

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

2 March 2018
SC(18)MAR04 - Manslaughter
Tim Holroyde
Ruth Pope
0207 071 5781

1 ISSUE

1.1 This is the first consideration of the loss of control manslaughter guideline post consultation; diminished responsibility will be considered at the April Council meeting and there will be a final consideration of all four guidelines including checking the sentence levels at the May meeting.

1.2 Council members have provided suggestions by email for the gross negligence manslaughter guideline and the agreed version is currently being tested with judges who took part in research during consultation.

1.3 The aim is to publish the guidelines early in September 2018 in time for training to be delivered at the Serious Crime Seminar in September which Sarah Munro has kindly offered to deliver.

2 RECOMMENDATION

2.1 The Council is asked to consider the amendments to the loss of control guideline as shown at Annex A (additions are underlined and deletions are struck through)

3 CONSIDERATION

General

3.1 Only eight of the 44 respondents to the consultation addressed the loss of control guideline. Responses were received from the CPS, the Law Society, the Criminal Law Solicitors Association (CLSA), the London Criminal Courts Solicitors Association (LCCSA), the Criminal Bar Association (CBA), Council of HM Circuit Judges (CHMCJ) and two academics. The majority were broadly positive, although there were some concerns around how weapons are dealt with in the guidelines and some suggestions for additional aggravating and mitigating factors.

3.2 The draft loss of control guideline was 'road tested' with 11 judges, four of whom re-sentenced their own cases and seven of whom sentenced a scenario based on a 2014 case. This research revealed some inconsistency in the application of culpability, aggravating and mitigating factors. A summary of the research is at **Annex C**.

Culpability

3.3 One respondent (an academic) was concerned that the high culpability factor ‘planning of criminal activity (including the carrying of a weapon) **before** the loss of control’ could be applied to victims of domestic abuse who kill their abusers. Similarly, she was concerned that the high culpability factor ‘Loss of self-control in circumstances which only just met the criteria for a qualifying trigger’ would be unfairly applied in ‘final straw’ cases. Another academic queried whether carrying a weapon would be high culpability if there were legitimate fears for personal safety.

3.4 In the development of the guideline the Council had considered the scenario of the domestic abuse victim who uses a weapon to kill her physically stronger abuser. The guideline was drawn up on the basis that in such a case the loss of control could be deemed to have occurred before the decision to obtain a weapon (each case will turn on its own facts). The legislation (see annex B) recognises that the loss of control need not be sudden and therefore it is to be assumed that courts will take into account all of the surrounding circumstances in assessing the severity of the qualifying trigger that led to the loss of control.

Question 1: Is the Council content that the guideline would work fairly in the case of an abuse victim who loses control over a period of time and kills using a weapon?

3.5 The CHMCJ considered whether the factor ‘use of a firearm (whether or not taken to the scene)’ should be extended to include a knife or other lethal weapon, but concluded that the sentence ranges provided sufficient flexibility for sentencers in such cases. The Law Society thought that it would be helpful to have definition of a weapon for this guideline.

3.6 In road testing several judges felt that use of a weapon (particularly a knife) should be a step one factor, making the point that but for the weapon there would not have been a death. There was a suggestion that if not a step one factor, use of a weapon should justify increasing the starting point before going on to consider other aggravating and mitigating factors.

3.7 In the context of manslaughter by reason of loss of control, the Council took the view that the main significance of the use of a weapon at step one was the degree to which it indicated prior planning. Firearms were singled out as their use would be likely to represent both planning and a disproportionate response to the qualifying trigger as well as putting others at risk. Any more rigid reference to the use of a weapon at step one would cause difficulty with the situation discussed at 3.3 above. ‘Offence involved the use of a weapon’ is an aggravating factor at step two (with the usual proviso to avoid double counting).

Question 2: Is the Council content with the treatment of weapons in the guideline?

3.8 The Law Society foresaw that that it may be difficult for courts to decide whether the loss of self-control was in ‘circumstances which only just met the criteria for a qualifying

trigger'. In road testing there was inconsistency in the assessment of the level of provocation in the scenario used. It was anticipated that judges would find that the high culpability factor applied (and in the actual case the sentence of 10 years before plea indicates that the level of provocation was found to be low), but only two of the seven judges did so. The other five found that it fell between just meeting the qualifying trigger and 'exceptionally high degree of provocation'.

3.9 The limited details that the judges were given in the scenario may have contributed to the inconsistency. These factors will inevitably require the sentencer to make a judgement on the facts of the individual case. This will be no different from the SGC Manslaughter by Reason of Provocation Guideline which required the sentencer to distinguish between a low, substantial and high degree of provocation. The Council considered whether there was any additional guidance that would assist sentencers with this evaluation, but concluded that there was nothing useful that could be added.

Question 3: Is the Council content that courts will be able to make an assessment of the level of 'provocation' based on the facts of individual cases?

3.10 It is possible that the starting point of 14 years for high culpability may have deterred judges from placing cases in that category. Where judges (either resentencing their own cases or sentencing the scenario) made a finding of high culpability the final sentence was noticeably higher than the actual sentence passed. Sentence levels will be looked at in the round at the May Council meeting.

3.11 Judges in road testing frequently assessed culpability as medium which suggests that they were balancing factors in high and lower. One judge suggested that more factors in lower culpability would assist in identifying cases that should fall into lower and medium. As currently drafted there is only one lower culpability factor compared to five factors in high (although most of the factors in high are unlikely to apply in the majority of cases). The Council did consider other low culpability factors prior to consultation but was unable to identify any appropriate ones. In the absence of any suggestions no change is proposed.

3.12 The same judge suggested that more guidance on qualifying triggers would be useful. One judge asked why references to the nature and duration of the provocation (in the SGC guideline) have not been retained in the loss of control guideline. Another judge suggested that it would be helpful if the guideline were to include a definition of loss of control, and suggested:

a conviction of manslaughter by reason of Loss of Control necessarily means that the killings resulted from the defendant's 'loss of control', which had a qualifying trigger, and a person of the defendant's sex and age, with a normal degree of tolerance and

self-restraint and in the circumstances of the defendant might have reacted in a similar way to the defendant”.

3.13 A summary of the legislation is provided at **Annex B**. If the Council thought that this idea had merit, it might be preferable to include a little more information, for example:

A conviction for manslaughter by reason of loss of control necessarily means that the killing resulted from the offender’s loss of self-control, which had a qualifying trigger, and a person of the offender’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the offender might have reacted in a similar way to the offender. The qualifying trigger will have been:

- *a fear of serious violence from the victim against the offender or another **or***
- *thing(s) said or done which constituted circumstances of an extremely grave character and caused the offender to have a justifiable sense of being wronged **or***
- *a combination of both*

3.14 If it was felt that more guidance on qualifying triggers would be helpful, this could perhaps be framed in terms of the nature and duration of the thing(s) said or done. For example, ‘Loss of self-control in circumstances which only just met the criteria for a qualifying trigger – taking into account the nature and duration of the qualifying trigger’. One judge queried the use of the word ‘exceptional’ in the lower culpability factor stating that as currently worded it would be rarely used. The reason for setting such a high bar for this factor is that in all cases the ‘provocation’ has to be at the minimum either a fear of serious violence or something extremely grave said or done, so to something greatly in excess of that will be exceptional.

Question 4: Does the Council wish to adopt either of the suggestions to include information about the offence?

Question 5: Does the Council wish to make any amendments to the factors relating to the assessment of the level of ‘provocation’?

Aggravating factors

3.15 The CLSA queried whether ‘dishonesty or pursuit of financial gain’ is a valid factor:

We question the value of the aggravating feature relating to dishonesty and pursuit of financial gain. In homicide offences it is the level of violence that is most relevant. An underlying intent to dishonesty is less relevant. It is an aggravating feature that a homicide is committed in the course of a robbery but it is the use or threat of violence that is the relevant factor not the dishonesty. In the case of a burglary it is the invasion into the victim’s home.

3.16 In the context of manslaughter by reason of loss of control, it is difficult to envisage a situation where this factor would apply. There is a high culpability factor of ‘offence committed in the context of other serious criminal activity’ which would capture situations such as where rival drug dealers are fighting over territory; there are no other examples of cases where financial gain seems to play a part. As aggravating factors are non-exhaustive, it may be preferable to remove this factor.

3.17 The CLSA also suggest adding group attack and timing and location as aggravating factors. Loss of control cases nearly always involve just the offender and the victim; a group attack is unlikely to apply. The Council is well aware of the downside of including nonspecific references to timing and location. It is not proposed to adopt these suggestions.

3.18 The Law Society made the following suggestions:

- Any previous history of any abuse or violence towards the victim, not necessarily significant
- Commission of offence when judgement *significantly impaired* through alcohol or drugs
- The vulnerability of victim;
- Offender responsible for the violent circumstances occurring;
- Need for clarification of ‘weapon’;
- Previous history of losing control;
- Previous threats to victim.

3.19 The removal of ‘significant’ from the first aggravating factor has been agreed for other guidelines. The Council has not changed the factor ‘commission of offence whilst under the influence of alcohol or drugs’ as suggested by the Law Society for other guidelines, but it will be possible to include additional information available for this factor in the digital version of the guideline. Prior to consultation the Council decided that ‘vulnerability of victim’ was unlikely to be a relevant factor for this guideline. There are situations such as a carer looking after a vulnerable but difficult dependent, where this factor might conceivably apply, but there is a danger that referring to vulnerability as an aggravating factor might increase sentences in cases where the vulnerability is already taken into account by other factors (such as the fact that the offender has a weapon).

3.20 It is not clear how it is envisaged how the proposed factor ‘Offender responsible for the violent circumstances occurring’ would be applied in the context of this offence except in ways already taken into account by high culpability factors at step one particularly as the partial defence would not be made out where the offender incited the qualifying trigger as an excuse to use violence. ‘Previous history of losing control’ is problematic because the partial defence is only made out if the offender reacted in a way that a person of same age with a normal degree of tolerance might have done. Therefore, it could be argued that the fact that the

offender has demonstrated 'short fuse' in other circumstances is not by itself relevant. Previous threats to victim is perhaps already covered by 'history of previous violence or abuse towards victim by offender'.

3.21 In road testing judges did not report any difficulty with the aggravating factors, but there was little consistency with how they applied them to the scenario (see Annex C). It seems likely that this was more to do with the different interpretation that the judges put on the facts of the case than any inherent difficulty with the factors.

Question 6: Does the Council wish to make any changes to the aggravating factors?

Mitigating factors

3.22 Several respondents criticised the caveat that had been placed on the mitigating factor relating to mental health. The Council has already decided to remove this for the other guidelines.

3.23 The Law Society suggested the following mitigating factors

- Victim contributed substantially to events;
- Large discrepancy in age or size between victim and offender, that may have led offender to having been more fearful;
- Previous history of exercising control;
- History of any violence or abuse by the victim to offender, not necessarily significant, or a single incident of significant violence or abuse;
- Persistent threats or serious provocative behaviour by the victim.

3.24 There are two mitigating factors in the guideline that are relevant to these suggestions:

- History of significant violence of abuse towards the offender by the victim
- Violence initiated by the victim

3.25 It is submitted that the suggestions from the Law Society are either adequately covered by the existing factors or are already taken into account in the finding of loss of control.

3.26 Again in road testing there was inconsistency in the application of the mitigating factors, but this did not seem to be due to any difficulty with the factors.

Question 7: Does the Council wish to make any changes to the mitigating factors?

4 IMPACT AND RISKS

4.1 There is a suggestion from the road testing findings that the draft guideline may lead to higher sentences in cases of high culpability. A review of cases sentenced in 2016 is being carried out to enable an accurate assessment of current sentencing practice and the Council will be asked to consider sentence levels at the May Council meeting.

MANSLAUGHTER BY REASON OF LOSS OF CONTROL

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

Offence range: 3 – 20 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

A conviction for manslaughter by reason of loss of control necessarily means that the killing resulted from the offender’s loss of self-control, which had a qualifying trigger, and a person of the offender’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the offender might have reacted in a similar way to the offender. The qualifying trigger will have been:

- a fear of serious violence from the victim against the offender or another **or**
- thing(s) said or done which constituted circumstances of an extremely grave character and caused the offender to have a justifiable sense of being wronged **or**
- a combination of both

<p>CULPABILITY demonstrated by one or more of the following:</p> <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.
<p>A - High Culpability</p> <ul style="list-style-type: none"> • 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 met the criteria for a qualifying trigger – <u>taking into account the nature and duration of the qualifying trigger</u> • Concealment, destruction, defilement or dismemberment of the body (where not separately charged)
<p>B - Medium Culpability:</p> <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
<p>C - Lower Culpability</p> <ul style="list-style-type: none"> • Qualifying trigger represented an exceptionally high degree of provocation = <u>taking into account the nature and duration of the qualifying trigger</u>

<p>HARM</p> <p>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</p>

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
Starting Point 14 years' custody Category Range 10 - 20 years' custody	Starting Point 8 years' custody Category Range 5 – 12 years' custody	Starting Point 5 years' custody Category Range 3 - 6 years' custody

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 factual 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 or in the finding of a qualifying trigger

Aggravating factors

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
- 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
- Persistence of violence
- 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)
- Involvement of others through coercion, intimidation or exploitation
- Victim was providing a public service or performing a public duty
- 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
- Intention to cause serious bodily harm rather than to kill
- History of significant violence or abuse towards the offender by the victim
- Violence initiated by the victim
- 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
- Mental disorder or learning disability

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.

Blank page

Summary from the Coroners and Justice Act 2009

54 Partial defence to murder: loss of control

- (1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—
- (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
 - (b) the loss of self-control had a qualifying trigger, and
 - (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
- (3) In subsection (1)(c) the reference to “*the circumstances of D*” is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

55 Meaning of “*qualifying trigger*”

- (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—
- (a) constituted circumstances of an extremely grave character, and
 - (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).
- (6) In determining whether a loss of self-control had a qualifying trigger—
- (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
 - (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
 - (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

Blank page

Loss of Control 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. Eleven of those judges re-sentenced their own manslaughter case or sentenced a scenario (which can be found at the bottom of this page) using the Loss of Control guideline. The research will provide valuable information to support development of the manslaughter guideline. However, there are limitations to the work, and as a result the research findings presented below should be regarded as **indicative** only and not conclusive.

Key Findings

- The road testing found that in cases (own and scenario) where the offender was placed in high culpability (A), this tended to lead to an increased sentence from the actual sentence given in the original case, suggesting a potential risk of increased sentences for high culpability cases. This applied in cases which were found to be high culpability originally, indicating that the increase in sentence is due to a higher starting point in the draft guideline as opposed to the draft guideline raising the culpability.
- Most judges were generally able to easily place offenders in a culpability category. However, the scenario identified an issue with consistency when judges were deciding factors based on provocation, judges were more likely to consider the degree of provocation to be at a medium level as opposed to a very low level of provocation which was anticipated by the team. This may lead to a potential deflation of sentences for these types of cases. Some judges also strongly felt that 'use of a weapon' should be considered at an earlier section of the guideline.
- 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.
- Generally, judges were content with the starting points and ranges, and in all but one (own case) of the sentencing exercises, judges used the starting points as described in the guideline.
- The road testing found little consistency between judges for the mitigating and aggravating stage of the guideline. Judges were inconsistent in their application of the factors which led to a varied range of final sentences for the scenario. Generally, when sentencing the scenario all judges had (at least) included 'offence involved use of a weapon' as an aggravating factor and all but a couple of judges had included some degree of mitigation. However, this is where the similarities finished. Other aggravating factors considered by the judges were persistence of violence, history of significant violence or abuse towards victim by offender and significant mental or physical suffering caused to the deceased. Consideration of mitigating factors varied even more: no previous convictions, history of significant violence or abuse towards the offender by the victim was included, good character, remorse and sole or primary carer for dependent relatives were considered by judges.

Scenario

B pleaded guilty to the manslaughter of his estranged wife on the basis of lack of intent. He was tried for murder but convicted of manslaughter and sentenced on the basis of loss of control. He killed her with a kitchen knife in her home. The victim had recently moved out of the family home and B was unable to accept that she wished to be without him. He continued to seek her out and to try to think of reasons why he should be with her, sometimes using her relationships with other members of the family to persuade her spend time with him. Over many years the victim had come to despise B who she considered to be a weak father and a drunk, and she said frequently that she deserved better than him. With a degree of cruelty, she frequently said that he was not a good father, especially when dealing with the grave problems created by the behaviour of their son. On three occasions when they still lived together the victim had confronted B with a knife – but she had not actually used violence towards him. It was after the third of these incidents that she had decided to move out.

On the day before her death, there had been a terrible row in the family home between their sons which B could not cope with, and so he rang the victim in the middle of the night. She came to the house in a very angry state and said some terrible things to B and their son. She made it quite clear to everyone that she had gone for good and wanted nothing more to do with B. B arrived unannounced at her flat the next morning. She was angry with him for failing to warn her that he was coming, but she let him in. B lost his control because of a mixture of factors: the strong and contemptuous language which she used, her statement that he would no longer be able to go out with her and their granddaughter in the future, and the fact that she had, on previous occasions, made as if to harm him with a knife. There was a knife at the scene. It is not clear how the knife ended up in B's hand. He used the knife to inflict ten wounds to her head, chest and neck. Five of those wounds showed the clear determination to cut into or towards the throat. He also plunged the knife into her chest, causing a deep wound. This wound travelled upwards and backwards in the body so that the point of the knife emerged through her shoulder. The judge found that there was intent to kill. He pulled out the knife, washed it and left locking the door behind him. When he got home said to their son "I have killed your mother" and told him to call the Police.