

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.

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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>

