



Bad driving and the justice system Prosecutors and the courts

THIS BRIEFING COVERS:

Prosecution service roles; low conviction rates and leniency; 'careless' v 'dangerous' driving; charging and prosecution transparency; the courts; coroners and inquests.

This briefing argues that the frequency with which apparently 'dangerous' driving results in a conviction for merely 'careless' driving and seemingly derisory sentences or even acquittals is due to inconsistent interpretation and misapplication of the law by prosecutors and the courts (although the variable standards of police investigations are another significant contributor).

Cycling UK believes that changes to the law itself are necessary, as outlined in our companion briefing *The legal framework and sentencing policy*. Similarly, *Compensation for injured cyclists* proposes reforms to the working of civil law.

These briefings are available at www.cyclinguk.org/campaigning/views-and-briefings

HEADLINE MESSAGES

- Injuries to cyclists rarely lead to the prosecution of the driver involved and, when they do, all too often the incident seems to be dismissed or minimised as "just one of those things". This reinforces fears that the roads are lawless, dangerous places for cycling and walking.
- One of the reasons behind this is the difficulty faced by prosecutors and courts when trying to interpret and apply the law consistently. There is also a cultural tendency to dismiss driving that caused obviously foreseeable danger as 'careless', rather than deeming it 'dangerous'.

KEY FACTS

- In law, dangerous driving falls not just "below", but "far below" the standard that would be expected of a "competent and careful driver"; it should also "... be obvious to a competent and careful driver" that the driving would give rise to "danger either of injury to any person or of serious damage to property". Hence the distinction between "dangerous" and "careless" driving is not about the state of mind of the driver (i.e. whether what they did was intentional), but whether their driving objectively caused obviously foreseeable danger.
- The number of people who are killed in road crashes far exceeds the number of drivers who are convicted for causing death by driving. In 2015, there were 1,568 road deaths in England and Wales, but only 122 people convicted of 'causing death by dangerous driving', and 176 of 'causing death by careless or inconsiderate driving'.
- Between 1990 and 2015, counting principal offences alone, the number of people taken to court in England and Wales for causing death or serious injury by driving, or of dangerous or careless driving fell by c72%, with a c77% drop in convictions. It is unlikely that a drop on this scale reflects better driving standards. Even though the number of people killed or seriously injured (KSI) declined by c62% over this same period, this is still significantly less than the decline in the number of people proceeded against or found guilty of bad driving offences.



Cycling UK VIEW

- The prosecution of bad drivers needs to reinforce the message that it is unacceptable to endanger and intimidate other road users, not least cyclists and pedestrians who are disproportionately affected by road crashes.
- Drivers who cause injury or death through reckless behaviour should not be treated more leniently than those who do so through reckless behaviour associated with non-traffic crime.
- The law states that driving is 'dangerous' when "... it would be obvious to a competent and careful driver that driving in that way would be dangerous." All too often, however, prosecutors and courts tend to dismiss such driving as 'careless', and the result is lenient sentencing.
- Prosecutors and courts should understand and apply the current legal definitions of 'dangerous' and 'careless' consistently and correctly. Prosecution policy and guidelines should provide clearer advice on these charges and be drafted accordingly.
- Prosecutors and courts should not take the driver's intentions into account when deciding between a charge of 'dangerous' or 'careless' driving. If the driving in question caused obviously foreseeable danger, it should be irrelevant to the charging decision whether or not the driver meant to cause harm and a 'dangerous' charge should be brought.
- Manslaughter or assault charges should be seriously considered where there is evidence that danger was caused recklessly or intentionally.
- Specifically, looking but failing to see a cyclist at a junction is *inherently dangerous*, and should be prosecuted as such. Not seeing what is there to be seen is clearly below the standard to be expected of a competent and careful driver.
- Both the police and prosecutors should be more open and transparent about how they decide whether to charge a driver or not and, if they do charge, what charges to bring.
- Juries should be clearly directed not just on the definitions of 'careless' and 'dangerous' driving, but also on the Highway Code as it relates to the standard of driving to be expected.
- Courts should make greater use of driving bans, and not routinely let drivers keep their licence on pleas of 'exceptional hardship', i.e. the predictable consequences of their offending behaviour.
- Courts should seriously consider the impact that the sentences they pass may have on the victim of the crime, to make sure that it does not demean their suffering. Whilst Cycling UK does not advocate long prison sentences for dangerous driving offences arising purely from lapses of attention by generally responsible drivers, the courts should nonetheless signal disapproval and protect other road users by considering substantial driving bans.
- Courts should be careful to avoid the appearance of 'victim-blaming' when directing juries in criminal cases. For example, if a driver has failed to see a cyclist, whether or not the cyclist was wearing a helmet is irrelevant.
- Coroners should have sufficient understanding of the Highway Code and road safety issues relating to cycling, so that they can ask witnesses relevant questions and/or permit relevant questions to be asked during inquest hearings.
- Coroners should be more willing to write '*Preventing Further Deaths*' reports in road traffic cases to highlight actions needed to prevent future road fatalities.





BACKGROUND INFORMATION

1. Prosecution services: roles

- **Crown Prosecution Service (CPS - England & Wales):** www.cps.gov.uk

The CPS is responsible for prosecuting criminal cases investigated by the police. It:

- decides whether more serious cases should be prosecuted and keeps all cases under continuous review (the police can decide whether to prosecute in certain cases);
- determines the appropriate charges in more serious or complex cases, and advises the police during the early stages of investigations;
- prepares cases and presents them at court;
- provides information, assistance and support to victims and prosecution witnesses.

In deciding whether to prosecute, the CPS has to determine: (a) whether the evidence is more likely than not to persuade a court, properly directed, to convict for the offence as charged (the 'Evidential Test'); and (b) whether pursuing the case is in the public interest (the 'Public Interest Test').¹

- **The Crown Office and Procurator Fiscal Service (COPFS - Scotland):** www.copfs.gov.uk/

In Scotland, Procurators Fiscal (PFs) are responsible for both investigating and prosecuting serious cases and they have the power to direct the police in their investigations. Once the police have carried out their initial investigation and submitted a report to the COPFS, the local Procurator Fiscal decides if and how to act. This decision is taken in the public interest and there must be sufficient evidence. With respect to road fatalities, the police are not allowed to charge until instructed by the PF.

- **The Public Prosecution Service (PPSNI - Northern Ireland):** www.ppsni.gov.uk/

The PPS is the principal prosecuting authority in Northern Ireland, taking decisions about whether to prosecute in cases investigated by the police. It publishes a *Road Traffic Policy* covering principal road traffic offences.²

2. Prosecutions and convictions for bad driving

Cycling UK view:

- The prosecution of bad drivers needs to reinforce the message that it is unacceptable to endanger and intimidate other road users, not least cyclists and pedestrians who are disproportionately affected by road crashes.
- Drivers who cause injury or death through reckless behaviour should not be treated more leniently than those who do so through reckless behaviour associated with non-traffic crime.

Year-on-year, the number of drivers found guilty of causing death by dangerous or careless driving in England and Wales is much less than the number of people killed on the roads. In 2015, for example, there were 1,568 road deaths,³ but only 122 people convicted of 'causing death by dangerous driving', and 176 of 'causing death by careless or inconsiderate driving'.^{4,5} Furthermore, the number of people taken to court for dangerous and careless driving offences has been dropping for years.



• **England and Wales**

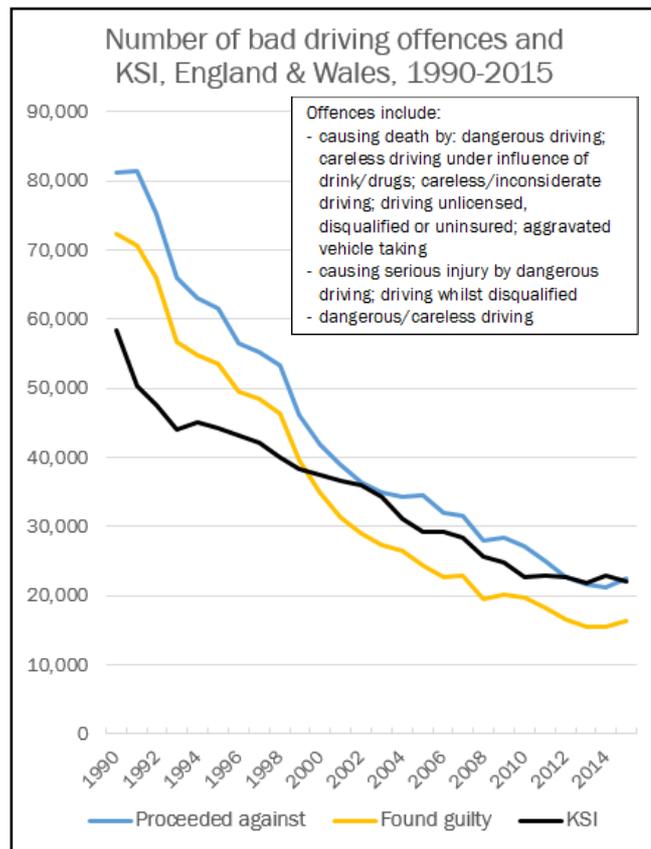
The chart to the right shows a substantial overall drop in both prosecutions and findings of guilt (convictions) for bad driving offences in England & Wales, set against KSI (killed or seriously injured).

Between 1990 and 2015, counting principal offences alone⁶, the number of people taken to court for causing death or serious injury by driving, or of dangerous or careless driving fell by c72%, with a c77% drop in convictions.⁷ (N.B. 'Dangerous' and 'careless' driving convictions may involve only a slight injury, or no injury at all).

It is unlikely that the overall drop from 1990 reflects better driving standards. Even though KSI numbers have declined by c62% over this same period, this is still significantly less than the decline in the number of people proceeded against or found guilty of bad driving offences.

Both proceedings and findings of guilt rose slightly in 2015. Figures for future years may or may not confirm whether this is the start of a trend.

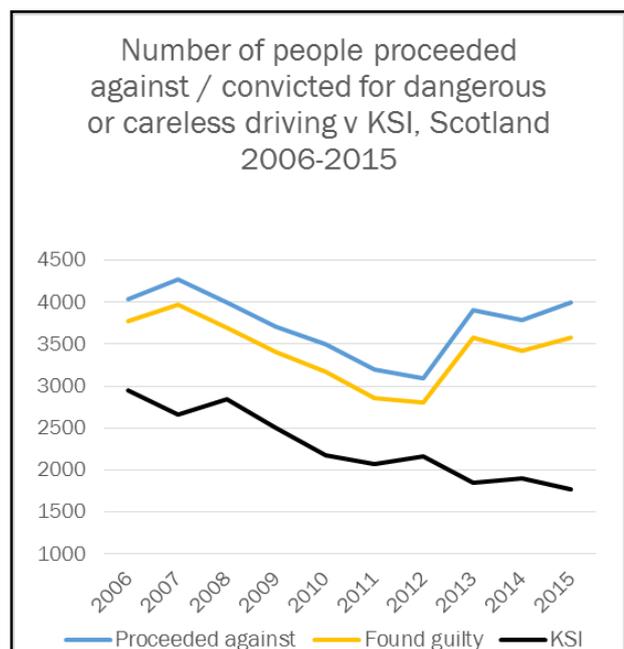
Source: Casualty figures from *Reported Road Casualties GB Annual Reports* (DfT); Criminal justice statistics from Ministry of Justice *Motoring Data Tool* and a Freedom of Information request, December 2016.⁸



• **Scotland**

Over the period 2006/7 to 2015/16, the number of people proceeded against / found guilty of dangerous or careless driving started dropping in around 2008, but rose quite steeply in 2013, falling again slightly in 2014 to about the same level as it was in 2008, and then rising again in 2015 to the levels seen in 2013. KSIs dropped by c40% during this time.

Source: Casualty figures from *Reported Road Casualties Scotland* (Transport Scotland); Criminal justice statistics from *Criminal Proceedings in Scotland* (Scottish Government).⁹





3. 'Careless' v 'Dangerous' driving

Cycling UK view:

- The law states that driving is 'dangerous' when "... it would be obvious to a competent and careful driver that driving in that way would be dangerous." All too often, however, prosecutors and courts tend to dismiss such driving as 'careless', and the result is lenient sentencing.
- Prosecutors and courts should understand and apply the current legal definitions of 'dangerous' and 'careless' consistently and correctly. Prosecution policy and guidelines should provide clearer advice on these charges and be drafted accordingly.

Drivers are commonly prosecuted for 'careless' rather than 'dangerous' driving where it appears, at least from the published description, that most people would describe the standard of driving as 'dangerous'. This drastically limits the range of potential sentences available in the event of a conviction, causing distress to families and victims and, often, public outcry too.

a. Legal definitions

'**Dangerous**' driving means a manner of driving that, when objectively viewed, falls '*far below*' the standard that would normally be expected of a hypothetical '*competent and careful*' driver; and that it would be obvious to a competent and careful driver that driving in that way would be dangerous.

The legal definition also says that 'dangerous' '*refers to danger either of injury to any person or of serious damage to property*'. In other words, if someone drives in a way that could, foreseeably, injure someone or seriously damage property, they are driving 'dangerously' and it follows that they should be prosecuted accordingly. CPS policy and guidelines on prosecuting bad driving should be emphatic on this point, and clearly spell out that 'careless' charges *should not be used if the danger caused would have been obviously foreseeable to a careful and competent driver*. For more on CPS policy and guidelines, see section 3c below.

'**Careless**' driving (or 'driving without due care and attention') means driving simply 'below' (i.e. not '*far below*') the standard of a careful and competent driver. The definition also omits any reference to the driving causing obviously foreseeable danger.

Legal Definitions	
Dangerous driving	"...falls far below what would be expected of a competent and careful driver, and it would be obvious to a competent and careful driver that driving in that way would be dangerous." "[...] "dangerous" refers to danger either of injury to any person or of serious damage to property;"
Source: Road Traffic Act 1988, as amended by the Road Traffic Act 1991. Section 2A.	
Careless driving	"...falls below what would be expected of a competent and careful driver." "A person is to be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving."
Source: Road Traffic Act 1988. Section 3ZA, as amended by the Road Safety Act 2006.	

Note: The *Road Traffic Acts* (1988 & 1991) apply to England, Wales & Scotland, but not to Northern Ireland. The *Road Safety Act 2006* applies to the whole of the UK (England, Wales, Scotland & Northern Ireland).

b. Intentions

Cycling UK view:

- Prosecutors and courts should not take the driver's intentions into account when deciding between a charge of 'dangerous' or 'careless' driving. If the driving in question caused obviously foreseeable danger, it should be irrelevant to the charging decision whether or not the driver meant to cause harm and a 'dangerous' charge should be brought.
- Manslaughter or assault charges should be seriously considered where there is evidence that danger was caused recklessly or intentionally.

By replacing 'reckless' with 'dangerous' driving, the *Road Traffic Act 1991* removed all trace of *mens rea* ('guilty mind', or criminal intent) from the offence. Thus, an act of dangerous driving (as defined in section 3a above) should be treated as 'dangerous' whether the offender was acting wilfully, aggressively, recklessly or made a simple misjudgement.

It follows that an act of dangerous driving should not be dismissed merely as 'careless' just because it was unintentional. Whilst it is right that differences in intentionality should be reflected in *sentencing*, they should not be taken into account when determining the actual offence for which the driver is being *prosecuted*. (Cycling UK's briefing *The legal framework and sentencing* explains this point in more detail: www.cyclinguk.org/campaignsbriefings).

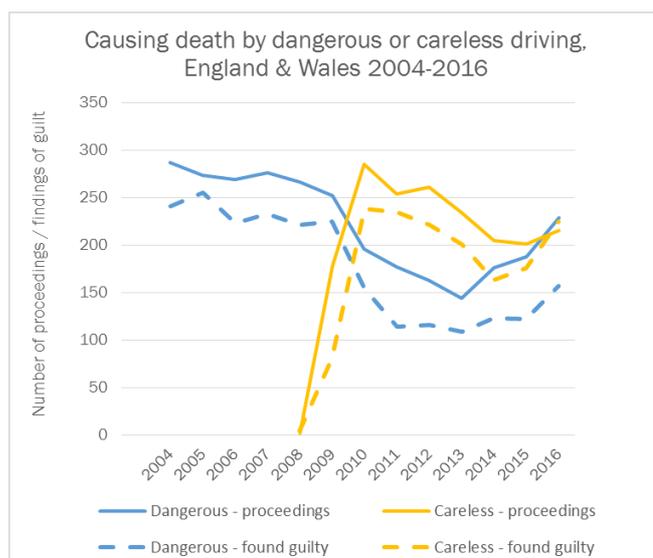
Despite this, prosecutors have often appeared to decide between 'dangerous' and 'careless' charges by considering whether the offence did involve wilful risk-taking or, on the other hand, a simple lapse of attention. In other words, the driver's intention has apparently made a difference to the charge, even though their driving seems to have been clearly 'dangerous' when objectively viewed.

c. The impact of introducing the charge of 'causing death by careless driving' in 2008

In 2008, the Government introduced a new offence of 'death by *careless* driving'.

In the following years, the number of defendants proceeded against for 'death by *dangerous* driving' dropped significantly: in 2008, 266 were proceeded against for this offence, but by 2013, this number had fallen to 144, representing a drop of 46%. (See chart right).

Source: Ministry of Justice Criminal Justice Statistics Overview tables.¹⁰



Arguably, therefore, the new 'death by careless driving' charge effectively downgraded the threshold between 'dangerous' and 'careless' driving from 2008 until 2013, even though the legal definitions did not change. This suggests that prosecution services were not always paying sufficient regard to the correct definitions or applying them consistently, and that driving that caused obviously foreseeable danger became increasingly likely to be dismissed as merely 'careless', an outcome entirely at odds with the need to promote road safety.



However, in 2013 the Crown Prosecution Service (England & Wales) revised its guidance on charging motorists. Over the next three years, the number of people prosecuted for 'death by *dangerous* driving' started to rise and, in 2016, stood at 229, or 14% less than in 2008 (266). Findings of guilt for this charge also started to rise in 2014 following years of decline (although they are still about 29% down since the new charge of 'death by *careless* driving' was introduced).

See next section (3d) for more on the impact of the CPS's revised and improved guidance on charging offending motorists.

d. CPS revised guidelines on prosecuting bad driving offences (2013 - England & Wales)¹¹

Until 2013, CPS prosecution guidelines were, in Cycling UK's view, wrong in law because they did not clearly explain that intentions should not be taken into account when determining a charge.¹²

2013 improvements

- Under "*examples of circumstances that are likely to be characterised as dangerous driving*", the guidelines list: "*failing to have a proper and safe regard for vulnerable road users such as cyclists, motorcyclists, horse riders, the elderly and pedestrians or when in the vicinity of a pedestrian crossing, hospital, school or residential home*".
- The guidelines state: "*It is not necessary to consider what the driver thought about the possible consequences of his actions: simply whether or not a competent and careful driver would have observed, appreciated and guarded against obvious and material dangers*".
- The guidance also says: "*Dangerous driving includes situations [...] where there is a substantial error of judgement, that, even if only for a short time, amounts to driving falling far below the required standard.*" The list it gives of examples of 'dangerous' driving now includes: "*a brief but obvious danger arising from a seriously dangerous manoeuvre. This covers situations where a driver has made a mistake or an error of judgement that was so substantial that it caused the driving to be dangerous even for only a short time.*"

While the word 'manoeuvre' might be interpreted to mean that the above advice only relates to acts such as overtaking or negotiating a junction etc, (and not, for instance, to actions such as running into the back of a cyclist a driver claims they didn't see), at least the guidelines make it clear that prosecutors should only consider the driving *objectively* and judge it against what would be expected of a competent and careful driver. In other words, the advice guards against the temptation to take the driver's intentions into account.

The case law cited to illustrate this point is also useful: two of the examples clearly indicate that intentionality is not a relevant factor, (e.g. the case of an offender who unintentionally pressed the accelerator instead of the brake).

Concerns about the guidelines

- Unfortunately, the revised guidelines did not include the driver's state of mind in the list of "*Factors that are not relevant in deciding whether an act is dangerous or careless*". This addition would have been particularly welcome, making it absolutely clear that 'intentions' have no place in deciding whether a driver should be charged with 'dangerous' or 'careless' driving.
- Cycling UK is also concerned by the CPS's failure to remove the suggestion that 'emerging from a side road into the path of another vehicle' may be 'careless' driving – see 3e below). This, we argue, is *dangerous* driving.

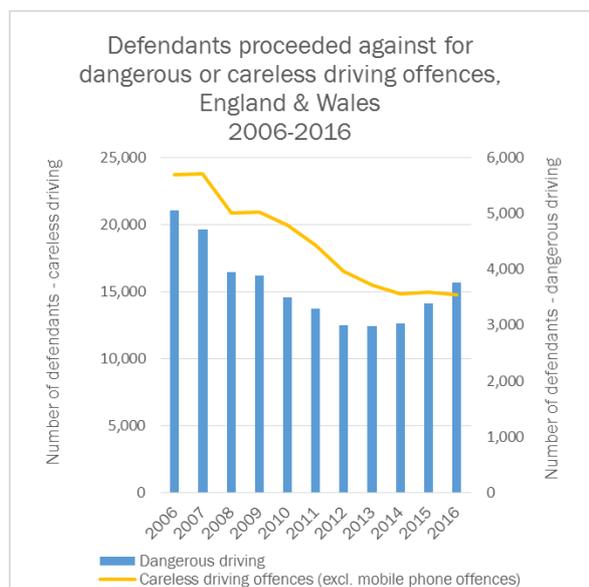
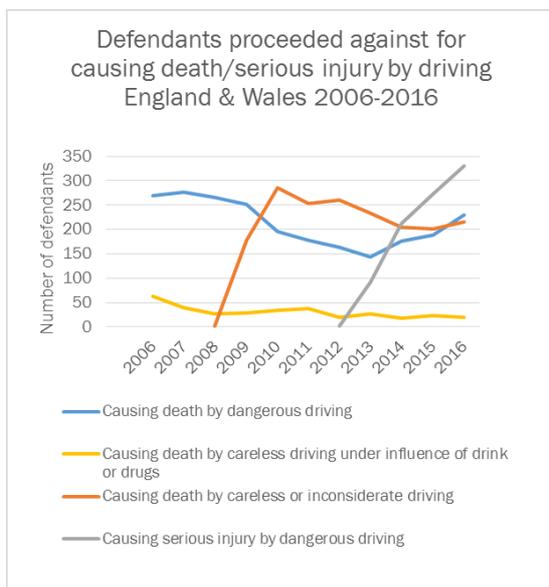
Impact of the revised guidelines

As mentioned above (3c), the introduction of the charge of 'death by *careless* driving' in 2008 led to a noticeable decline in the number of people being taken to court for 'death by *dangerous* driving' over the next few years.



However, prosecutions for ‘death by *dangerous driving*’ started to rise again from 2014, with 59% more people appearing in court on this charge in 2016 than they did in 2013 (with a 44% increase in findings of guilt). In contrast, in 2016 proceedings for ‘death by *careless driving*’ were 8% less than in 2013 (although there were 7% more of them in 2016 than in 2015 - 215 as opposed to 201).

In non-fatal cases, proceedings for ‘*dangerous driving*’ have also gone up since 2013, but at +26% the increase is not as marked as that seen in fatal cases. Findings of guilt for non-fatal *dangerous driving* have, however, gone up by 45%. Proceedings for ‘*careless driving*’ have dropped, but only by 5%.



Whether the increase in the number of defendants being prosecuted / convicted for ‘*dangerous driving*’ since 2013 is the start of a trend remains to be seen, but it may be that the revisions to the CPS guidelines are helping courts understand the difference between ‘*dangerous*’ and ‘*careless*’ driving.

Nevertheless, while this may show that better guidelines do have welcome impact, on their own they are unlikely to solve the wider problems identified in this briefing. Hence, Cycling UK will continue to press for changes to the statutory definitions and penalties for these offences as part of the Government’s ongoing review of road traffic offences and penalties. See our Legal Framework briefing for more: www.cyclinguk.org/campaigning/views-and-briefings

Traffic crime v non-traffic crime: A 2007 study suggested that, although those convicted of killing or injuring cyclists were not treated more leniently than those who had killed or injured other road user types, they were treated more leniently than people who killed or injured through non-traffic crime (e.g. assaults). The research found that: “*Nationally four times as many [road traffic incident (RTI)] fatalities occur as homicides in Britain, yet there are fewer convictions for lethal motoring offences than homicide offences. Convicted drivers typically receive lesser sentences than other comparable criminals, and often receive a monetary fine with no detention sentence at all.*”

Voelcker J. *A Critical Review of the Legal Penalties for Drivers Who Kill Cyclists or Pedestrians*. School for Policy Studies, University of Bristol. April 2007. See www.jake-v.co.uk/content/cycling.php

Manslaughter/Assault: Where evidence suggests conscious or reckless risk-taking, or intent to cause danger, intimidation or injury, prosecutors should consider manslaughter or assault charges.



e. Looking but failing to see

Cycling UK view: Specifically, looking but failing to see a cyclist at a junction is *inherently dangerous*, and should be prosecuted as such. Not seeing what is there to be seen is clearly below the standard to be expected of a competent and careful driver.

Looking but failing to see a cyclist at a junction is inherently *dangerous*, not *'careless'*. However, this act of bad driving in particular is often dismissed as *'careless'* because it may have been unintentional (see 3b *'Intentions'* above).

Unfortunately, the CPS guidelines (see 3d above) still list *'emerging from a side road into the path of another vehicle'* as *'careless'* driving, even though Cycling UK urged that this should be categorised as *'dangerous'* during consultations on revisions to the advice both in 2007 and 2013.

In Britain each year (2011-15), the police reckoned that *'Failed to look properly'* contributed to 42%-44% of the collisions they attended (and for which they reported one or more *'contributory factors'*); and they identified the factor more frequently than any other.¹³

4. Investigations, charging and prosecution transparency

Cycling UK view: Both the police and prosecutors should be more open and transparent about how they decide whether to charge a driver or not and, if they do charge, what charges to bring.

a. Police referrals to the CPS

For many motoring offences, the police have the authority not to pass on a case to the CPS. As they frequently exercise this power, it is often the police rather than the CPS who decide whether a prosecution should be brought. A significant number of cases are dropped as a result.

Each police force is independent, however, so their approach to road traffic crime varies.

Case study: in 2016, Cycling UK's Cyclists' Defence Fund (CDF) launched a private prosecution against the driver whose car knocked cyclist Michael Mason from his bicycle in 2014, causing injuries from which he died two weeks later. The police investigated the collision, but decided against referring the case to the CPS. Following pressure, the police said they would refer the case to the CPS after all, but then reverted to their original decision not to do so. For more see: www.cyclinguk.org/press-release/2016-10-11/trial-date-set-crowdsourced-private-prosecution-driver-accused-causing-cycl

b. Police investigations

All too often, the actual (or assumed), outcome of the collision makes too much difference to how much energy and resource the police put into their investigations. If the police initially believe that the victim's injuries will not prove fatal, then their response is likely to fall well short of the standards set in their official guidance *Investigating Road Deaths*¹⁴, even though (and despite its title), it is meant to cover life-changing injuries too.

Sentencing is likewise over-dependent on whether or not a victim happens to die, and may also influence police decisions over how to conduct their investigations. The maximum penalty for causing



death by dangerous driving is 14 years, whereas it is only five years for causing serious injury by dangerous driving; for causing death by careless driving, the maximum sentence available is five years, but for non-fatal careless driving, the maximum penalty is a fine.

Inevitably, if the police don't gather enough evidence in a case, prosecutors cannot realistically pursue it. This has particularly serious repercussions when, contrary to the police's initial expectations, the victim subsequently dies.

- For more on the police's crucial role in charging and strengthening prosecution potential, see www.cyclinguk.org/campaigning/views-and-briefings/traffic-police-and-other-enforcement-agencies

c. More transparency over charging decisions

In the past, lack of information (e.g. about court dates or key charging decisions) has often made it difficult for road crash victims and their families to challenge anything they believe to be contentious or legally incorrect (e.g. a decision not to prosecute, or to downgrade the prosecution from a 'dangerous' to a 'careless' driving offence).

However, following pressure from Cycling UK, RoadPeace and others, the Ministry of Justice made changes to the *Victims' Code* (England & Wales) at the end of 2015, which entitle victims to information about prosecution decisions, case progression and support services.¹⁵

More generally, it is far from clear how well the prosecution services fulfil their stated roles. For example, the road crash victims' charity RoadPeace has flagged up several cases where prosecutions have failed simply due to poor management by the CPS (e.g. failure to follow up police or other witnesses or to ensure they are notified of and available to attend court dates). www.roadpeace.org

5. Courts

There are a number of different courts at different levels empowered to try cases of bad driving. All cases start off in the magistrate's court, but where the case is actually tried depends on the seriousness of the offence and the court's sentencing powers:

- More serious offences are 'indictable-only', e.g. manslaughter and 'causing death by dangerous driving', and can only be tried by jury in the higher courts (e.g. the Crown Court in England).
- Less serious offences (e.g. careless or inconsiderate driving) or low level offences (e.g. speeding, traffic-light or documentation offences) can only be heard in the lower (e.g. magistrate's) courts and now in dedicated local 'traffic courts', where there are no juries.
- Middle-ranking offences (e.g. causing serious injury by dangerous driving, dangerous driving and causing death by careless driving) are triable 'either way', in which case the relevant prosecution service decides the most appropriate court. If they wish to be tried by jury, 'either way' defendants can also elect to be sent to the Crown Court.

Appeals are heard in higher courts. The last port of call in England, Wales and Northern Ireland is the Supreme Court of the United Kingdom; or the High Court of Justiciary in Scotland, unless the matter involves a human rights law issue, in which case an appeal to the Supreme Court is possible.

For more on the court structure and powers, see: www.hmcourts-service.gov.uk (England and Wales); www.scotcourts.gov.uk/ for Scotland; www.courtsni.gov.uk/ for Northern Ireland.



a. Jurors

Cycling UK view: Juries should be clearly directed not just on the definitions of 'careless' and 'dangerous' driving, but also on the Highway Code as it relates to the standard of driving to be expected.

Juries always need clear guidance on the legal definitions of 'careless' and 'dangerous' driving (see section 3 above), and on relevant sections of the Highway Code. This should help prevent their personal attitudes and experience swaying their judgement, while making it easier for them to come to a decision.

In bad driving cases, after all, personal attitudes are more than likely to come into play. Jurors are probably drivers themselves (rather than, say, burglars) and, when they see another driver in court, may well think: *"There but for the grace of God go I."* Equally, they may not necessarily be competent or careful drivers or recognise their own driving deficiencies, and entertain their own highly subjective concepts of what substandard driving means. As such, jurors tend to identify with the motorist, play safe and, when faced with a choice between 'dangerous' and 'careless' charges, may lean too much towards the lesser charge, even if it is clear that the driving in question caused obviously foreseeable danger.¹⁶ They might even decide not to convict, as happened in the case of Michael Mason despite the lack of any explanation as to why the driver failed to see what was there to be seen (see page 9).

The tendency of jurors to act leniently towards drivers is one of the reasons why the prosecution services may prefer 'careless' to 'dangerous' charges, as they are more likely to secure a conviction.

b. Disqualification / court discretion / offenders' pleas of hardship

Cycling UK view: Courts should make greater use of driving bans, and not routinely let drivers keep their licence on pleas of 'exceptional hardship', i.e. the predictable consequences of their offending behaviour.

Cycling UK believes that bans are a particularly effective penalty. Not only do they remove drivers who endanger others from the road, but also send out a strong message that bad driving is unacceptable.

Nevertheless, figures clearly suggest a significant drop in the number of offending drivers who are sentenced to a ban, while thousands who have totted up twelve points within three years and should face an automatic six-month ban, do not lose their licences either:

- The number of people disqualified from driving directly by the courts dropped from 155,484 to just 62,822 – a fall of 60%.¹⁷ The number of motorists found guilty of offences for which the courts could directly disqualify them also fell during this period, but by much less (27%).¹⁸
- DVLA has confirmed to Cycling UK that, as of January 2017, there were 9,909 drivers still able to drive even though they had amassed 12 points or more on their licence increases.¹⁹

'Exceptional hardship': one problem is that magistrates can use their discretion over banning defendants who plead 'exceptional hardship'. Far too many courts accept such pleas, even though the hardship in question may be nothing more than inconvenience (e.g. not being able to drive children to school, or get to work), and was a predictable consequence of repeat offending. Cycling UK believes that this issue should be addressed as part of the Government's ongoing review of road traffic offences and penalties.

For more, see our 'Legal framework' briefing: www.cyclinguk.org/campaigning/views-and-briefings



Case study: A particularly serious case of a driver who had totted enough points to be banned but was allowed to keep his licence, is that of Christopher Gard. Six weeks before he drove into and killed cyclist Lee Martin whilst texting, Gard had successfully appealed against losing his licence on the grounds that it would cause his family 'exceptional hardship'. This clearly bore more weight with the magistrate than his six previous convictions for driving whilst using a mobile phone, his accumulation of over 12 points, and the fact that he had twice avoided convictions and points by attending a driver awareness course.

www.cyclinguk.org/news/20161115-groundhog-day-gard-texting-driver-pleads-leniency

c. Sentencing / demeaning the victim

Cycling UK view: Courts should seriously consider the impact that the sentences they pass may have on the victim of the crime, to make sure that it does not demean their suffering. Whilst Cycling UK does not advocate long prison sentences for dangerous driving offences arising purely from lapses of attention by generally responsible drivers, the courts should nonetheless signal disapproval and protect other road users by considering substantial driving bans.

The prospect of condemning a fellow driver makes juries shy away from tough penalties, especially when the result may be a prison term (see 5b above). As a result, the courts are often criticised for demeaning the victim by passing what to them/their family appear to be lenient sentences in serious or (worse still) fatal injury case.

Cycling UK believes the solution is to make much greater use of driving bans (see 5b above) in all cases.

Longer prison sentences should be reserved, rightly, for those who present an ongoing danger, i.e. whose driving shows evidence of reckless or dangerous intent, or who have breached previous driving bans. For more on bans as a sentencing option, see Cycling UK's 'Legal framework' briefing: www.cyclinguk.org/campaignsbriefings.

This change of policy could be implemented without amending the current legislative framework. However, our briefing on the legal framework also shows how the above principles could be implemented more fully through reform of the framework and consequent revisions to sentencing guidelines.

d. Blaming the victim

Cycling UK view: Courts should be careful to avoid the appearance of 'victim-blaming' when directing juries in criminal cases. For example, if a driver has failed to see a cyclist, whether or not the cyclist was wearing a helmet is irrelevant.

Blaming the victim for the outcome of a clear-cut driving offence is unacceptable. In criminal cases, whether or not an injured cyclist was wearing a helmet or high-viz clothing, for example, should not influence the scale of the penalty.

Case study: In 2008, Denis Moore was driving the car that killed cyclist James Jorgensen on a roundabout. He admitted causing death by dangerous driving and his solicitor acknowledged that his client had suffered a 'momentary lapse of concentration'. Without hearing any evidence about the effectiveness of helmets, or whether one would have made any difference to Mr Jorgensen's injuries, the judge said that the victim's helmetless state was a 'mitigating factor'.

Mitigating factors should relate to the commission of the offence, not its outcome. Yet, no evidence was presented to the court to suggest that Mr Jorgensen's lack of a helmet contributed to the commission of the offence of 'causing death by dangerous driving' (e.g. that the lack of a helmet was contributory factor to the causation of the 'causing death' element of the offence).

Nevertheless, Moore's sentence was reduced accordingly. He received 24 weeks in jail, suspended for 12 months, a three month electronic tagging order, and a two-year driving ban, followed by an extended test.

6. Coroners and Inquests

Cycling UK view:

- Coroners should have sufficient understanding of the Highway Code and road safety issues relating to cycling, so that they can ask witnesses relevant questions and/or permit relevant questions to be asked during inquest hearings.
- Coroners should be more willing to write '*Preventing Further Deaths*' reports in road traffic cases seriously to highlight actions needed to prevent future road fatalities.

The coroner is a doctor or legal professional responsible for investigating deaths in particular situations, including road fatalities.

An inquest is a legal investigation into the causes and circumstances of a death, but *not* an inquiry into who is liable. It is held in public, sometimes with a jury, by a coroner. Relatives may attend and ask questions of witnesses, but only about the medical cause and circumstances of the death. They can also ask a lawyer to represent them, something that is recommended in the case of a road death that could lead to a claim for compensation.

Unfortunately, coroners' experience and understanding of road deaths varies, and they do not always allow witnesses to be questioned. However, coroners can – and some do – make a vital contribution to reducing future risk to others through their inquiries and making good use of their duty to write reports to alert the relevant authorities to lessons that need to be learnt from the cases that come before them.²⁰ In the past, such reports have been discretionary, but since 2013 Parliament has imposed a duty on coroners to produce 'Preventing Further Deaths' (PFD) reports where concern is identified.

A PFD report is a recommendation, sent to a person or organisation that the coroner believes has the power to take action. The coroner does not specify what the action should be, but the recipient usually has 56 days to respond detailing the action taken or to be taken, whether in consequence of the PFD or otherwise, and the timetable for it. Equally, if they propose to take no action, they must explain why. Unfortunately, however, recipients do not always respond. For example, in 2014, a coroner in the case of a cyclist who died following contact with tramlines in Croydon, wrote to the London Borough outlining her concerns. No response had been recorded by June 2017.²¹

The Chief Coroner publishes guidance on PFDs (including what constitutes 'concern'), uploads them online and produces a bi-annual summary of them to ensure that the wider implications are disseminated.²² For more on coroners, see www.roadpeace.org/resources/

POLICY BACKGROUND

Offences: *The Road Traffic Act 1988* (RTA), as amended by the *RTA 1991* and by the *Road Safety Act 2006* (RSA) defines bad driving offences.

Much of the RTA 1991 followed the recommendations of the *North Report*, which advised the Government to base bad driving offences more firmly on the actual standard of driving (dangerousness), than on the driver's attitude (recklessness).²³ As a result, the earlier offence of 'reckless driving' was replaced by 'dangerous driving', with a corresponding change to the 'causing death by ...' equivalent. 'Careless driving' remained unchanged.

Lord North quite reasonably saw no need for an offence of 'causing death by careless driving', as it was hard to conceive of situations where death would be caused by driving which gave rise to danger that would not be "obvious to a competent and careful driver".

However, the persistent failure of prosecutors and courts to prosecute and convict for 'dangerous' offences in accordance with Lord North's intentions, frequently led to derisory sentences (typically £100-£500) being handed down in the magistrates court because the offence was deemed to be 'careless' instead. Inevitably, this caused great distress to victims, particularly when the fact that someone had died was not even mentioned in court.

In response, the *Road Safety Act 2006* introduced the new offence of 'causing death by careless driving', which came into effect in August 2008. Although well-intentioned, the effect of this change (at least in the five years following) was simply been to lower the threshold between dangerous and careless offences – see 3d above.

The offence of 'causing serious injury by dangerous driving' was introduced under Section 143 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, which amended the RTA 1988.

N.B the two RTAs apply to England, Wales and Scotland, but not to Northern Ireland. The RSA 2006 applies to the whole of the UK.

Prosecutions: CPS policy on prosecuting bad driving offences and Sentencing Council guidelines on the sentencing of bad driving offences involving death (*Guideline on Causing Death by Driving*²⁴), were both updated in the aftermath of the changes in the RSA 2006.

Cycling UK's views on CPS advice on prosecuting bad driving is explained in 3d.





CASE STUDIES

Cycling UK's Road Justice campaign website lists many cases of derisory sentences arising from cases where the driver was prosecuted merely for a 'careless' driving offence - www.roadjustice.org.uk. Here are just a few examples (incident date given in title):

Cyclist killed in Bury: driver pleads guilty to causing death by 'careless' driving (23/3/11): The driver was sentenced to 160 hours community service + 18-month ban. The judge noted that cyclist Bernard Parkes, 64, wasn't wearing a helmet and had shopping on his handlebars.

Uninsured driver who caused death of cyclist on A5 by 'careless' driving while adjusting radio receives suspended sentence and fine (20/3/11): The uninsured driver who killed 43-year-old cyclist Robert Gregory was given a six-month suspended sentence, 200 hours of unpaid work, a 15-month driving disqualification for each of the two offences (to run concurrently) and was fined £350 with a £15 victim surcharge. He admitted causing death by 'careless' driving, and that he was adjusting the radio at the time of the collision.

Driver aged 17 with previous speeding conviction who killed former British Cycling coach Rob Jefferies pleads guilty to causing death by 'careless driving'; receives community sentence and £85 fine (26/5/11): The driver was sentenced on 13th Jan 2012, to 200 hours of community service and an 18-month driving ban after admitting causing the death by 'careless' driving of a well-known cycling coach.

Liverpool businessman pleads guilty to 'causing death by careless driving' of top Irish cyclist, David McCall (August 2008): Michael Croome (then aged 27) was sentenced for five years on conviction of causing the death by dangerous driving of David McCall, 46, a former Commonwealth medal-winning cyclist. However, he appealed his conviction, apparently on the grounds that the court had not considered the alternative verdict of causing death by 'careless' driving. He pleaded guilty to the latter offence on 13th December 2011, admitting he was rushing to catch a plane. He had two previous speeding convictions and a careless driving conviction, and has been caught speeding on two further occasions since causing David McCall's death.

Red-light running driver pleads guilty to causing death by 'careless' driving (29/9/10): Driver Brian Creasey was jailed for 20 weeks in August 2011, after pleading guilty to causing the death of 53-year-old cyclist Ian Hammell on the A59. Creasey admitted running a red light.

'Careless' driver gets community sentence for A435 cyclist death (4/8/10): The driver was given a two-month community order, 200 hours of unpaid work and £110 costs after admitting causing the death by 'careless' driving of 52-year-old cyclist Cath Ward on the A435. She was a well known member of the Solihull Cycling Club.

Lorry driver receives 100 hour community sentence and a one-year driving ban for killing 89-year-old cyclist Vera Chaplin in Essex (August 2010).

Driver receives 100 hour community sentence for killing 85-year-old cyclist Barbara Taylor in Blackpool: The judge noted that she wasn't wearing a helmet.

¹ CPS. *The Code for Crown Prosecutors*. January 2013. www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf

² PPSNI. *Road Traffic Policy*. 2010. <http://www.ppsni.gov.uk/SiteDocuments/PPS%20Press%20Office/PPSNI%20TRAFFIC.pdf>

³ DfT. *Reported Road Casualties Great Britain 2015*. September 2016. Table RAS30032

<https://www.gov.uk/government/collections/road-accidents-and-safety-statistics>

⁴ Ministry of Justice *Motoring Data Tool December 2015*. May 2016.

<https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly>

⁵ This is the case even if the (typically) fifth of all road fatalities that result from a 'single-vehicle' incident (i.e. where no other vehicle was involved, e.g. runs off-road, colliding with debris/animals etc.) are subtracted.

⁶ Excluding lesser driving offences with which the same defendant may have been charged/convicted.

⁷ In fact, according to data published in a DfT consultation on road safety compliance (Nov 2008), proceedings and convictions for careless, dangerous, and death by dangerous driving had been dropping at least from 1985. See

<http://webarchive.nationalarchives.gov.uk/+/http://www.dft.gov.uk/consultations/closed/compliance/roadsafetyconsultation.pdf>

⁸ Casualty statistics: DfT annual *Reported Road Casualties Great Britain*. 1990-2015

<https://www.gov.uk/government/collections/road-accidents-and-safety-statistics> (Table RAS 40007), minus casualty data from *Key Reported Road Casualties Scotland 2015*, Table 2, <http://www.transport.gov.scot/statistics/road-casualty-statistics/key-reported-road-casualties-scotland-all-editions>; Criminal Justice statistics: *Ministry of Justice Motoring Data Tool December 2015*. May 2016. <https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly>; FoI request made by Cycling UK to MoJ for principal offence figures 1990-2004, answered 16 December 2016.

⁹ Transport Scotland. *Reported Road Casualties Scotland 2015*. Oct 2016.

<https://www.transport.gov.scot/publication/reported-road-casualties-scotland-2015/> / Scottish Government. *Criminal Proceedings in Scotland 2015-16*. Tables 4a & 4b. January 2017.

<http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/DatasetsCrimProc/crimproc201415>

¹⁰ Ministry of Justice. *Criminal Justice Quarterly Statistics December 2016* (May 2017) and *December 2014* (May 2015). Tables A6.1 & A6.2 and A7.1 & A7.2 respectively.

<https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly>

¹¹ The CPS's Road Traffic Offences - *Guidance on Charging Offences arising from Driving Incidents* (2013), is a merger of two previous CPS publications *Guidance on Prosecuting Cases of Bad Driving* and the *Policy for Prosecuting Cases of Bad Driving* (both published in 2007). New guidance at:

http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_guidance_on_prosecuting_cases_of_bad_driving/

¹² With the support of the CDF (www.cyclistsdefencefund.org.uk), Cycling UK challenged the CPS guidelines (England & Wales) adopted in 2009, arguing that they were an incorrect statement of the law. The CPS defended this case merely by arguing that their guidelines did not purport to be a correct statement of the law anyway. The 2013 revisions have gone some way to allaying some of our concerns about them. See also RoadPeace briefing at:

http://www.roadpeace.org/resources/RoadPeace_CPS_guidance_2013_summary.pdf

¹³ DfT. *Reported Road Casualties Great Britain 2015*. September 2016. Table RAS 50001. (Link above)

¹⁴ *The Authorised Professional Practice on Investigating Road Deaths* (College of Policing) superseded ACPO's *Road Death Investigation Manual* (RDIM) in 2014

<http://www.app.college.police.uk/app-content/road-policing-2/investigating-road-deaths/>

¹⁵ Ministry of Justice. *Code of Practice for Victims of Crime*. Oct 2015.

<https://consult.justice.gov.uk/digital-communications/victims-code/results/code-of-practice-for-victims-of-crime.pdf>

¹⁶ Cunningham S. *The reality of vehicular homicides: convictions for murder, manslaughter and causing death by dangerous driving*. *Criminal Law Review*. September 2001: "a problem inevitably arises from what is meant by a 'competent and careful' driver. In practice the competent and careful driver will be those twelve drivers sitting on the jury."

¹⁷ Ministry of Justice. *Criminal Justice Statistics Quarterly Dec 2016*. May 2017. Overview Tables A.6.5A.

www.gov.uk/government/collections/criminal-justice-statistics-quarterly

¹⁸ Ministry of Justice. *Criminal Justice Statistics Quarterly Dec 2016*. May 2017. Overview Table A.6.2 (link above).

¹⁹ DVLA answer to a Freedom of Information follow-up request made by Cycling UK, June 2017.

²⁰ For example, following the inquest into the death of two cyclists in London (2011 and 2013), the Coroner queried the safety of the cycle superhighways. http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/22_10_13_cycling.pdf

²¹ PFD report following the inquest touching the death of Roger De Kerk.

<https://www.judiciary.gov.uk/wp-content/uploads/2014/11/de-Klerk-2014-0448.pdf>

²² PFDs replaced 'Rule 43' reports in 2013. Until then, coroners had the discretion to make a report (rule 43 of the *Coroners Rules 1984*), but Parliament upgraded this to a duty where concern is identified (*Coroners and Justice Act 2009* with Reports on Action to Prevent Future Deaths ('reports') under paragraph 7, schedule 5, of the 2009 Act and regulations 28 and 29 of the *Coroners (Investigations) Regulations 2013*). Guidance on PFDs has been issued by the Chief Coroner:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/coroners/guidance/guidance-no5-reports-to-prevent-future-deaths.pdf>

²³ DoT and Home Office, *Road Traffic Law Review Report*, 12 April 1988.

²⁴ Sentencing Council. *Causing death by driving: definitive guideline*. July 2008.

http://sentencingcouncil.judiciary.gov.uk/docs/web_causing_death_by_driving_definitive_guideline.pdf