018] *EWCA Crim* 1227; [2018] *Crim. L.R.* 868.

Babic [2018] *EWCA Crim* 457, per Lord Burnett CJ.

Sentencing Council, Sentencing Children and Young People, para.4.7 (emphasis in the original).

Coroners and Justice Act 2009 s.121(1) states that when exercising functions to create sentencing guidelines the Council "is to have regard to the desirability of" structuring its guidelines "in the way described in subsections (2) to (8)". In practice, however, the structure has been closely followed by the Council. See generally J.V. Roberts and A. Rafferty, "Sentencing guidelines in England and Wales: Exploring the new format" [2011] *Crim. L.R.* 681–690.

Collins [2018] *EWCA Crim* 1713; [2019] 1 *Cr. App. R. (S)* 7. In the case itself the court held that the judge had been right to take account when determining sentence both that the victim was particularly vulnerable and that he had been targeted as vulnerable by the offender. There was no double counting in this case, because the first matter related to harm and the second to culpability.

Treacy LJ referred in *Collins* to the Terrorism guideline as one in which a specific warning had been placed, but in fact that is not the case.

Forbes [2016] *EWCA Crim* 1388; [2016] *Crim. L.R.* 946.

See further *Farms* [2018] *EWCA Crim* 1457, where the court accepted that the judge had fallen into error when using the "significant psychological harm" suffered by the victim as the reason for categorising the case as 1A, but then further stating that this same factor required an uplift to the starting point.

Bondzie [2016] *EWCA Crim* 552; [2016] 2 *Cr. App. R. (S)* 28; [2016] *Crim. L.R.* 591.

This judgment also engaged with the SGC's guideline Overarching Principles: Seriousness in relation to prevalence of local offending.

See fn.29.

An example of very low culpability is *Harvey* [2010] *EWCA Crim* 1317; [2011] 1 *Cr. App. R. (S)* 42.

According to the Consultation guideline, "This occurs in only a small number of cases but is always regarded by the courts as very serious."

See further Stark, "Reckless manslaughter" [2017] *Crim. L.R.* 782.

According to the Consultation guideline: "A typical scenario (although not the only scenario) that might be captured by this factor is where the offender is part of an organised burglary, theft or robbery and the victim is killed by a vehicle as the offenders make their escape."

Sentencing Council, Manslaughter Guideline: Response to Consultation, https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-consultation-response_WEB-1.pdf [Accessed 22 January 2019], p.6.

Jogee [2017] *A.C.* 387; [2016] 1 *Cr. App. R.* 31; see further B. Crewe et al, "Joint enterprise: the implications of an unfair and unclear law" [2015] *Crim. L.R.* 252–269.

Admittedly, oddly expressed as "A greater degree of provocation than normally expected".

A court has discretion to take into account matters in mitigation which are not specifically listed in an offence guideline, but this does seem an odd omission.

Watson [1989] 1 *W.L.R.* 684; [1989] *Crim. L.R.* 733.

The equivalent aggravating factor in sch.21 is para.10(f) which does not have the six words which the Council has added in respect of manslaughter.

- 45 The 2018 Act came into force on 13 November 2018, less than two weeks after the manslaughter guidelines took effect.
- 46 Consultation guideline, https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter_consultation_paper_Final-Web.pdf [Accessed 22 January 2019], p.9.
- 47 *Rashid* 2018 *WL* 05850932 (sentencing remarks of Yip J).
- 48 H. Quirk, "Sentencing white coat crime: the need for guidance in medical manslaughter cases" [2013] *Crim. L.R.* 871–888.
- 49 House of Commons Justice Committee, *Draft Sentencing Council guidelines on manslaughter (TSO, 2017)*, HC 658 (4th report of Session 2017-2019), <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/658/658.pdf> [Accessed 22 January 2019].
- 50 *Thornley* [2011] *EWCA Crim* 153; [2011] 2 *Cr. App. R. (S)* 62; [2011] *Crim. L.R.* 415.
- 51 *Ward* [2012] *EWCA Crim* 3139; [2013] 2 *Cr. App. R. (S)* 35; [2013] *Crim. L.R.* 433.
- 52 For a critical analysis of murder sentencing following the 2009 Act reform see J. Horder and K. Fitz-Gibbon, "When sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing" (2015) 74(2) *CLJ* 307–328.
- 53 The Council argues that the judge in an appropriate case may find that there was a loss of control *before* the decision to obtain the weapon, and that "all of the surrounding circumstances" can be taken into account: Sentencing Council, Manslaughter Guideline: Response to Consultation, https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-consultation-response_WEB-1.pdf [Accessed 22 January 2019], p.15.
- 54 Homicide Act 1957 s.3, as amended by the Coroners and Justice Act 2009.
- 55 *Vowles* [2015] 2 *Cr. App. R. (S)* 6: the court must consider all the evidence and not feel bound by medical opinion.
- 56 Sentencing Council, Manslaughter Guideline: Response to Consultation, https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-consultation-response_WEB-1.pdf [Accessed 22 January 2019], p.17.
- 57 Sentencing Council, Manslaughter Guideline: Response to Consultation, https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter-consultation-response_WEB-1.pdf [Accessed 22 January 2019], p.18.
- 58 Indicating that there are cases where lack of intent to kill will make little difference to sentence outcome: *Peters* [2005] *EWCA Crim* 605; [2005] 2 *Cr. App. R. (S)* 101; [2005] *Crim. L.R.* 492; *Cameron* [2010] *EWCA Crim* 1282; [2011] 1 *Cr. App. R. (S)* 24.
- 59 *Peters* [2005] *EWCA Crim* 605; [2011] 2 *Cr. App. R. (S)* 61; [2005] *Crim. L.R.* 492.
- 60 *Vowles* [2015] *EWCA Crim* 45; [2015] 2 *Cr. App. R. (S)* 6; [2015] *Crim. L.R.* 542.
- 61 *Edwards* [2018] 4 *W.L.R.* 64; [2018] 2 *Cr. App. R. (S)* 17.
- 62 Discussed at length by Hughes LJ in *AG's Ref (No. 54 of 2011)* [2011] *EWCA Crim* 2276; [2012] 1 *Cr. App. R. (S)* 106; [2012] *Crim. L.R.* 144.
- 63 In *Ahmed* [2016] the Court of Appeal indicated that release arrangements following a hospital order might offer greater public protection than those following release from prison, but in *Edwards* [2018] 4 *W.L.R.* 64; [2018] 2 *Cr. App. R. (S)* 17 the court said that those comments were not of general application.