

Introduction

Hello, my name is Amel Elfallah. I am a sheriff based at Paisley Sheriff Court, however today I am speaking to you as an adviser to the [Scottish Sentencing Council](#). This lecture is the second one following an introductory lecture on the work of the council.

In the previous lecture, I explained the work of the Council and how it operates, and I explained that one of the Council's primary roles is to prepare sentencing guidelines for the criminal courts.

To recap briefly on the previous lecture, the [Scottish Sentencing Council](#) is an independent, advisory body established in 2015 as a result of the [Criminal Justice and Licensing \(Scotland\) Act 2010](#).

Slide 1

It has three statutory objectives, namely to:

- promote consistency in sentencing practice
- assist the development of policy in relation to sentencing, and
- promote greater awareness and understanding of sentencing policy and practice.

Slide 2

It's made up of 12 members with 6 judges from across the court levels, a prosecutor, an [advocate](#), a [solicitor](#), a police officer, someone with knowledge of victims' issues and one other person who is not qualified as a judge or legal member.

Slide 3

Before I explain the role of the sentencing guidelines, let's consider the following scenario. You are a [sheriff](#). You must sentence a 19-year-old offender who has pled guilty to causing death by careless driving. She is a law student from France. She has never been in trouble with any court before. On the day of the offence, she had rented a car. She had a momentary lapse of attention when she pulled out of a café carpark. She drove into a bend, and onto the wrong side of the road for a matter of seconds, before hitting an oncoming motorcycle. She was driving within the speed limit, but the collision killed the motorcyclist, a 36-year-old mother who was travelling alone. The offender stopped, called the emergency services and waited for the police to arrive. She herself was badly bruised. As soon as she instructed a solicitor, she made clear that she wanted to plead guilty. The court received an impact statement from the husband of the deceased lady describing how utterly devastated he and his children were by the loss.

How would you decide on the sentence? Please take a moment to pause the recording and think about it.

We will return to this scenario later in the lecture. For now, though, let's talk about the sentencing guidelines we will need to apply, in a little more detail.

The Council has produced [three general guidelines](#) to date. These are overarching guidelines to be used when sentencing all offences in Scotland. The Council has also produced an offence guideline on causing death by driving.

Slide 4

The key aims of the guidelines are to provide assistance to judges who often have to make challenging sentencing decisions; to promote consistency and predictability in how sentences are decided across Scotland; and to help the public better understand those sentencing decisions. The Council tries to ensure that its guidelines are succinct in order to assist busy judges and lawyers, and to use accessible language in order to assist the public.

The guidelines are available on the Council [website](#) for a closer look. Let's look at each one in turn.

Slide 5

The first guideline is on the [principles and purposes of sentencing](#). Before November 2018, the purposes of sentencing had never formally been agreed by the courts. Preparing this guideline was not a matter of the 12 Council members just sitting down and deciding what they felt these principles and purposes should be, though. They conducted [research](#) into what exists in other jurisdictions, interviewed the Scottish judiciary, held focus groups with the public and analysed criminal justice statistics. The Council also engaged in wide consultation across the justice system including with judges, victims' groups, the legal profession, interest groups and other interested organisations. And also looked closely at current sentencing practice. After extensive engagement and consultation, a guideline was drafted which applies to the sentencing of all offences in Scotland.

Slide 6

That guideline's core principle is that sentences must be fair and proportionate. To achieve this, the guideline says that:

- All relevant factors of a case must be considered including the seriousness of the offence, the impact on the victim and others, and the circumstances of the offender
- Sentences should be no more severe than is necessary and
- Sentencing decisions should treat similar cases in a similar way, assisting consistency and predictability

As I say, you can have a closer look at the [guideline](#) online to see the other key messages.

Slide 7

The guideline also lists some of the main purposes of sentencing, namely:

- protection of the public
- rehabilitation of offenders
- giving the offender the opportunity to make amends
- punishment
- expressing disapproval of offending behaviour.

Let's look at them one at a time.

Protection of the public can mean prison but does not necessarily, mean prison. Sentencing may seek to protect the public from offending behaviour through preventative measures and by deterring offending behaviour.

Rehabilitation of offenders is the way in which courts may seek to reduce the risk of reoffending. It's about providing people who have offended with the chance to change and move away from past offending behaviour.

Giving the offender the opportunity to make amends acknowledges the harm caused to victims and communities. Its aim is to recognise and meet the needs of victims and communities by requiring the offender to try and repair at least some of the harm caused.

Punishment may be considered when deciding the severity of a sentence. But punishment is only one of the possible purposes of sentencing.

And expressing disapproval of offending behaviour may act as an expression of society's concern about, and disapproval of, the offending behaviour under consideration.

In practice, most sentences will aim to achieve more than one purpose. There will, in some cases, be a tension between these different purposes where the judge must try to achieve the appropriate balance in view of the particular circumstances of the case.

For example, it is not difficult to imagine a case, perhaps a serious sexual offence, where the judge has to balance the goals of public protection, disapproval, punishment, and rehabilitation.

Until this guideline was published, these principles and purposes had not been set out in Scotland in a single, authoritative document.

Slide 8

The work on the principles and purposes of sentencing leads us into the question of how judges actually arrive at sentencing decisions. This became the subject of the second general guideline on the [sentencing process](#). Like the first guideline, it also applies to all sentencing decisions in Scotland. The two guidelines are complementary and should be read alongside one another.

The sentencing process guideline describes how judges reach sentencing decisions: i.e. the various steps they take, and the factors - such as the seriousness of the offence, and any aggravating and mitigating factors - to be taken into account. The guideline aims to reflect practice, and to explain to the public how sentencing decisions are made. And, as with the principles and purposes guideline, this is the first time that the steps in the process have been expressly defined in a single document in Scotland.

So let's go through these steps, keeping in mind our death by driving scenario.

Slide 9

The first step is to assess the nature and seriousness of the offence. The seriousness of an offence is determined by two things: firstly, the culpability, or level of blame, of the offender; and secondly,

the harm caused, or which might have been caused, by the offence. The harm caused in our scenario is the death of the motorcyclist.

Some of the factors a judge might use to determine culpability are set out in the guideline and you can have a closer look at that on the Council [website](#).

Slide 10

When determining culpability, questions that judges might ask themselves are:

- Was there any planning or premeditation of the offence?
- Did the offender intend to cause harm, or was the offender reckless as to whether harm was caused?
- Did the offender know the risks, or should they have known the risks that might arise from their actions, even if they did not intend to cause the harm?

Bear in mind that harm is interpreted broadly. It includes cases where actual harm was caused, and cases where there was a risk of harm but no actual harm resulted. It includes a wide range of different types of harm, such as offences where harm is caused to an individual or to property, or more widely to society or the environment. In offences where there was a risk of harm, but no actual harm resulted, the judge will consider the nature of the offender's conduct, the likelihood of harm occurring, and the gravity of the harm that could have resulted.

In looking at the question of harm, the court will also consider the impact on any victim, and will take into account the wider public interest, when deciding a sentence. In some cases an impact statement may be provided to the court by the victim describing the effect that the offence has had on them. For more information on victim impact statements, see [section 14 of the Criminal Justice \(Scotland\) Act 2003](#).

Slide 11

Some more specific examples of factors which may be relevant to the assessment of harm include:

- deliberate degradation or humiliation of a victim
- whether there are multiple victims
- whether the conduct involves a prolonged offence or repeated offences against the same victim
- whether the conduct has had an especially serious physical or psychological effect on a victim, even if unintended.

This list is not exhaustive, though. The Council has tried to ensure that the guideline does not prevent judges from taking account of specific matters which arise in a case simply because they are not listed within the guideline.

In our scenario, we have someone who did not intend to cause harm. So we may consider the culpability low. But the harm caused is very high. This makes deciding the seriousness of this particular offence complex. In contrast, in other cases, the offender's culpability may be high, but

there may be a low level of harm. Each case is different and should be judged according to its own facts and circumstances.

Slide 12

The 'Death by driving guideline' considers a range of offences including causing death by careless or inconsiderate driving. The guideline sets out three levels of seriousness:

- Level A - careless or inconsiderate driving which falls not far short of dangerous driving
- Level B – cases of careless or inconsiderate driving which do not fall into level A or C
- Level C - careless or inconsiderate driving arising from momentary inattention

Once seriousness has been assessed, the second step in the process is to select the sentencing range.

Slide 13

This means the range of sentences which applies to the headline sentence for the offence the judge is dealing with. For example, in the 'Death by driving offences guideline', the sentencing ranges for causing death by careless or inconsiderate driving are:

- A – level 2 community payback order to 2 years' custody
- B – level 2 community payback order
- C – fine of up to £10,000 to level 2 community payback order

A level 2 community payback order is one which has an unpaid work (or other activity) requirement of between 101 and 300 hours. A Level 1 community payback order has unpaid work between 20 and 100 hours.

All of the guidelines will take into account any statutory provision relevant to the offence, including any statutory maximum and minimum sentences, and any relevant [guideline judgments](#).

A [guideline judgment](#) is an opinion on sentence when disposing of an appeal pronounced by the High Court or the Sheriff Appeal Court which is appropriate in any similar case (see [section 118\(7\)](#) and [189\(7\)](#) of the Criminal Procedure (Scotland) Act 1995). When that has happened, a sentencing [court shall have regard](#) to any relevant opinion.

Slide 14

The sentencing court also has to keep in mind the following factors:

- any relevant statutory provision that applies, including the [presumptions](#) against imprisonment on a person aged 21 or over who has not previously been sentenced to imprisonment or detention
- [the presumption](#) against imposing custodial sentences of [under 12 months](#) and
- the presumption against passing a sentence of [detention on a person aged under 21](#)

These presumptions are all matters of law set by parliament.

Remember our scenario with the 19 year old law student? Think about which of these presumptions apply.

Slide 15

Once the judge has identified the sentencing range, it's time for step three: that is, identifying aggravating and mitigating factors.

Aggravating factors are facts and circumstances which may make the offence more serious for sentencing purposes. Aggravating factors which are integral to the offence and have been taken account of in the initial assessment of seriousness should not be considered again at this step. That would be 'double-counting'.

Mitigating factors include factors personal to the offender, which might lead to a less severe sentence.

The sentencing process [guideline](#) gives some examples of aggravating and mitigating factors which are worth having a look at. Some of these are statutory and must be considered by law and others, although not statutory, may be relevant. Once again, the lists are not exhaustive and the sentencing judge should take into account any relevant aggravating and mitigating factors in each case.

Slide 16

Examples of statutory aggravations that make an offence more serious are that it involves racial or domestic abuse.

Examples of other aggravating factors include:

- the presence of others, for example the children or partner of the victim
- that the offender was operating in a group or gang
- any steps the offender might have taken to prevent the victim reporting the offence

It is for the judge to consider what weight (if any) should be given to any particular factor, including any factors that are not listed in the guideline.

Slide 17

The guideline on causing death by driving lists examples of aggravating and mitigating factors particular to that offence.

For example, aggravating factors include more than one death, and previous convictions; while mitigating factors include providing assistance at the scene, and previous good driving. You can see more in the [guideline itself](#).

Slide 18

Step four is determining the headline sentence.

Following the sentencing process guideline we discussed earlier, having completed [steps 1, 2, and 3](#), the judge should then select the headline sentence. This is the sentence which the judge considers appropriate for the offence before moving on to steps 5-7, which I will talk about in a moment.

When the accused is being sentenced for more than one offence, the judge can give separate sentences for each offence. Or they can impose what is known as a 'cumulo' sentence, which is when the judge gives one single sentence for all of the offences together.

When the offender appears for sentence on more than one offence and the judge decides to impose separate custodial sentences for two or more of the offences, it is up to the judge to decide whether the sentences are to be served concurrently (at the same time) or consecutively (one after the other) or a mixture.

Steps five – seven of the process guideline cover issues which will not necessarily apply in every case, but where they do apply, they should be taken into account in arriving at the final sentence.

Step five relates to taking into account a plea of guilty to an offence. The [law](#) says that the judge must take into account the stage in proceedings at which an offender indicates their intention to plead guilty. Where an offender has pled guilty, a judge will consider reducing the headline sentence. Generally, the earlier the guilty plea is made, the greater the reduction. This can generally be up to a third off the sentence for a plea of guilty at the earliest opportunity. The Council is currently preparing a guideline on sentencing reductions, which will look at that process in more detail, so keep an eye out for that in due course.

Meantime, back to the sentencing process guideline. Step six relates to time already spent in custody. The [law](#) says that any time already spent in custody awaiting trial or sentence in the case should be taken into account when a custodial sentence is being imposed.

Step seven relates to ancillary orders. These are orders which are imposed in addition to a sentence. Some are mandatory where certain offences are involved and others are discretionary depending on the circumstances of the case.

The guideline provides a non-exhaustive list which includes, for example, the forfeiture of a car in a drink driving case; forfeiture of an offensive weapon such as a knife; a non-harassment order; or a victim surcharge.

Step eight is imposing the sentence.

Slide 19

Judges should always set out the reasons for their sentencing decisions. This includes if a judge decides not to follow a guideline. The [law](#) says that judges must have regard to all applicable sentencing guidelines or state their reasons if they decide not to follow them.

Slide 20

I have spoken about the first two general sentencing guidelines. The third general sentencing guideline published by the Council is on [sentencing young people](#). For the purposes of that guideline, a young person is someone who is aged 24 or under at the date of conviction or plea of guilty.

The [guideline](#) mentions the frameworks taken into account in its preparation including the United Nations Convention on the Rights of the Child, and the other overarching sentencing guidelines I have already discussed.

Slide 21

When preparing the guideline, the Council also relied upon independent, academic [research](#) into brain development and its impact on maturity and culpability. The research explains how young people develop physically and psychologically and indicates that the parts of the brain which relate to self-control and the ability to understand the consequences of actions continue to develop until at least the age of 25. This means that, generally, a young person may have a lower level of maturity, and a greater capacity for change and rehabilitation.

Slide 22

Taking this research into account, the guideline emphasises rehabilitation as a primary consideration for sentencing.

The guideline states that the nature and duration of a sentence should be different from that which might be imposed on an older person for a similar offence. This is intended to recognise that a [community based sentence](#) could in some circumstances be more challenging for a younger person than an older one – if, for example, the court considered that a lengthier community programme would be effective.

Slide 23

A judge is not prevented from imposing a custodial sentence on a young person where appropriate, for example for reasons of public safety. But the guideline says that such a sentence should be shorter than one which would have been given to an older person for a similar offence.

The guideline also says that, where judges consider it appropriate, they should fix review hearings held before them in court to monitor the young person's progress. The aim is to try to, as far as possible, increase completion rates and reduce breaches.

Slide 24

The sentencing young people guideline provides for a principle-based and individualised approach. This means that the judge should take into account the personal circumstances and the personal level of maturity of an offender when assessing their culpability. However, the guideline does **not** affect a judge's consideration of the harm caused to a victim when assessing the level of seriousness of an offence.

If you would like some more information on the guideline, there are three [short videos](#) available to watch on the Council website, explaining the key messages of maturity, the individualised approach and rehabilitation.

Slide 25

So, now we've gone through all three general guidelines, let's think about how to apply them to our scenario. We have an offender who is under the age of 25, so the sentencing young people guideline applies to her. The offence guideline on causing death by driving will apply as well. Our offender also pled guilty to the offence.

Taking all of that into account, what sentence would you give her? Has that changed from the sentence you would have given her at the start of the lecture?

The Council asked a practising sheriff what sentence they would have given. Depending on numerous other factors, they would probably have imposed a community payback order with a requirement for unpaid work, and a disqualification from driving for a year. This, of course, is a fictional case, even if it may coincidentally bear any resemblance to an actual one, but I hope it highlights for you some of the many issues sentencing, particularly in these types of cases, may involve.

Slide 26

For more information on what other guidelines the Council is currently preparing see its Annual Report on the [publications page of the website](#). Members welcome views on which topics should be considered for future guidelines and would be happy to hear from you – if you would like to get in touch, please email sentencingcouncil@scotcourts.gov.uk. Please also contact the Council if you have any questions or other comments in relation to sentencing.

Thank you, I hope you have found this lecture useful.