



Faculty of Advocates

Response to

Sentencing Guideline - Offences of Causing Death by Driving

Q1)

Do you agree or disagree that the general structure of the guideline, providing guidance in line with steps 1 to 3 of the sentencing process guideline, is appropriate?

We agree that the general structure of the guideline is appropriate. Steps 1 to 3 allow the reader to understand the process involved in arriving at the eventual disposal, and the factors listed at each step reflect those that are routinely considered by the court when sentencing.

Q2)

Do you agree or disagree that the style of the guideline, employing narrative and tables, is helpful?

We agree that the use of narrative and tables makes the guideline less dense and therefore easier to use. We agree that the use of tables also enhances flexibility because it allows the reader to move between sections depending on circumstances of the offence.

Q3)

Do you agree or disagree that the draft guideline makes the relationship between this guideline and other applicable guidelines clear?

We agree, with the exception that the guideline omits reference to the Sentencing Young People guideline, which we consider should be referred to at the beginning of the document together with a hyperlink.

Q4)

Is there anything that can be done to make the relationship between this guideline and other applicable guidelines clearer?

Only as outlined in response to Q.3 above. We consider that providing the reader with hyperlinks to all applicable guidelines is sufficient, rather than incorporating elements of other guidelines within this one, which could be confusing.

Q5)

Do you consider that the offences should be listed within the guideline by order of seriousness, the order they appear in the Road Traffic Act 1988, or in any other order?

We consider that listing the offences by order of seriousness is logical and makes the guideline easier to follow, particularly for members of the public who might not be legally trained.

Q6)

Do you agree or disagree that the draft guideline should not emphasise any particular purpose or purposes of sentencing?

We agree that the draft guideline should not emphasise any particular purpose of sentencing as that can vary substantially from case to case, depending on the circumstances. We consider that to do so could reduce the flexibility of the process. In any event, the Principles and Purposes of Sentencing guideline, which outlines the overarching principles that apply to the sentencing process generally, is clearly referenced at the beginning of the guideline. The reader can be taken to that guideline through the hyperlink, which is useful.

Q7)

Do you agree or disagree that the approach to the assessment of seriousness set out at step 1 for each of the offences covered by the guideline is appropriate?

We agree that the approach to the assessment of seriousness set out at step 1 for each offence is appropriate.

The guideline makes it clear for all users that the level of seriousness is to be assessed by the level of culpability. The relevant features in relation to culpability are clearly set out in the guideline in table format which in turn is easy to navigate.

Paragraph 6 emphasises the importance of considering all the circumstances of the offence to arrive at a fair assessment. The same paragraph makes it clear that the sentencer has a discretion to move to a higher level in cases where certain features are present from more than one level.

Relative to section 1 offences, we agree that the layout of the table is easy to navigate with the Level options and the three culpability factors, '*nature or manner of driving*': '*capacity of driver*' and '*other*'.

We also agree with the examples set out in 'LEVEL A' in relation to section 1 offences, however for the reasons set out below in answer to question 11 we suggest that *racing* should also be an option in 'LEVEL B'.

In relation to section 1 offences under 'LEVEL B' we wonder if it might be helpful to provide further guidance with examples as to what could be included in the category of "*aggressive driving*", for example, "*tailgating*."

Relative to offences under sections 2B, 3A, 3ZB and 3ZC we agree that the guidelines are clear and easy to follow regarding the standard of driving, the level of intoxication, the level of careless driving and the features of causing death when unlicensed, uninsured, or disqualified.

Q8)

Are there any changes that should be made to the features of seriousness listed at step 1 of each offence?

Yes, the following changes are suggested in relation to section 1 offences.

- i. that "*racing*" should be included in both LEVEL A and LEVEL B with the suitable examples "*racing over a prolonged distance and/or at grossly excessive speeds*" in LEVEL A and simply "*racing*" in LEVEL B, as set in the consultation document in paragraph 60, Option 2.
- ii. Option 2 is regarded as the best way of reinforcing the judge's discretion depending on the level of culpability.

Q9)

Do you agree or disagree that the difference between the quality of driving under level B seriousness and level C seriousness for death by dangerous driving offences is sufficiently clear?

We agree that the difference between the quality of driving under LEVELS B & C is sufficiently clear across all the offences.

In relation to the manner of driving in the section 1 offences table, we agree that the use of “*grossly excessive speed*” for LEVEL B and “*excessive speed*” for LEVEL C is readily understandable and allows for the necessary flexibility without stating examples of any particular speeds or range.

In relation to CAPACITY OF DRIVER in section 1, we agree the use of “*gross impairment*” in LEVEL A and “*impairment*” in LEVEL B is sufficiently clear while allowing for discretion by the sentencer depending on the whole circumstances.

Q10)

Do you agree or disagree that the feature of seriousness regarding the quality of driving for Level B offences should instead refer to “driving that created a very significant risk of danger” to make the distinction more clear?

We agree that the feature of seriousness regarding the quality of driving for Level B offences should refer to a very significant risk to make the distinction clearer, as currently the distinction between “significant” and “substantial” is not easy to understand or explain.

Q11)

In relation to the categorisation of racing in death by dangerous driving offences, which of the options presented at paragraph 60 of the consultation do you consider the most appropriate?

We are of the opinion that Option 2 is the most appropriate, namely that racing should be included in both LEVEL A and LEVEL B, “*racing over a prolonged distance and/or at grossly excessive speeds*” in LEVEL A and simply “*racing*” in LEVEL B.

We see Option 2 as the best way of emphasising the judge’s discretion depending on the level of culpability as envisaged by the Council in paragraph 58 of the consultation document. In our opinion a driver is more culpable if the racing is a prolonged, arranged race along winding roads, than two cars spontaneously pulling away from traffic lights, though the latter could well fall into LEVEL A depending on the circumstances.

Additionally, we agree that deterrence relative to racing is a desirable goal in the public interest. We think that the deterrent effect is better publicised if the guidelines make it plain that racing may fall into LEVEL A or LEVEL B with the attendant flexibility for the sentencer to move up to level A depending on the circumstances.

Q12)

Do you agree or disagree with the non-inclusion of starting points within the sentencing ranges?

While we consider both sides of the argument set out at paragraph 63 of the consultation document to be valid, the overall balance of this question results in agreement that the “starting point” ought not to be included within the sentencing ranges.

In particular, we agree that the sentence will be more individually tailored without the inclusion of arbitrary starting points, allowing for the considerable range of circumstances that arise in cases falling within this guideline.

Furthermore, the non-inclusion of starting points is consistent with the approach taken in the Sentencing Process Guideline, which is to be read in conjunction with this guideline. There is therefore a uniformity of approach between the guidelines, which is beneficial.

Q13)

Do you agree or disagree that the ranges set out within the guideline should reflect current sentencing practice?

We agree that the guideline should reflect current sentencing practice. There is no suggestion that there has been any difficulty in relation to sentencing practice in this area, and none is raised by the Faculty of Advocates.

That there has been a recent increase in the statutory maximum for certain offences does not undermine the guideline. That is due in part to the fact that the guidance is not binding on the court, and also because sentences coming close to or reaching the statutory maximum are uncommon.

Q14)

Do you agree or disagree that the sentencing ranges specified within the guideline are appropriate for each offence?

a) Causing death by dangerous driving

Agree. We recognise that the ranges produced are based on the extensive research set out within the consultation document.

b) Causing death by careless driving when under the influence of drink or drugs

Agree for the same reason.

c) Causing death by careless, or inconsiderate, driving

Agree for the same reason.

The wide sentencing range included on page 14 of the draft guideline reflects the wide range of circumstances that can apply to these offences, which often involve low level culpability.

d) Causing death by driving: unlicensed, uninsured, or disqualified drivers

Agree for the same reason.

As with offences under Section 2B, the sentencing range reflects the fact that culpability for this offence focusses on the driver's status as disqualified, unlicensed or uninsured, as opposed to the manner of driving.

Q15)

Do you agree or disagree with the non-inclusion of guidance on disqualification periods, the young driver scheme, or the drink driver rehabilitation scheme?

a) Disqualification periods

We see no reason why this should not be included, whether in the main body of the guideline or as an annex.

b) Young Driver Scheme

As above.

c) **Drink Driver Rehabilitation Scheme**

As above.

Q16)

Do you agree or disagree that the aggravating and mitigating factors listed in the table at Step 3 for each offence are appropriate?

Causing death by dangerous driving

Aggravating factors

More than one person killed.

We agree that multiple fatalities should be included as an aggravating factor for death by dangerous driving. However, given the focus of the guideline is on culpability and not harm, there should be enough flexibility within the guideline for the sentencer to have regard to the whole circumstances, and not simply to the number of people who were killed. For example, in a case involving a head on collision with one other vehicle, in which two passengers are killed, we do not consider that the sentence should be significantly higher, if at all, than if one person had been killed. In that situation the driver/accused has no way of knowing the number of occupants in the other vehicle. Conversely, if the standard of driving is so serious that it results in a collision involving more than one other vehicle with the result of multiple fatalities, that is in our view more serious.

Serious injury caused to another person/s (excluding the driver).

We agree, as the possibility of serious injury to another is a foreseeable consequence of the decision to drive dangerously.

Relevant previous convictions (not necessarily limited to road traffic):

We agree.

Other offences committed at the same time (such as driving while disqualified or without insurance or leaving the scene of the offence with a view to evading detection):

We agree.

Mitigating factors:

Driver sustained serious injury:

We agree. However, to what extent this will be a mitigating factor will

depend on the nature of the injury/ies. For example, a driver suffering broken limbs is less of a mitigating factor than if the driver was left paralysed. Each case will therefore turn on its own facts.

Previous good driving record:

We agree, as this might be an indicator that the incident was a one-off lapse of judgement on the driver's part / out of character.

Deceased was a family member or a close friend of driver:

We agree, as to some extent the driver will have been punished already for the commission of the offence.

Remorse:

We agree.

Driving while inexperienced:

We agree. However, with an offence such as causing death by dangerous driving, which carries a higher level of culpability, this will be less of a mitigating factor, as the driver will have had a complete disregard for other road users.

Providing assistance at the scene:

We agree, as this is a potential indicator of remorse.

Driving in an emergency, whether in designated emergency vehicle or otherwise:

We agree, as this provides an explanation, as opposed to an excuse, for the manner of driving.

Causing death by careless driving when under the influence of drink or drugs.

Aggravating factors:

More than one person killed:

We agree, for the same reasons stated above.

Serious injury caused to another person/s (excluding the driver):

We agree, for the same reasons stated above.

Relevant previous convictions (not necessarily limited to road traffic):

We agree, for the same reasons stated above.

Other offences committed at the same time (such as driving while disqualified or without insurance, or leaving the scene of the offence with a view to evading detection:

We agree.

Mitigating factors:

Driver sustained serious injury:

We agree, for the same reasons stated above.

Deceased was a family member or close friend of driver:

We agree, for the same reasons stated above.

Remorse:

We agree.

Previous good driving record:

We agree, for the same reasons stated above.

Driving while inexperienced:

We agree. However, whilst inexperience might be a relevant factor in considering why a driver has driven carelessly, for example, by taking chances on the road that a more experienced driver would not, this offence involves the voluntary consumption of alcohol or drugs by the driver, which might be the reason for their impaired decision making, irrespective of their experience. Each case will therefore turn on its own facts.

Providing assistance at the scene:

We agree, for the same reasons stated above.

Driving in an emergency, whether in designated emergency vehicle or otherwise:

We agree, for the same reasons stated above.

Involuntary intoxication due to alcohol or drugs:

We agree.

The actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting:

We agree.

Causing death by careless or inconsiderate driving

Aggravating factors:

More than one person killed:

We agree, for the same reasons stated above.

Serious injury caused to another person/s (excluding the driver):

We agree, for the same reasons stated above.

Relevant previous convictions (not necessarily limited to road traffic):

We agree, for the same reasons stated above.

Other offences committed at the same time (such as driving while disqualified or without insurance, or leaving the scene of the offence with a view to evading detection):

We agree.

Mitigating factors:

Driver sustained serious injury:

We agree, for the same reasons stated above. However because culpability is less for this offence, this may be more of a mitigatory factor than if, for example, the driver had driven dangerously.

Deceased was a family member or close friend of driver:

We agree, for the same reasons stated above.

Remorse:

We agree.

Previous good driving record:

We agree, for the same reasons stated above.

Driving while inexperienced:

We agree. Unlike cases of causing death by dangerous driving, the driver has fallen only "short" of the expected driving standards. It is easier to identify how an inexperienced driver might fall into this category for example; such a driver may have less experience of gauging the speed of other vehicles when pulling out of a junction.

Providing assistance at the scene:

We agree, for the same reasons stated above.

Driving in an emergency, whether in designated emergency vehicle or

otherwise:

We agree, for the same reasons stated above.

Involuntary intoxication due to alcohol or drugs:

We agree.

The actions of the victim or a third party contributed significantly to the likelihood of a collision occurring and/or death resulting:

We agree.

Causing death by driving unlicensed, uninsured or disqualified drivers

Aggravating factors:

More than one person killed:

Being uninsured, unlicensed, or disqualified are the only determinants of culpability for this offence, as there are no factors relating to the standard of driving. That being the case, whilst we recognise that the level of harm for this offence has been fixed by statute and is therefore a factor that the sentencer must take into account, we find it difficult to understand the inclusion of multiple deaths as an aggravating feature.

Serious injury caused to another person/s (excluding the driver):

We disagree, as culpability is not determined by the standard of the driving on the part of the driver/accused.

Relevant previous convictions (not necessarily limited to road traffic):

We agree.

Other offences committed at the same time (such as driving while disqualified or without insurance or leaving the scene of the offence with a view to evading detection:

We agree.

Mitigating factors:

Driver sustained serious injury:

We agree, for the same reasons stated above. However because culpability is lower for this offence, this may be more of a mitigatory factor than if, for example, the driver had driven dangerously.

Deceased was family member or close friend of driver:

We agree, for the same reasons stated above.

Remorse:

We agree.

Previous good driving record:

We agree.

Driving while inexperienced:

We disagree. Being uninsured, unlicensed or disqualified are the only determinants of culpability for this offence, as there are no factors relating to the standard of driving. Driving experience is therefore irrelevant in our view.

Providing assistance at the scene:

We agree, for the same reasons stated above.

Driving in an emergency, whether in a designated emergency vehicle or otherwise:

We agree, for the same reasons stated above.

Genuine belief on the part of the driver that they were not, as the case may be, uninsured/unlicensed/disqualified from driving:

We agree.

Q17)

Do you agree or disagree that the guideline should provide further guidance on the following aggravating and mitigating factors?

Previous convictions:

We disagree, as the number/range of convictions to be considered will vary from case to case. To further expand upon what is meant by "relevant previous convictions" is (a) not an easy task for that reason; and (b) might have an impact on the current flexibility of the guideline.

Remorse:

We disagree, as the indicators and level of remorse will vary from case to case. To provide further guidance might restrict the current flexibility of the guideline.

The relationship between the offender and victims:

We disagree, as the extent to which this can be taken into account as a mitigatory factor will depend on the nature of the relationship and the impact of the person's death on the driver, which will vary from case to case.

Q18)

Do you agree or disagree with the approach to listing contributory actions of others as mitigating factors?

We agree as, depending on the circumstances, these might have had a bearing on the outcome, for example, if the passenger of the vehicle was not wearing a seatbelt. We recognise however that, with offences that carry a higher level of culpability, this will be a weaker factor in mitigation.

Q19)

Do you agree or disagree that the voluntary surrender of a licence by an older driver should be listed as a mitigating factor?

We disagree, as with all these offences the driver would be disqualified in any event. Consequently, whilst there may be cases in which this factor can be taken into account, the voluntary surrender of a licence is not in our view a sufficiently reliable indicator of remorse that it should be listed in the guideline.

Q20)

Should any additional mitigating or aggravating factors be listed?

No.

Q21)

Do you think the guideline will influence sentencing practice in Scotland?

Yes. The guideline reflects current sentencing practice however it promotes consistency, as there will be an expectation that any sentence imposed will be justified with reference to the guideline, whether or not the guideline is followed.

Q22) Do you agree or disagree that the guideline will lead to an increase in public understanding of how sentencing decisions in death by driving cases are made?

We agree. The structure of the guideline demonstrates to the reader how sentencers reach a headline sentence in a format that is instructive and easily navigated.

Q23) What benefits do you see arising from the introduction of this guideline, if any?

The key benefits of the guideline are that it provides transparency to the approach to sentencing for these offences and will hopefully lead to consistency in decision-making. There is also a benefit to practitioners when advising accused persons, as the guideline provides the practitioner with a path to explaining the sentencing range and likely outcome as well as a basis to advise on the prospects of an appeal against sentence.

Q24) What negative effects do you see arising from the introduction of this guideline, if any?

None.

Q25) What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?

Not applicable from our perspective.

Q26) Would you like to make any other comments in relation to any matter arising from this consultation?

No