CRIMINAL LAW SEMINAR

DEVON CHAMBERS
www.devonchambers.co.uk

23 September & 01 October 2014

Causing Serious Injury by Dangerous Driving and Causing Death by Driving: Unlicensed, Disqualified or Uninsured Drivers
Piers Norsworthy

Road Traffic Offences and Perverting the Course of Justice
Sally Daulton

Developments in Death by Dangerous/Careless Driving
Rupert Taylor

Road Traffic Offending and Civil Liability
Scott Horner

CPD reference: DHF/DECH

Devon Chambers
3 St Andrew Street, Plymouth, PL1 2AH
DX 8290 PLYMOUTH 2
Tel: 01752 661 659
Fax: 01752 601 346
www.devonchambers.co.uk
clerks@devonchambers.co.uk

CAUSING SERIOUS INJURY BY DANGEROUS DRIVING AND CAUSING DEATH BY DRIVING: UNLICENCED, DISQUALIFIED OR UNINSURED DRIVERS

Piers Norsworthy

Piers Norsworthy

Email address: piersnorsworthy@devonchambers.co.uk
Core Practice Area: Crime
Call: 2001
Inn: Lincoln's Inn
Education: The University of Exeter
Appointments: Devon Chambers' Head of Crime, The Western Circuit Representative for Devon and Cornwall 2008-2013, Devon Chambers' Criminal Bar Association Representative (2013-)
Memberships: Criminal Bar Association, The Western Circuit.

Piers practises Criminal Law. Almost all of Piers' work is for the defence. He regularly undertakes cases involving, amongst other areas, murder/manslaughter, death by dangerous/careless driving, arson, firearms, human trafficking, serious violence, all aspects of drugs possession and supply, fraud and regulatory and disciplinary offences..

Road Traffic Offences
Piers is a specialist in road traffic offences especially death by dangerous/careless driving. Piers possesses an LGV C+E licence (aka HGV Class One) permitting him to drive articulated lorries and has been instructed to represent lorry drivers who are involved in serious collisions during the course of their employment.

Court Martial
Piers also undertakes all forms of Criminal Law before the Court Martial.

Tribunals
Piers has also undertaken work before Sporting Disciplinary Tribunals and the Care Standards Tribunal (list 99).

Family Law
Piers will also undertake work in the Family Courts particularly in cases that call for the questioning of expert witnesses for example in fact finding hearings.

Judicial Review
As matters relating to trial on indictment cannot be the subject of Judicial Review such applications are rare for most criminal practitioners. However, Piers has appeared in the High Court making an application in order to correct an error of the Crown Court and the Prison Service and to seek a rehearing for a Defendant who was not given an opportunity to be heard.

Direct Public Access
Piers is authorised to undertake work in accordance with the Public Access Scheme which means that members of the public can instruct Piers directly. For further details please contact one of Devon Chambers' Clerks.

Private Clients
Piers has built up a substantial practice of private client work. With the ever growing restrictions upon legal aid, Defendants are increasingly looking to instruct a barrister on a private basis. Piers' Clerks will be happy to discuss all aspects of fees in order that clients fully understand how much their case will cost them.

Across the Country
Whilst Piers is based in Plymouth he is happy to travel, and frequently does so, throughout the country in order to represent Defendants wherever their case may be heard.

Notable or reported cases

Notable Cases
Regina v. C [2014] Defence of a man charged with murder.

Regina v. C-H [2014] Defence of a young man charged with causing death by careless driving whilst intoxicated.

Regina v. W [2014] Defence of a man charged with murder.

Regina v. J [2013] Defence of a man originally charged with attempted murder.

Regina v. F [2013] Defence of a man charged with causing death by careless driving whilst intoxicated.

Regina v. R [2013] Defence of a man charged with conspiracy to supply in excess of a million pounds worth of amphetamine.

Regina v. G [2013] Defence of a man charged with murder.

Regina v. D [2012] Defence of a man charged with murder, whilst a serving Marine.

Regina v. H [2011] Defence of a man charged with murder by poisoning.

Regina v. W [2011] Causing death by careless driving.

Regina v. C [2011] Defence of a man charged with causing death by dangerous driving, whilst driving his lorry. The impact of his diabetes as a potential defence was a significant consideration.

Regina v. D [2011] Defence of a man charged with conspiracy to supply Class 'A' drugs. The prosecution case was that the conspiracy was as a multi million pound operation.

Regina v. R [2010] Defence of a young man charged with arson being reckless as to whether life was endangered. The main issue concerned the impact of prescribed drugs upon his state of mind.

Regina v. M [2009] Defence of a man charged with murder by stabbing. Provocation was argued in order to commute the offence to one of manslaughter.

Regina v. L & T [2007] Prosecution of two men charged with the murder of a man by drowning.

Reported Cases
Regina v. D (and Others) [2013] Before the Court Martial Appeal Court and the Administrative Court (Judicial Review), regarding the continuation of an Anonymity Order for a Defendant..

Regina (on the Application of Webb) v. Swindon Crown Court and Secretary of State for Justice [2011] Judicial Review in order to correct an error of both Swindon Crown Court and the Prison Service regarding the length of time the Applicant should be recalled to prison.

Regina v. Purdy [2007] Appeal against conviction on the grounds of an error in the Learned Judge's summing up to the jury.

Regina v. Marron [2006] Appeal against conviction on the grounds of the appearance of bullying during the jury's deliberations.

Other Interests

The Countryside, Rugby and Politics.

Section 1A Road Traffic Act 1988 "Causing Serious Injury by Dangerous Driving"

In force from: 3rd December 2012

1. This new offence was introduced to "ensure that the criminal law is fully effective in addressing dangerous driving and its all too often appalling consequences".[1]

2. It was intended to fill the gap between dangerous driving and offences of causing death by dangerous driving.

3. The Government did "not agree with those who consider[ed] that the maximum penalty for dangerous driving should be raised at large."[2]

4. Section 143 of LASPO[3] created this new offence:

> **"143 Offence of causing serious injury by dangerous driving**
>
> (1) The Road Traffic Act 1988[4] is amended as follows.
>
> (2) After section 1 insert—
>
> **"1A Causing serious injury by dangerous driving**
>
> (1) A person who causes serious injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.
>
> (2) In this section "*serious injury*" means—
>
> (a) in England and Wales, physical harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861, and

[1] Mr. Crispin Blunt, The Parliamentary Under-Secretary of State for Justice, 13th October 2011.
[2] Supra.
[3] Legal Aid, Sentencing and Punishment of Offenders Act 2012.
[4] "The Act"

(b) in Scotland, severe physical injury."

(3) In section 2A (meaning of dangerous driving) in subsections (1) and (2) after "sections 1" insert ", 1A".

(4) Section 1A inserted by subsection (2) has effect only in relation to driving occurring after that subsection comes into force."

5. Subsections 5 and 6 deal with the maximum sentences:

Summarily: [6 months'] imprisonment and or a fine of £5,000.00.

On indictment: 5 years' imprisonment and or a fine of £10,000.00.

Endorsement: Obligatory. 3-11 penalty points.

Disqualification: *See below.*

6. Subsection 7 deals with schedule 27 of LASPO which makes 11 minor and consequential amendments to other legislation. Regarding Orders upon conviction, the two most important of which are:

- Section 34(4) Road Traffic Offenders Act 1988 ("The Offenders Act") is amended to include an **obligatory disqualification for at least 2 years'** (subject to any special reasons) for this offence.

And

- Section 36(2)(b) of The Offenders Act is amended to include the requirement for any disqualification[5] to be until "he passes the appropriate driving test[6]" for this offence.

[5] Under section 34 of the Offenders Act.
[6] As defined by section 36(5) of The Offenders Act.

Alternative Verdicts

7. Another consequential amendment under subsection 7 (above) deals with alternative verdicts and amends section 24 of The Offenders Act.

8. If a person is charged with an offence under section 1A of The Act and is found not guilty, s/he may be convicted of:

- Dangerous driving (section 2 of The Act)
- Careless, inconsiderate driving (section 3 of the Act)

9. **There is no alternative verdict of causing serious injury by careless driving.**

10. As the offence of causing death by careless driving (section 2B of The Act) has been available since 18th August 2008, it would have appeared sensible to create an offence of causing serious injury by careless driving allowing for a maximum sentence of perhaps 2 years' imprisonment. That opportunity was not taken.

Elements of the Offence

11. The Crown must prove that:

- Serious injury is caused to another person,
- By driving a mechanically propelled vehicle,
- Dangerously,
- On a road or other public place.

12. "Serious injury" is defined in England and Wales by section 1A(2)(a) as:

"physical harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861".

13. Dangerous driving is defined by section 2A of The Act.

Sentencing

14. There are no Definitive Guidelines published by the Sentencing Council for this offence.

15. However, they are:

> "planning to review the guidelines on driving offences and work on this may begin in 2015, depending on whether there are any further plans to change legislation in this area."[7]

16. In the case of R. v. Ellis [2014] EWCA Crim 593 (see below) the Court of Appeal stated:

> "There are presently no Sentencing Guidelines for [this] offence but, in our view assistance can be obtained as to the relevant approach to disqualification and to the related issue of culpability from the approach taken to those issues in cases of causing death by driving and dangerous driving, making allowance for the fact that the consequences of the driving will be different and the standard of driving being considered may differ."[8]

[7] Email of 4th August 2014 to PN from the Office of the Sentencing Council.
[8] Paragraph 13.

17. Should the section 20 OAPA guidelines apply? It could be argued that guidance could be sought from those guidelines. The maximum sentence is the same.

Notable Cases

18. As there are no Definitive Guidelines any cases from the Court of Appeal should be considered helpful.

19. However, on the issue of sentence there is limited case law thus far from the Court of Appeal. There appear to be three cases currently listed on Westlaw of some relevance.

R. v Duggan [2014] EWCA Crim 1368.

20. The issue in this appeal was the amount of credit that should have been given.

21. This was a renewed application for leave to appeal. Anita Duggan had pleaded "guilty" to a section 1A offence. She received 32 months' imprisonment. She was disqualified from driving for two years.

22. She and the complainant were involved in an "altercation" in a Public House. It developed further in a car park. The applicant was in her car, when the complainant knocked on its window. An argument followed. The applicant moved her car out of the parking space, by reversing and driving forward a number of times, crushing the complainant against another car. She suffered a fractured femur close to the femoral artery. The appellant then drove home and posted a "revolting" remark onto Facebook.

23. An issue arose during the sentencing hearing, such that the case was adjourned for about two months so that a Newton Hearing could take

place. At that hearing, witnesses attended, but the applicant conceded the point in issue and was sentenced.

24. The applicant had a "very bad criminal record which included Road Traffic Act offences and offences of violence." (paragraph 8 and 9[9])

25. The sentencing judge gave credit for the guilty plea of 10 per cent.

26. The Court of Appeal allowed the appeal in that the applicant was entitled to full credit for her guilty plea and therefore reduced the sentence to one of two years' imprisonment. Therefore, meaning a post trial sentence of 3 years' imprisonment for a very short period of dangerous driving.

27. The appeal appears to have succeeded because it was determined that the adjournment for the Newton Hearing could have been avoided and that the "basis of plea in relation to the applicant's actions could have been drafted with greater clarity."[10]

R. v Li [2014] EWCA Crim 1069.

28. The issue in this case concerned the length of imprisonment, credit for his pleas and the length of the disqualification.

29. The full facts need to be read to understand exactly how bad the driving was in this case. However, the case can be summarised to have included:

- Overtaking multiple vehicles in a single manoeuvre.
- Negotiating bends at speed.

[9] 24 previous court appearances for 52 offences between 1999 and 2013.
[10] Paragraph 11.

- Ignoring passengers requests to slow down.
- Speeds possibly up to 130 mph.
- Crossing into the opposite carriageway.
- Skidding and drifting into the opposite carriageway.
- Being uninsured having fraudulently obtained insurance.
- Previous conviction for speeding.

30. A collision occurred the result of which was:

- The death of one of the appellant's passengers.
- Very serious and serious injury caused his other two passengers and the two occupants of the car with which he collided.

31. The sentencing judge imposed:

- 8 years' imprisonment for the offence of causing death by dangerous driving.
- 5 years' imprisonment for the offence of causing serious injury by dangerous driving (concurrent on each).
- 12 months' imprisonment for the insurance offence (concurrent).
- Disqualification for 10 years.

32. The appellant had pleaded guilty and had indicated his intention at an early stage although the reality was that the case was overwhelming. The sentencing judge did not indicate what credit he had allowed on the most serious offence and had not given any credit on the section 1A offences as he had imposed the maximum sentence.

33. The Court felt that 20 per cent reduction was appropriate which would have given a starting point on the most serious offence of 10 years.

34. The Court concluded that the sentencing judge should have afforded more credit for personal mitigation and therefore reduced the sentence on the death by dangerous driving offence to six years' and four months' imprisonment.

35. Further, (although it made no practical difference to the appellant's sentence) the Court reduced each sentence of 5 years' to four years' imprisonment for the section 1A offences.
36. In addition the Court reduced the period of disqualification to one of five years.

R. v Ellis [2014] EWCA Crim 593.

37. The issue in this appeal was the length of the disqualification.

38. Jonathan Ellis had pleaded "guilty" to a section 1A offence. He received 2 years' imprisonment. He was disqualified from driving for 8 years.

39. The appellant drove his Nissan at about 11pm, during which he tried to race and overtake a 4x4 in front of him. He had two passengers in his car. He was rapidly accelerating and braking. He was driving aggressively and too close to the car in front.

40. A collision occurred when the 4x4 braked and the appellant's car was too close to stop and collided with it, then skidded and slewed across the road hitting an oncoming car head on.

41. The driver of the oncoming vehicle suffered serious injury, including a fractured skull and an open compound fracture of her ankle. Her sight was affected. Her life "had been turned upside down."

42. The appellant had no previous convictions.

43. The Court sought assistance from the relevant approach to disqualification from the Definitive Guidelines in cases of causing death by driving. Which in essence states that the minimum period of disqualification that should equate to the length of the custodial sentence imposed, or the relevant statutory minimum, whichever is the longer.

44. The appeal was allowed on that point and the period of disqualification was reduced to one of 5 years.

Section 3ZB Road Traffic Act 1988 "Causing death by driving: unlicenced, disqualified or uninsured drivers"

In force from: 18th August 2008

45. This offence was introduced by the Road Safety Act 2006. That Act also introduced the offence of causing death by careless driving. This was an attempt to bridge the gap between careless / dangerous driving and the offence of causing death by dangerous driving. That Act did not entirely *fill* the gap and there is still scope for further offences to make the legislation complete.

> **"3ZB[11] Causing death by driving: unlicensed, disqualified or uninsured drivers**
>
> A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under–
>
> (a) section 87(1) of this Act (driving otherwise than in accordance with a licence),
>
> (b) section 103(1)(b) of this Act (driving while disqualified), or
>
> (c) section 143 of this Act (using motor vehicle while uninsured or unsecured against third party risks)."

46. The maximum sentences[12] are as follows:

> **Summarily:** [6 months'] imprisonment and or the statutory fine.
>
> **On indictment:** 2 years' imprisonment and or a fine.
>
> **Endorsement:** Obligatory. 3-11 penalty points.
>
> **Disqualification:** Obligatory. Discretionary re-test.[13]

[11] Added by the Road Safety Act 2006 c. 49 s.21(1)
[12] The Offenders Act section 33 and schedule 2 Part 1.
[13] Section 36(4) of The Offenders Act.

Alternative Verdicts

47. There are no specific alternative verdicts available under The Offenders Act. As to alternative verdicts generally see Archbold 4-524 et seq.

Elements of the Offence

48. The Crown must prove that:

- The driver causes the death of another person,
- By driving a motor vehicle,
- On a road,
- At the time when he is driving, the circumstances are such that he is committing an offence of:
    - Driving otherwise in accordance of a licence,
    - Driving whilst disqualified, or
    - Using a motor vehicle while uninsured or unsecured against third party risks.

49. The most difficult element of this offence is what is meant by "causes".

50. This was anticipated in the 24th Edition of Wilkinson's Road Traffic Offences which said:

> "The question of causation may well prove problematical in practice for both the courts and prosecuting authorities. It would appear from the way in which the statute has been framed that the nature and quality of the driving

concerned is irrelevant; it is the very act of driving a motor vehicle on a road (but not on any other public place) which constitutes the first element of the offence. Whilst a disqualified driver may generally speaking be presumed to be aware of the criminality of his actions when deciding to drive, it is not hard to envisage circumstances in which due to inadvertence, or ignorance of the actions of other parties such as banks or insurance companies (or indeed the DVLA), an otherwise law-abiding motorist who despite driving perfectly properly is involved in an accident which leads to the death of another person may be faced with the prospect of prosecution and potential incarceration for an offence under this legislation."

51. This issue came before the Court of Appeal in the case of R. v. Williams [2010] EWCA Crim 2552; [2011] 1 W.L.R. 588. Mr. Williams appealed against his conviction for a section 3ZB offence.

52. In the Court of Appeal the Crown accepted that no fault, carelessness or lack of consideration in driving could be attributed to the appellant.

53. However, his appeal, on the basis that to be guilty of the offence there must be some fault or other blameworthy conduct on the part of the appellant, was dismissed as the Court found that the wording in the section was clear. The offence can occur without any blameworthy conduct.

54. In the case of R. v. Hughes (Appellant) [2013] UKSC 56[14], this issue was considered by the Supreme Court.

[14] This case is considered more fully in the Devon Chambers' January 2014 Newsletter "Death by Almost Careless Driving – Another Road Traffic Offence" which is reprinted at the end of this section of the materials.

55. Ultimately the Supreme Court stated:

> "The statutory expression cannot, we conclude, be given effect unless there is something properly to be criticised in the driving of the defendant, which contributed in some more than minimal way to the death."[15]

56. The Supreme Court went on to consider some of the possible scenarios in which someone could therefore be guilty of a section 3ZB offence. Those examples included:

- Someone who was driving slightly in excess of a speed limit,
- Breach of a construction and use regulation,
- Underinflated tyre or one that had fallen below the prescribed tread limit.

57. In January 2014 there were two other appeals before the Court of Appeal that were heard together: R. v. Uthayakumar and Clayton [2014] EWCA Crim 123.

58. Those two cases concerned appellants who had pleaded "guilty" to a section 3ZB offence following the dismissal of Mr. Hughes' appeal in the Court of Appeal, (applying the ruling in the Williams case) but prior to Mr. Hughes' appeal being allowed by the Supreme Court.

59. Those cases make for interesting reading and give an indication of how the CPS appeared to seek to justify a retrial (following the successful appeals) where two people of good character had been involved in accidents resulting in a death.

[15] Paragraph 32.

Sentencing

60. There are Definitive Guidelines for a section 3ZB offence. They can be found at pages 16 and 17 of the "Causing Death by Driving" Guidelines.

Causing death by driving: unlicensed, disqualified or uninsured drivers

Road Traffic Act 1988 (section 3ZB)

Maximum penalty: 2 years imprisonment minimum disqualification of 12 months, discretionary re-test

Nature of offence	**Starting point**	**Sentencing range**
The offender was disqualified from driving **OR** The offender was unlicensed or uninsured plus 2 or more aggravating factors from the list below	**12 months custody**	**36 weeks–2 years custody**
The offender was unlicensed or uninsured plus at least 1 aggravating factor from the list below	**26 weeks custody**	**Community order (HIGH)–36 weeks custody**
The offender was unlicensed or uninsured – no aggravating factors	**Community order (MEDIUM)**	**Community order (LOW)– Community order (HIGH)**

The Sentencing Council may review all of the guidelines for such offences in 2015.

JANUARY 2014

CASE REPORT:

Death by Almost Careless Driving - Another Road Traffic Offence?

Regina v. Hughes (Appellant) [2013] UKSC 56

In the Supreme Court, Mr. Hughes successfully appealed the decision of the Court of Appeal, which had overturned the ruling of the Recorder of Newcastle in his favour.

Facts: In October 2009, the Defendant Mr. Hughes, was driving his family in his camper van. His driving was "faultless" and his speed was a steady 45-55 on a road which has a limit of 60 mph. As he rounded a right-hand bend he was confronted by a car driven by Mr. Dickinson that was coming towards him on the wrong side of the road. Mr. Dickinson's car collided with Mr. Hughes' camper van. Mr. Dickinson "suffered injuries in the impact which proved fatal".[16]

The Supreme Court made it clear that the collision was the fault of Mr. Dickinson who was under the influence of heroin as well as being overtired. There was nothing that Mr. Hughes could have done to avoid the collision.

[16] Paragraph 2.

However, Mr. Hughes neither had the necessary insurance nor did he have a full driving licence. He knew that he did not have insurance and his driving licence had been revoked on medical grounds. As both offences are of strict liability, he was undoubtedly guilty of the two offences of driving while uninsured and driving without a full licence.

He was prosecuted for two offences under the new section 3ZB for causing the death of Mr. Dickinson at a time when he was uninsured and without a full driving licence.

The Legislation: The new offence created by section 3ZB of the Road Traffic Act 1988 ("the 1988 Act") was added by section 21(1) of the Road Safety Act 2006 and came into force on 18th August 2008. It provides:

> **"3ZB Causing death by driving: unlicensed, disqualified or uninsured drivers**
>
> A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under–
>
> (a) section 87(1) of this Act (driving otherwise than in accordance with a licence),
>
> (b) section 103(1)(b) of this Act (driving while disqualified), or
>
> (c) section 143 of this Act (using motor vehicle while uninsured or unsecured against third party risks)."

Background to the Appeal: It was submitted on behalf of Mr. Hughes that he was not guilty of either offence as he had not caused the death of Mr. Dickinson. The Recorder of Newcastle agreed but the Crown appealed that ruling to the Court of Appeal, Criminal Division.

The Court of Appeal was bound by its earlier decision in the case of R. v. Williams [2010] EWCA Crim 2552, [2011] 1 WLR 588 and allowed the Crown's appeal and found that in law Mr. Hughes had caused the death.

Mr. Hughes appealed to the Supreme Court on the basis that the ruling in Williams was incorrect.

The common sense problem to the Williams decision was obvious. Instead of Mr. Hughes being punished for what he had actually done wrong (no insurance and no full licence) he would be subject to a possible term of imprisonment because of the poor driving of Mr. Dickinson. This problem would equally apply to anyone who had inadvertently found themselves without insurance.

The question for the Supreme Court was "what is meant by the expression in section 3ZB "causes the death of another person by driving…""[17]

Whilst the Crown sought to argue that Parliament's intention was to create an aggravated form of the simple offences and "to impose criminal liability for a death if it involved the presence of the defendant at the wheel of a car on

[17] Paragraphs 14 and see also paragraph 22 et seq.

the road where he had no business to be. The fault is sufficient … in driving at all when he had no right to be on the road."[18]

That argument could not be sustained. If that is what Parliament had intended then there were many ways of expressing that without any doubt. The Supreme Court gave some examples of how this could have been achieved, if Parliament had so intended.[19]

As Parliament used the expression "causes…death…by driving" that imports the concept of causation. The Supreme Court stated:

> … "if Parliament wishes to displace the normal approach to causation recognised by the common law, and substitute a different rule, it must do so unambiguously. Where, as here, Parliament has plainly chosen not to adopt unequivocal language which was readily available, it follows that an intention to create the meaning contended for by the Crown cannot be attributed to it."[20]

Therefore:

> "a defendant charged with the offence under section 3ZB must be shown to have done something other than simply putting his vehicle on the road so that it is there to be struck. It must be proved that there was something

[18] Paragraph 15.
[19] Paragraph 19.
[20] Paragraph 27.

> which he did or omitted to do by way of driving it which contributed in a more than minimal way to the death."[21]

Ultimately the Supreme Court stated:

> "The statutory expression cannot, we conclude, be given effect unless there is something properly to be criticised in the driving of the defendant, which contributed in some more than minimal way to the death."[22]

The Supreme Court went on to consider some of the possible scenarios in which someone could therefore be guilty of a section 3ZB offence. Those examples included:

> Someone who was driving slightly in excess of a speed limit,
>
> Breach of a construction and use regulation,
>
> Underinflated tyre or one that had fallen below the prescribed tread limit.

The Supreme Court indicated that "it may be that [section 3ZB] will add relatively little" and commented upon the apparent failings in road traffic legislation including:

> … "the gaps in the 1988 Act offences and penalties could easily have been cured by different means, for example by increasing the available penalties for dangerous driving, driving whilst uninsured and driving whilst

[21] Paragraph 28.
[22] Paragraph 32.

> disqualified, and by adding the offence of causing grievous bodily harm by dangerous driving."[23]

Section 143(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, inserts section 1A of the 1988[24] Act which creates the offence of causing serious injury by dangerous driving which carries upon indictment a maximum sentence of five years' imprisonment.

Conclusion: So if your driving fell short of careless or inconsiderate driving but it contributed in some more than minimal way to a death and you were driving without insurance or a licence (even if it were inadvertently) you may be prosecuted under section 3ZB and receive a maximum term of imprisonment of two years.

Piers Norsworthy

The author is a practicing criminal barrister at Devon Chambers, Plymouth, who has a particular interest in Road Traffic Law cases involving death or serious injury. He holds an LGV (C+E) licence entitling him to drive articulated lorries.

[23] Paragraph 13.
[24] In force: 3rd December 2012.

ROAD TRAFFIC OFFENCES AND PERVERTING THE COURSE OF JUSTICE

Sally Daulton

Sally Daulton

Email address: sallydaulton@devonchambers.co.uk
Core Practice Area: Crime, Family
Call: 2009
Inn: Gray's Inn
Education: Oxford University (MA, Politics, Philosophy and Economics), City University Business School (MBA), University of West of England (Graduate Diploma in Law and Bar Vocational Course)

Sally joined Devon Chambers as a pupil in October 2010 and became a tenant in October 2011. Before coming to the bar, Sally has a career in business and as a management consultant. She worked for Price Waterhouse's Strategic Consulting Group, was a Director of Devon and Cornwall Training and Enterprise Council, and spent many years as a Non-Executive Director in the NHS.

Family
Sally accepts instructions in financial remedy and public and private children law matters.

She has acted at all stages of financial remedy proceedings, including claims under the Matrimonial Causes Act, TOLATA and Schedule 1 Children Act. Her involvement has ranged from providing initial advice on the prospects of the claim to conducting contested final hearings.

She has represented parents in private law children matters, including conducting fact-finding and contested final hearings. She has also acted in public law children matters at all stages in proceedings form late night emergency protection order applications to agreed and contested final hearings.

Crime
Sally is regularly instructed by the Crown Prosecution Service, the Department for Work and Pensions and the Probation Service to prosecute in both the Crown and Magistrates Courts. She is a Category 2 Prosecutor. Sally also defends in both courts. She has experience of a wide range of offences including Offences Against the Person, Offences Against Property, Drugs, Theft and Fraud (including Robbery and Burglary), Public Disorder, Sexual Offences and Motoring Offences.

She has also represented both appellants and respondents in appeals to the Crown Court, and undertakes work involving confiscation proceedings under the Proceeds of Crime Act 2002.

Sally also receives instructions in Prison Law cases, representing prisoners at parole hearings.

Mental Health
As a Non-Executive Director of Cornwall Partnership NHS Trust, Sally was Chair of the Mental Health Act Managers for Cornwall and regularly chaired Mental Health Act panels at which patients were detained or discharged under the Mental Health Act 1983. She has particular strengths in advocating for people with learning difficulties or mental health issues, and is happy to accept instructions for Mental Health Tribunals.

Road Traffic Offences and Perverting the Course of Justice

1. The most famous case of perverting the course of justice in relation to road traffic offences in the recent past resulted in an eight month custodial sentence for each of the defendants (*R v Christopher Huhne and Vasiliki Pryce*). Was this an exceptional case (pour encourager les autres), or was it always thus?

2. *Attorney Generals Ref No 35 of 2009, [2009] EWCA Crim 1375:*

   *T*here is a long-standing principle that perverting the course of justice is so serious that it is almost always necessary to impose immediate custody unless there are exceptional circumstances. The offence undermines the very system of criminal justice.

Sentencing for Perverting the Course of Justice, 2011 and 2012

Year	**Age**	**Plea**	**Type of sentence %**					**Average length of custody in months**
			Discharge	**Fine**	**Community Order**	**Suspended sentence**	**Custody**	
2011	18-20	Guilty	1		21	33	44	9.3
		Not guilty			8	17	75	12.4
	21+	Guilty	1	1	9	41	48	9.2
		Not guilty	1	1	8	38	51	10.8
2012	18-20	Guilty	1		17	38	45	11
		Not guilty				20	80	14.6
	21+	Guilty	1		10	40	48	9.7
		Not guilty			4	20	72	18.9

Banks on Sentence, 9th edition

3. *R v Tunney 2006 EWCA Crim 2066, 2007 1 Cr App R (S) 91 (p 565):*
   The Court should regard: (1) the seriousness of the substantive offence, (2) the degree of persistence in the conduct, and (3) the effect of the attempt to pervert the course of justice.

4. Are the same principles applied in relation to road traffic (normally speeding) offences as to other offences of perverting the course of justice?

5. *R v Chris Huhne and Vasiliki Pryce*:

   "Offending of this sort strikes at the heart of the criminal justice system. As has been observed before, the purpose of the points system is that those who drive badly eventually have to be punished by way of disqualification, which serves to discourage bad driving and thereby to protect the public from it. The system depends, in relation to those caught on camera, upon the honest completion of the relevant form or forms. The dishonest completion of such forms is all too easy to do, and the consequent points' swapping often goes unnoticed and unchecked.

   However, it must be clearly understood that it amounts to the serious criminal offence of doing acts tending and intended to pervert the course of justice and that, save in the most exceptional circumstances, an immediate custodial sentence must follow.

   Indeed, in my view, this is the type of offence which requires the court to underline that deterrence is one of the purposes of sentence".

   Sentencing remarks of Mr Justice Sweeney

6. Cases that have come before the Court of Appeal have not resulted in sentences of immediate custody being suspended (although their term may have been reduced).

7. *R v Jason Langley [2011] EWCA Crim 2716*:

   Both Mr Langley and his partner Emma Geary pleaded guilty to counts of doing an act tending or intended to pervert the course of public justice. On 1st March 2011 a speed camera had identified a Peugeot (registered to a rental company) travelling at 43 mph on a road restricted to 30 mph. The rental company told the police that Mr Langley was the driver at the time. In June Mr Langley told the police that Miss Geary was the driver, and on 15th July, she completed and returned the appropriate form stating that she was the driver. However, by that time photographic evidence of the offence had been viewed by police officers and that showed that there were in fact two male occupants of the vehicle. Police contacted the rental company and discovered that Mr Langley was an employee, who was collecting the vehicle from a customer in Loughborough at the time. Police then contacted Mr Langley who initially said that he had not seen photographic evidence and the vehicle log sheet for the day had been mislaid. He then changed his mind in a further telephone conversation on the same day, stating that he had nominated his partner because he already had points on his driving licence.

8. Both he and Miss Geary admitted their guilt at subsequent interviews. She stated that she admitted to being the driver because Mr Langley had asked her to do so as he would have lost his job. She was reluctant to do so at first, but she knew that he had six points on his driving licence and that additional points would cause him difficulties at work.

9. A pre-sentence report before the court bore out the account that had been given by Miss Geary. The position described by Mr Langley was that his firm were in the process of revising contracts of employment which would have had the effect of entitling them to dismiss an employee with

points on a licence. He judged his employment position to be precarious and that was his motive for seeking that Miss Geary should agree that she would tell the police she had been the driver. He admitted knowing he was doing wrong, but the author of the report said that it was fair to say that he had little idea of how seriously his actions would be viewed by the courts.

10. When sentencing, the judge noted that for an offence of perverting the course of justice unless there are exceptional reasons a custodial sentence is inevitable. That is the case because it is necessary to mark that this offence undermines the process of justice.

11. In the case of Miss Geary he noted that the events which had happened were not her fault in the first instance, and that she was looking after their child. For these reasons, and for other reasons concerned with her personal circumstances, he took the view that the sentence could be suspended for one year.

12. Mr Langley was sentenced to three months imprisonment (and given six penalty points). The judge noted that after trial there might well have been a sentence of nine to 12 months' imprisonment, but both had admitted matters at an early stage and he discounted even beyond the normal third.

13. Mr Langley appealed – the sole ground being that he was not attempting to avoid disqualification. Had he admitted speeding, he could have expected a fine and three points on his licence, bringing him to nine points. What he had done was not out of fear of disqualification, but out of fear of losing his job. On this basis, he argued, the sentence could be suspended.

14. The Court of Appeal found that "the motive for perverting the course of justice remains a motive which is fear of the consequences of admitting

the offence that he had committed. It is in our view no less dishonest and no less injurious to the public interest for this very serious offence to occur because the appellant was in fear of losing his job". Thus they upheld the immediate custodial sentence saying that the approach taken by the judge to the facts of the matter and his analysis of their legal consequences was impeccable.

15. They did reduce the number of penalty points from six to four, thus quashing the resulting disqualification.

16. *R v Henderson (Trevor Richard), R v Metcalfe (Graeme David) [2011] EWCA Crim 1152*:

> Mr Henderson and Mr Metcalfe appealed against sentences of six months' imprisonment imposed after their guilty pleas to perverting the course of justice. Mr Henderson was a professional lorry driver who had 11 points endorsed on his driving licence. He received a fixed penalty notice for speeding. Fearing that he would lose his livelihood, he asked Mr Metcalfe to say that he had been driving at the time. Mr Metcalfe duly accepted the fixed penalty and paid the fine. When arrested, both made full admissions. Both men were also of good character. The Recorder took a starting point of nine months and gave full credit for the guilty pleas.

17. Mr Henderson and Mr Metcalfe both appealed, submitting that their sentences were manifestly excessive and, relying on *R v Ollerenshaw (Paul Michael) [1999] 1 Cr App R (S) 65*, that short sentences should be as short as possible.

18. The Court of Appeal found: "The purpose of the points system was that those who drove badly eventually had to be disqualified, which served to discourage bad driving and protect the public. Mr Henderson and Mr Metcalfe had tried to evade and pervert the course of justice. They had not committed the offence in the heat of the moment but as a

considered response on Mr Henderson's part to receipt of the notice. Mr Metcalfe had acted as a deliberate volunteer to accept the punishment lawfully due to Mr Henderson and was therefore equally at fault".

19. However, they also considered that it was not a case where the giving of a false name had resulted in an innocent person being the subject of investigation or charge, with all the distress that that could cause. Looking at the circumstances as a whole, the starting point taken by the Recorder was higher than was reasonably open to him on the facts. *Ollerenshaw* applied and, although deterrence and punishment were important for cases of this kind, it was also important to keep short sentences as short as is reasonably possible. The appropriate starting point was six months and taking guilty pleas into account the sentences were therefore reduced to four months.

20. *R v Lefton (Janet, Jeremy and Harold) [2007] EWCA Crim 1015*:

> The appellants were mother, father and son, and had all been sentenced to three months custody following pleas to perverting the course of justice (and perjury). All three had lied to a magistrates' court in order to have the son's convictions in absentia for speeding set aside. On their solicitor's advice, they had pretended that no notices of intended prosecution had been received and that no-one remembered who, out of a number of possible candidates, had been driving. When their lies were subsequently uncovered, they co-operated fully with the police. They submitted that suspended sentences should have been imposed.

21. The Court of Appeal did not suspend the sentences – "immediate custodial sentences almost invariably follow conviction for perverting the course of justice, even on a guilty plea". The sentences were reduced (to 21 days for the son and 6 weeks for the mother and father), taking into account the mitigation that all had pleaded guilty, they had co-operated fully with the police, and they had offered to give evidence in criminal

proceedings against the solicitors who so advised them. It was a significant factor that the original sentence of three months would prevent the son from sitting his University finals.

Road Traffic Act 1988 section 172

22. So instead of naming another driver, what about failing to name any driver? The duty to do so falls under **s172 of the Road Traffic Act 1988**:

Duty to give information as to identity of driver etc in certain circumstances.

(1) This section applies

(a) to any offence under the preceding provisions of this Act except

(i) an offence under Part V, or

(ii) an offence under section 13, 16, 51(2), 61(4), 67(9), 68(4), 96 or 120,

and to an offence under section 178 of this Act,

(b) to any offence under sections 25, 26 or 27 of the Road Traffic Offenders Act 1988,

(c) to any offence against any other enactment relating to the use of vehicles on roads, and

(d) to manslaughter, or in Scotland culpable homicide, by the driver of a motor vehicle.

(2) Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies

(a) the person keeping the vehicle shall give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police, and

(b) any other person shall if required as stated above give any information which it is in his power to give and may lead to identification of the driver.

(3) Subject to the following provisions, a person who fails to comply with a requirement under subsection (2) above shall be guilty of an offence.

(4) A person shall not be guilty of an offence by virtue of paragraph (a) of subsection (2) above if he shows that he did not know and could not with reasonable diligence have ascertained who the driver of the vehicle was.

(5) Where a body corporate is guilty of an offence under this section and the offence is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly.

(6) Where the alleged offender is a body corporate, or in Scotland a partnership or an unincorporated association, or the proceedings are brought against him by virtue of subsection (5) above or subsection (11) below, subsection (4) above shall not apply unless, in addition to the matters there mentioned, the alleged offender shows that no record was kept of the persons who drove the vehicle and that the failure to keep a record was reasonable.

(7) A requirement under subsection (2) may be made by written notice served by post; and where it is so made

> (a) it shall have effect as a requirement to give the information within the period of 28 days beginning with the day on which the notice is served, and
>
> (b) the person on whom the notice is served shall not be guilty of an offence under this section if he shows either that he gave the information as soon as reasonably practicable after the end of that period or that it has not been reasonably practicable for him to give it.

(8) Where the person on whom a notice under subsection (7) above is to be served is a body corporate, the notice is duly served if it is served on the secretary or clerk of that body.

(9) For the purposes of section 7 of the Interpretation Act 1978 as it applies for the purposes of this section the proper address of any person in relation to the service on him of a notice under subsection (7) above is

(a)in the case of the secretary or clerk of a body corporate, that of the registered or principal office of that body or (if the body corporate is the registered keeper of the vehicle concerned) the registered address, and

(b)in any other case, his last known address at the time of service.

(10) In this section

- "registered address", in relation to the registered keeper of a vehicle, means the address recorded in the record kept under the Vehicles Excise and Registration Act 1994 with respect to that vehicle as being that person's address, and
- "registered keeper", in relation to a vehicle, means the person in whose name the vehicle is registered under that Act;

and references to the driver of a vehicle include references to the rider of a cycle.

(11) Where, in Scotland, an offence under this section is committed by a partnership or by an unincorporated association other than a partnership and is proved to have been committed with the consent or connivance or in consequence of the negligence of a partner in the partnership or, as the case may be, a person concerned in the management or control of the association, he (as well as the partnership or association) shall be guilty of the offence.

23. For an individual, this provision allows for two defences to failing to provide information as to the identity of the driver:

- If he shows that he did not know **and** could not with reasonable diligence have ascertained who the driver of the vehicle was (ss (4))

or

- if he shows that it has not been reasonably practicable for him to give the required information (ss (7)).

Defence under ss(4)

24. The registered keeper of a vehicle does **not** have a duty to know who was driving their vehicle at any given time – the duty is to use all reasonable diligence to ascertain who was driving, this duty starting from the time the notice of intended prosecution is received. Whether the registered keeper **in fact** knew who was driving is a matter for the court.

25. *Atkinson v DPP [2011] EWHC 3363 (Admin):*

> Ms Atkinson owned a motor scooter. On 13 November 2010 it was recorded doing 38 mph in a 30 mph zone. Cheshire Police sent a notice to Ms Atkinson, who was the registered keeper, asking who the driver was. She responded that she did not know who the driver was. The scooter had been for sale and she had let someone test drive it. She did not record his name and had no idea who it was.

26. Cheshire Police responded that unless she told them the identity of the driver she would be reported for the offence under s172 of the Road Traffic Act 1988 of failing to provide the identity of the driver. She replied that she did not know the name of the driver and Cheshire Police reported the matter for prosecution.

27. At trial Ms Atkinson argued that she had a defence under s172(4) in that she did not know the identity of the driver and could not with reasonable diligence ascertain who the driver was. The prosecution argued that the duty to identify the driver under s172(2) was a continuing duty and existed from the moment the keeper let someone drive. The magistrates acceded to this submission and Ms Atkinson was convicted.

28. She appealed by way of case stated, the questions being:

- Were we right to conclude that acting with reasonable diligence started at the point the appellant allowed someone else to use her motor scooter and not when she received the notice from Cheshire Police asking her to identify the driver?
- If the question is answered in the affirmative, were we right to conclude that the appellant had failed to act with reasonable diligence?

29. The CPS argued, in the High Court, that the legislation should not be construed in such a way that a person could escape liability by deliberately failing to record the identity of a driver. Where a person did not record the identity of the driver, the court should find that they have not acted with reasonable diligence and should convict.

30. The High Court provided two examples of the harshness that could arise if this argument was accepted:
    - If a person knew that a vehicle of which they were the keeper was being driven by someone else, then even if they later, and not unreasonably, forgot who the driver was, they could never make out the defence.
    - If a husband and wife interchangeably drove the family car and were, some months later, asked to state who drove the car on a specific day, they would have no defence even if they could satisfy the court that they have forgotten and could not be expected to remember.

31. The court found that whilst there may be good reasons for ascertaining the identity of drivers before letting them drive, there is no legal duty to do so and, were such a duty to arise, then ordinary citizens would be required to keep records beyond that which would be reasonable. For example it might be reasonable to expect a seller of a vehicle to know the identity of a test driver, not least so that action could be taken if they steal the vehicle. However, placing a legal burden on them would

require them to keep that record for several months (until the time limit for the issuing of a s172 notice has expired) and, if the record were lost, the s172(4) defence would not be available.

32. The court noted that, not only is that too high a burden to place on a private citizen, but it would also render the requirements of s172(6) (for corporations to keep records of who is driving) superfluous.

33. The obligation to provide the identity of the offender exists, therefore, at the time the notice under s172 is issued. If the driver knows the identity of the driver *at that time* then he must disclose it. Similarly if he can discover the identity of the offender by reasonable diligence, he must do so and the identity must be disclosed. Where the registered keeper has forgotten, or did not know, the identity of the person and cannot now find out the identity, the defence under s172(4) is triggered and the person should be acquitted.

<u>Defence under ss(7)</u>

34. This section states that "the person on whom the notice is served shall not be guilty of an offence under this section if he shows either that he gave the information as soon as reasonably practicable after the end of that period or that it has not been reasonably practicable for him to give it".

35. Where it has been argued that the notice was never received, there is a two stage process to determine first whether notice was served, and only then, whether it was reasonably practicable to give the information.

36. *Whiteside v DPP [2011] EWHC 3471 (Admin):*

Mr Whiteside appealed by way of case stated against his conviction by a magistrates' court for an offence of failure to respond to a notification requiring driver details under the Road Traffic Act 1988 s172(3). His car was recorded as speeding and notices of intended prosecution were sent to his address requiring him to provide details of the person driving the car. He claimed, and the magistrates accepted, that although the notices were received at his address he did not personally receive them in time as he was out of the country. Accordingly he was unaware of the requirement to give information. The magistrates held that, although Mr Whiteside had not seen the notices, it was not a defence under s172(7)(b) and he was guilty of the offence. The questions for the opinion of the court were:

(i) whether the elements of the offence under s.172(3) included mens rea, namely knowledge on Mr Whiteside's part that he was under a requirement to provide the specified information

(ii) whether notice could be said to have been served on Mr Whiteside if it was accepted that it was not in fact received by him

(iii) if so, whether Mr Whiteside nonetheless had a defence pursuant to s172(7)(b), that it had not been reasonably practicable to supply the required information.

37. The appeal was dismissed on the grounds that:

(i) There was no scope for an implication of a mens rea requirement in an offence under s.172(2). The presumption that the commission of an offence required mens rea did not apply to cases where the offence was not criminal in any real sense but was an act which in the public interest was prohibited under penalty, such as the instant case. The offence did not require knowledge on the defendant's part that he was under an obligation to provide the specified information.

(ii) Under the Criminal Procedure Rules 2011 r.4.4(2)(a) service could be effected by post even if the defendant had not in fact received the notice. Mr Whiteside accepted that the post had been delivered to his address so there was effective service which obliged him to give the relevant information pursuant to s.172(2).

(iii) The burden was on Mr Whiteside to satisfy the magistrates that it was not reasonably practicable for him to have given the information and he failed to do that. The magistrates found that he could have arranged his affairs so that he did receive the notice. The magistrates' conclusion on that issue was open to them on the evidence. It was not for the High Court on a case stated to question the magistrates' conclusion on that matter.

38. Mr Whiteside did not have a defence under s172(7)(b) merely by virtue of the fact that he had no knowledge that the notices were sent. However in an appropriate case, a defendant might be able to show in such circumstances that it was not reasonably practicable for him to have been aware of the notice, in which case the defence would apply.

39. *Krishevsky v DPP [2014] EWHC 1755 (Admin):*

Mr Krishevsky appealed by way of case stated against a conviction under the Road Traffic Act 1988 s172(3) for failing to respond to a notification requiring him to give details of the identity of the driver of a vehicle alleged to have committed the offence of driving with excess speed. The magistrates had found that:

(i) Mr Krishevsky had been sent a notice of intended prosecution by first class post

(ii) the notice had contained a request for information

(iii) Mr Krishevsky had not received the notice

(iv) Mr Krishevsky had been sent and had received a reminder notice

(v) he had not responded to the reminder or to the request for information within it.

40. The magistrates convicted on the basis of receipt of the reminder notice and failure to respond to the request for information therein.

41. There were four questions raised on appeal, the first being: whether the magistrates had been correct in law to convict Mr Krishevsky even though he had not received the original notice. The remaining questions related to the validity of the conviction on the basis of receipt of the reminder notice. In the event, these latter questions did not need answering.

42. The court affirmed *Whiteside*, stating that actual receipt by an addressee was not a prerequisite for valid service. A notice would be deemed to be received in the ordinary course of the post unless the defendant could rebut the presumption. But they also distinguished *Whiteside* to the extent that the presumption had been rebutted in this case. It was important to discern what the magistrates had meant when stating that Mr Krishevsky had not received the notice. It could be interpreted as no more than that the notice had been properly served and that Mr Krishevsky's failure to receive it went only to consideration of the statutory defence under s172(7)(b) of the Act (as in *Whiteside*). However, on careful consideration, the only sensible reading of the magistrates' statement, taken with their observations that they had purportedly convicted Mr Krishevsky on the basis of the reminder notice, was that, confined to the facts of the instant case, the presumption of proper service by post had been rebutted. The wording that Mr Krishevsky "had not received" the notice was a finding that notice had not properly been served. However, that interpretation should not be taken as a statement of principle. The key to the prosecution establishing an offence under s172 was simply the establishment of proper service on that individual and failure on his part to provide the information within the required period. Normally, it could rely

on the presumption of service even if an appellant had not received the notice unless his evidence went further. However, in the instant circumstances, the court had to proceed on the basis that Mr Krishevsy's evidence was such that the magistrates had been satisfied that the presumption of service had been rebutted. Once the court had made that finding, there could never have been a proper conviction.

43. Of note was the observation of Lord Justice Moses: "I have a strong suspicion that the appellant in this case is extremely lucky that his good fortune arises from the failure of the justices clearly to state the facts which they found in the statutory context".

Practical applications of the case law

44. "Passing on speeding points" will almost invariably lead to an immediate custodial sentence – albeit short. Good character and good references are not "exceptional circumstances". Clients should be prepared for this.

45. "Not being able to remember who was driving" is a defence to a s172 offence, but the client must be able to prove, on the balance of probabilities, that they did not know (at the time they received the notice of intended prosecution) and that they could not, with reasonable diligence, establish who was driving. This will be determined on the facts, and questions to be considered include:

- How many people use the vehicle?
- How often does each use the vehicle?
- Was it a regular journey?
- Was it a long journey during which drivers swapped?

- How long after the journey was the notice of intended prosecution received?
- What was going on in the defendants' lives at that time?
- What did they check to remind themselves of the journey (diaries, work schedules, maps, satnav records)?
- What evidence have they asked for from the prosecution (photographs, enhanced photographs, video)?
- If the vehicle was being test-driven, what steps did they take to ensure the driver was insured and that they could name them in the event of an accident?

46. "Not being reasonably practicable" to respond to a s172 notice is a defence, but not receiving the notice does not, of itself, make it impracticable to respond. The first question is whether the notice was properly served. The second question is what diligence the defendant used to respond, including diligence to ensure that he did receive official notices.

DEVELOPMENTS IN DEATH BY DANGEROUS/CARELESS DRIVING

Rupert Taylor

Rupert Taylor

Email address: rtaylor@devonchambers.co.uk
Core Practice Area: Crime
Call: 1990
Inn: Gray's Inn
Education: LLB (Hons), L.L.M (Lond)
Memberships: Criminal Bar Association

Following his pupillage in London, Rupert joined Devon Chambers in 1990 and has, over the years, developed an extensive practice in heavy-weight criminal defence. He is deputy Head of Chambers.

He is a particular favourite with a large number of defence solicitors in Devon and Cornwall. His practice encompasses all areas of criminal law with a particular emphasis on murder and manslaughter, serious violence, sexual offences, drug importations and fatalities arising from road traffic collisions.

He is a jury advocate in the best traditions of the Bar; his calm, persuasive and charming manner lend him a formidable presence in the court room. He is very popular with clients and has a natural feel for the tactical and strategic approach towards cases.

His heavy workload means that his practice is predominantly focused in Devon and Cornwall but he is always prepared to travel to other areas to suit professional or lay client. Rupert prides himself on being available for conferences, whether by telephone, video-link or in person, to assist solicitors in the full preparation of a case.

He regularly provides seminars to solicitors as part of Chambers' well-respected CPD team; he recently lectured on the implementation of section 28 of the *Youth Justice and Criminal Evidence Act* 1999, click here to read in full.

Rupert is listed as a recommended Counsel in Legal 500.

Notable cases

R v B and others: representing a man charged with manslaughter arising out of an alleged restraint by doormen of a man in a nightclub.

R v E, Truro Crown Court: defending a man charged with serious sexual offences against his two step-sons over a period of several years.

R v P, Plymouth Crown Court: defending a man charged with the rape of a 14 year old girl.

R v M, Truro Crown Court: defending a man charged with sexual offences against 2 females, the allegations being so extreme that the media could not publish the details.

R v C, Plymouth Crown Court: defending a man charged as part of a multi-handed conspiracy to inflict grievous bodily harm involving alleged drug-dealers.

R v T, Exeter Crown Court: defending a Polish national charged with rape and section 18; the victim subsequently died; the investigation was one of the largest ever undertaken by the Devon and Cornwall Police.

Other Interests

Rupert enjoys water sports, in particular sea kayaking, and is RYA Coastal Skipper qualified. Rupert holds a current HGV qualification and previously served in the Royal Naval Reserve.

Neutral Citation Number: [2014] EWCA Crim 1531

No: 201401849/A8

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 24th June 2014

B e f o r e:
LORD JUSTICE TREACY
MR JUSTICE LEWIS

HIS HONOUR JUDGE MELBOURNE INMAN QC
(Sitting as a Judge of the CACD)
R E G I N A

V

JOHN THOMAS EAST

Computer Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Miss M Krone appeared on behalf of the **Appellant**

Miss M Loram appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. HIS HONOUR JUDGE MELBOURNE INMAN: On the day of his trial, 18th February 2014, in the Crown Court at Northampton, this appellant pleaded guilty to the offence of causing death by careless driving, contrary to section 2B of the Road Traffic Act 1988. He was sentenced by His Honour Judge Bray to 10 months' imprisonment and was disqualified from driving for 3 years and until the obligatory extended driving test is passed. The appellant appeals against the sentence of imprisonment by the leave of the single judge.

2. The offence was committed on 3rd October 2012. It occurred at the junction of Pheonix Parkway and Gretton Brook Road in Corby. The appellant is a coach driver and at 8 o'clock that morning he approached and stopped at the junction. It was the appellant's duty to give way to traffic travelling along Phoenix Parkway. Travelling on Pheonix Parkway was Neil Watson. He was riding his Honda 125 motorcycle. His direction of travel was such that he was approaching from the appellant's right. As Mr Watson approached the junction the appellant drove his coach from the mouth of Gretton Brook Road and into the path of Mr Watson. Mr Watson had no opportunity of avoiding the coach and he collided with its front offside, tragically suffering fatal injuries.

3. There was no criticism of Mr Watson's driving. He had overtaken some vehicles on Phoenix Parkway and had then regained his position in the road prior to the collision occurring. Mr Watson's speed was not a contributory factor in the accident.

4. Prior to the collision there was no criticism made of the appellant's driving by those who were passengers on the coach, nor any relevant evidence revealed by examination of its tachograph record. The appellant admitted by his plea that the accident occurred because he had simply failed to see Mr Watson approaching on his bike before he drove out into his path.

5. In sentencing, the learned judge identified the following aggravating features. Firstly, that the appellant was driving a coach with students on board and therefore had a special duty of care. Secondly, the junction was very busy at 8 o'clock in the morning and the appellant could have expected motorcycles to be present on the road. Thirdly, in his sentencing remarks he addressed the appellant in the following terms: "...you drove straight out into the major road when it should have been obvious that a collision was likely to occur."

6. On behalf of the appellant it is submitted by Miss Krone that the offence is properly categorised as being caused by momentary inattention when the appellant failed to see Mr Watson approaching. She further submits that the factors identified by the judge are not properly considered significant aggravating factors and the judge sentenced on the wrong factual basis, the evidence being that the appellant had clearly stopped at the mouth of the junction, being stopped alongside a lorry and had looked both ways before emerging. His guilt arose from the fact that in so doing he nevertheless failed to see Mr Watson approaching from his right.

7. In support of her submission Miss Krone has referred us to an earlier decision of this court in R v Zhao [2013] EWCA Crim 1060. Miss Krone submits that the facts in that case were broadly similar to those pertaining here and was a case of momentary inattention.

8. This is a very tragic case. Mr Watson was only 23 years of age when he died. He had his life ahead of him and of course leaves loved ones who grieve for him and for whom nothing can replace him.

9. The appellant is 67 years age and has a good driving record. He did not intend the tragedy that was caused and must live himself with its effect.

10. Cases as tragic as this present considerable difficulties in sentencing. That arises from the fact that in many offences the degree of culpability of the offender and the amount of harm caused bears some degree of proportion. In this offence the degree of culpability may have no such correlation with the harm actually caused. No sentence of this court can bring Neil Watson back to his loved ones and no sentence can or should attempt to put a price on his life.

11. The Sentencing Council have issued guidelines for sentencing in such difficult cases. The primary task for the court is to make an evaluation of the quality of the driving and the degree of danger that it foreseeably created. The guidelines set out five determinants of seriousness which include factors such as the offender's awareness of risk, for example as typified by prolonged bad driving, the presence of alcohol or drugs, driving at an inappropriate speed and whether the offender for example behaved in a seriously culpable manner. Having considered the seriousness the court must then consider whether there are any further aggravating features such as prior previous driving offences, or offences committed at the same time as the current offence. Personal mitigation such as a good driving record may justify a reduction in the appropriate sentence.

12. It is therefore essential to analyse the specific circumstances relating to the offence. The fact that its commission arises from momentary inattention is not in itself determinative, nor is the fact that the offender for example emerges from a junction into the path of another vehicle. All of the surrounding circumstances, including how the inattention arose must be considered.

13. The learned judge did not particularise how he determined his sentence according to the guidelines or what his sentence would have been before reduction for the appellant's guilty plea. The sentence of 10 months, after the appellant pleaded guilty at trial, would appear to demonstrate that the judge had in mind a sentence of 12 months' imprisonment before reduction for the plea.

14. The Sentencing Guidelines provide three levels of seriousness. Level 1 relates to driving not far short of dangerous driving. Level 2 relates to other cases. Level 3 to careless driving arising from momentary inattention with no aggravating factors. Examples of such are said to be turning without seeing an oncoming vehicle because of restrictive visibility.

15. The sentencing range for level 3, ranges from a low to a high community order. Level 2 provides a range from a community order to 2 years' imprisonment. To have started from the point of 12 months' imprisonment the learned judge must placed this case towards the higher range of level 2.

16. Clearly in this case the appellant was under a duty to have regard to the size of the vehicle he was driving and the volume of traffic. But in our judgment, the fact there were passengers within the coach he was driving and the fact that it was a busy time for traffic at the junction are not significant aggravating factors in this case.

17. The learned judge also sentenced on the basis that the appellant drove "straight out into the major road". Had that been the case, then that would have been a significant aggravating factor. It is clear, however, that did not represent the evidence in the case. The appellant had clearly stopped at the junction, alongside a vehicle and had been looking to ensure that it was safe to proceed. He certainly did not drive straight out into the path of the oncoming Mr Watson.

18. Further, although there was no restrictive visibility in relation to the geography of the road the prosecution expert in his report could not rule out the possibility that Mr Watson was alongside the final vehicle he had overtaken when the appellant first looked to his right which may have made him difficult to see at that moment.

19. In our judgment, a close examination of the particularly facts of exactly what happened reveal that this was properly to be considered a case of momentary inattention and there was, or may have been, a degree of restriction in the visibility that the appellant had when he first looked to his right. In our judgment, this is a case that fell within category 3 of the Sentencing Guideline categories. There are no aggravating circumstances which take into Category 2 and none therefore which would justify a sentence of 10 months' imprisonment after a plea at trial.

20. We have to have regard to the fact that imposing now the appropriate sentence which would have been passed at the time of sentence would be unjust because it would not reflect the severe penalty that the appellant has already served. He has been now in custody for a time which would amount to something in excess of 5 months as a determinate sentence. We must therefore reflect that in the sentence that we now impose.

21. For the offence of causing death by careless driving in these circumstances, the appropriate penalty was a community order. We will quash the sentence of imprisonment and we replace it with a community order, with requirements of 6 months supervision, together with the specified activity that the appellant engage in the Restorative Justice Programme for a minimum of four sessions. The supervision requirement is to ensure that programme is put into effect. We do not consider that the appellant would require supervision in any other circumstances. The order of disqualification and the requirement for the obligatory extended driving test are unaltered. To that extent this appeal is allowed.

Neutral Citation Number: [2014] EWCA Crim 500
No: 201305926/A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 6th March 2014

B e f o r e:
LORD JUSTICE ELIAS
MR JUSTICE SWEENEY
MR JUSTICE GREEN
R E G I N A

V

LIAM COLIN CREATHORNE

Computer Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr D Bruce appeared on behalf of the **Appellant**

Mr B Berlyne appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

MR JUSTICE GREEN:

1. **A. Introduction**

2. 1. This is an appeal with leave of the single judge against sentence. The appellant was born on 20th December 1988. He has 17 previous court appearances for 34 offences between 2005 and 2012. These offences include aggravated vehicle taking and driving without insurance and a licence. In 2008 he was sentenced to 12 months in a young offender institution for robbery.

3. 2. On 25th September 2013 in the Crown Court at Manchester, before His Honour Judge Hull, the appellant pleaded guilty to causing death by careless driving when over the prescribed limit, contrary to section 3A(1)(b) of the Road Traffic Act 1968. He was sentenced to 7 years' imprisonment. This is an offence for which the maximum sentence is 14 years. He was at the same sentenced to breach of a prior suspended order for criminal damage and battery, for which he was sentenced to 1 month term of imprisonment concurrent with the sentence for careless driving.

B. The Issues

4. 3. This appeal raises challenges to the weight accorded by the judge to various facts in his assessment of aggravating and mitigating circumstances. It also raises a broader point of principle about the approach a judge should take to determining whether to give full credit for an early guilty plea, in circumstances where a defendant cannot recall the events in issue and has to rely upon legal advice in order to decide when and, if so, whether to plead guilty.

C. The facts

5. 4. We turn to the facts. On 27th October 2012 the appellant and his friend, the deceased, had been at the Chadwick public house in Urmston. At 9.00 pm the manager thought that they had been drinking to excess and there followed a heated exchange. The manager asked a member of his security staff to eject them. The appellant drove off with the deceased. That same evening, at about 10.45 pm, a witness who was walking with her two daughters, saw the vehicle being driven along the road by the appellant. She considered that it was travelling too fast and commented to that effect to her daughters, who also thought the vehicle was travelling at an excessive speed. One of the daughters estimated the speed at about 45 miles per hour. The road was a single carriageway in a residential area. Houses bordered one side of the road. There were parked vehicles on the road as well.

6. 5. In the direction in which the appellant was travelling were two sets of bollards and traffic calming measures. These indicated that the road was narrowing and had restricted access. At the time of the accident the street lighting was in good working order and the traffic calming measures were clearly visible. A witness to the accident who was driving along the same road saw the appellant's vehicle coming towards him around a bend. It was apparent to him that the vehicle was travelling too fast into the

bend. The witness slowed down, as a precaution, to give the oncoming vehicle a wide berth. The witness estimated the speed to be approximately 50 miles per hour in a 30 mile per hour speed zone.

7. 6. As the vehicle began to leave the bend for the straight stretch of road after it, the rear end of the vehicle began to fishtail. It span around 180 degrees, crossed over to the wrong side of the road and collided with a tree. After striking the tree the vehicle spun around again and came to rest. Several people heard the impact and ran to help. One such person was a district nurse. It was clear to her that the passenger had sustained a serious head injury. The nurse noticed that his breathing was laboured. She held his hand and talked to him and tried to lift his chin up to make his airway clearer. The ambulance arrived at 11.00 pm. Fire services extricated the passenger from the car. Both men had life threatening injuries. Tragically the deceased died the following day.

8. 7. Blood samples were taken from the appellant about 6 hours after the accident whilst he was still unconscious. These contained 80 milligrams of alcohol per 100 millilitres of blood. The forensic scientist extrapolated from this that the appellant's blood alcohol concentration level at the time of the accident was approximately 189 milligrams of alcohol per 100 millilitres of blood within a range of 132 to 247 milligrams. The appellant was, on this basis, over twice the legal limit.

9. 8. The police found two empty cans of lager and a bag of cannabis in the front passenger seat footwell together with some unopened beers. There was however no evidence of cannabis in the blood sample extracted from the appellant. A forensic collision construction expert attended the scene at 11.32 pm on the evening of the accident. His report can be summarised as follows. The weather was fine but the road surface was damp. Visibility was good. Tyre marks indicated that the appellant lost control of the vehicle as he negotiated the bend, with the vehicle travelling on the wrong side of the road as it entered the bend shortly before the collision. The vehicle began to rotate, left the carriageway and the passenger side then collided with a tree. The front nearside passenger area sustained the most significant damage. The front and the rear nearside tyres were significantly under inflated. In fact they were 50% of the level they should have been. This was their condition prior to the accident. The state of the tyres might have exacerbated the loss of control on entering the bend. There was no evidence that emergency braking had been applied. The expert concluded further that neither the appellant nor the deceased were wearing seat belts. The expert also concluded that it was not possible to calculate the exact speed of the vehicle at the time of the incident, but he estimated that the collision happened as a result of the appellant driving his vehicle under the influence of alcohol and approaching the bend at a speed well in excess of the 30 mile per hour speed limit.

10. 9. The appellant was interviewed 3 months later, on 31st January 2013, and made no comment.

D. The Judge’s sentencing remarks

11. 10. We turn to the sentencing remarks of the judge. The judge was thorough in his observations. His remarks break down into three broad sections: aggravating factors; mitigation and guidelines.

12. 11. We start with aggravating factors. There are seven matters that the Judge paid attention to which may be summarised as follows. First, that the appellant was still angry after the heated incident in the pub. Secondly, that at 11.00 pm, when the appellant took control of the vehicle, he should not have been behind the wheel of any car. The level of alcohol in his blood was somewhere between 140 and 240. The figure of 180 milligrams of alcohol was the only figure that the court could place reliance upon, it being a mid-point. The appellant was hence driving with a level that was probably in excess of twice the legal limit. Thirdly, the vehicle had not been checked in the recent past and both of the nearside tyres were under inflated at half the level they should have been. He accepted that this would have affected the handling of the vehicle, especially when the vehicle was being driven at speed on a wet road and around a bend. This indicated, in the view of the judge, a serious lack of maintenance of the vehicle and this was a significant factor which had a major impact upon the accident. Fourthly, that being over the limit the appellant's driving reactions would have been dulled. Fifthly, on the available evidence, the judge concluded that the appellant was driving far too fast particularly on a wet road. When he went around the corner he was on the wrong side of the road. The appellant was, on any view, driving considerably in excess of 30 miles per hour on a wet surface. Sixthly, in relation to the level of criminality involved, given all of the circumstances referred to, the level of risk involved in his driving would have been obvious or should have been obvious to the appellant. The appellant had a false sense of confidence, reduced coordination and slow reactions and these affected his judgment as to speed, distance and risk and generally reduced his ability to drive. Seventhly, when the offence was committed the appellant knew that he had a problem with alcohol. He had a previous conviction in 2012, which required him to attend an alcohol treatment course which was intended to deal with a specific problem of binge drinking, particularly at weekends. That had finished early but the probation officers noted that he had admitted that he had gone back to his old ways and knowing that, he still went out drinking and put himself behind the wheel of a vehicle. His previous convictions demonstrated that he acted impulsively and recklessly, which characterised what occurred on this occasion.

13. 12. In relation to mitigation the judge identified three matters of relevance. First, he recognised that the appellant was genuinely remorseful. The second matter was that the judge took account of the early plea when considering discount. The judge gave only 25%, upon the basis that there had been an earlier hearing when a trial date was set, where not guilty pleas had been entered. At that point in time there was, in the judge's view, some information available to the appellant and to his legal advisors upon which he could have decided to enter a guilty plea. On this basis the judge decided that it was not justified to give the full one-third credit because the plea had not been entered at the very earliest opportunity. The third matter was that the appellant had sustained injuries of his own and moreover, these might exert some bearing on the way in which the appellant had to serve his sentence. The judge considered that this was modest mitigation.

14. 13. Finally, in relation to the sentencing guideline the judge observed that, in his view, the offending fell not very far short of dangerous driving. Though in this case there was the additional factor of the level of alcohol likely to have been twice the limit. He concluded that the sentencing range was therefore 7 to 14 years, with a suggested starting point of 8 years. Taking account of 25% credit for the early plea the judge stated that:
"...the least sentence, consistent with my public duty here, is one of seven years' imprisonment."

15. 14. Having committed an offence during the operational period of a suspended sentence of 2 months' imprisonment, the suspended sentence was activated with a term of 1 month imprisonment concurrent having regard to totality.

16. 15. We turn now to the grounds of appeal and our conclusion upon each them.

E. Ground 1: Starting point too high

17. 16. The first ground is that the starting point of 9 years and 4 months (inferred from the sentence ultimately imposed and taking account of the discount for plea) was too high and was outside the guidelines. In our view the starting point was entirely appropriate. The scientific evidence relied upon by the Crown was not challenged by the defence. The evidence indicated that at the time of the collision the appellant's blood alcohol concentration was over twice the legal limit. A relevant aggravating factor under the guidelines is the consumption of substantial amounts of alcohol leading to gross impairment. The other factors identified by the judge are all recognised aggravating factors. In our view, the judge was well within his legitimate discretion in concluding that this placed the offence in the highest category.

F. Ground 2: Insufficient weight given to mitigating factors

18. 17. The second ground is that insufficient account was given to various matters including: the appellant's remorse; his injuries; the fact that the blood alcohol level could not be calculated accurately and the calculation most favourable to the defence should have been taken; and, the fact that the prosecution did not proceed with the charge of dangerous driving. The starting point for this analysis is that provided the judge has addressed his mind to the relevant considerations and accorded some weight to those factors, an appeal court will be loathed to interfere with what is *a prima facie* legitimate exercise of the judge's discretion. In this case we do not accept that the judge erred in relation to any of these points. He addressed them squarely and indicated what weight he attached to each factors.

19. 18. As to remorse, it is quite clear the judge not only took account of remorse but gave considerable credit for it. Indeed he stated that this was the first and most critical point in mitigation. He also observed correctly, in our view, that remorse was common place in cases of this sort because defendants, including the appellant in this case, do not embark upon their driving intending it to be the cause of their friend's death. We can identify no error here.

20. 19. As to the appellant's injuries, the judge took these into account both in and of themselves and also when he recognised that they might make the appellant's time in custody more difficult. He stated that this was modest mitigation. The only possible point of criticism can be in his assessment that mitigation was "modest". We do not doubt that here the injuries to the appellant were serious. But we agree that this is modest mitigation because the appellant's injuries have to be set against the fact that the victim of the accident lost his life. We note also that in the relevant sentencing guidelines the following is stated under the heading "Mitigating Factors": "Offender was seriously injured in the collision. But the greater the driver's fault the less effect this factor should have on mitigation."

21. The appellant was entitled to some reduction in sentence, but in the circumstances of this case a modest reduction was within the judge's legitimate discretion, given the judge's finding as to the high level of fault attributable to the appellant.

22. 20. As to any uncertainty in the calculation of alcohol levels in the blood, the judge addressed the expert evidence. He took a figure midway in the range. We can identify no error in the approach he took. There was some inevitable inexactitude as to the exact level of alcohol in the blood, but there was expert evidence before the judge to guide him, which was not challenged by the appellant, and nothing was put before us to suggest that it was in any way inaccurate. Accordingly the judge used the only figures of any reliability before him and took neither the highest nor the lowest point. There was no other evidence on which he could form a sensible view. He use this figure to conclude that the appellant was, as he put it: "probably in excess of twice the legal limit". This seems to me us to be a fair and reasonable conclusion to arrive at upon the facts. Ground 4 advanced by the appellant overlaps with this particular point. There the appellant submits that the judge erred in accepting the toxicologist's report of presenting an exact calculation of the blood alcohol level. In so far as this particular ground goes, it is not, in our view, an accurate description of the judge's finding. He stated that this was the only reliable evidence he had to work with. This is not the same as saying it was exact.

G. Ground 3: Failure to give one-third discount for the early plea

23. 21. This ground raises a point of some wider significance concerning the approach a court should adopt in cases where the defendant cannot recall the events in issue and takes a decision about plea based upon legal advice. The ground of appeal is that the judge should have awarded the full one-third credit for the early plea. It will be recalled that he reduced the discount to 25% upon the basis that at an earlier hearing before the court the appellant had pleaded not guilty, even though there was some evidence available upon which the appellant could have been advised and which could have led to an earlier guilty plea. The appellant states that he suffered from amnesia due to the injuries sustained during the accident and in such circumstances he should have been accorded the full one-third credit because on advice he pleaded guilty at the first opportunity following advice.

24. 22. The respondent points out that in R v Caley [2012] EWCA Crim 282, the Court of Appeal gave general guidance on the extent to which credit should be given for an early guilty plea. Our attention was drawn to paragraphs 14, 28 and 29 of the judgment of Hughes LJ (as then was). In that case the court analysed what was meant by "first reasonable opportunity" in Annex 1 to the SGC Sentencing Guidelines of 2007 "Reduction in sentence for a guilty plea" which implement the objective in sections 144 and 174 Criminal Justice Act 2003 to improve the administration of justice by incentivising early pleas.

25. 23. Paragraph 1 of Annex 1 states:
"The critical time for determining the reduction for a guilty plea is the first reasonable opportunity for the defendant to have indicated a willingness to plead guilty. This opportunity will vary with a wide range of factors and the Court will need to make a judgement on the particular facts of the case before it."

24. In paragraph 9 of the judgment in Caley Hughes LJ pointed out that the identification of the first reasonable opportunity "is a matter for the sentencing judge".

26. 25. In paragraph 14 the court drew attention to the difference between the first reasonable opportunity for a defendant to admit his guilt and the first opportunity for his legal advisers to assess the strength of the evidence. In particular, the court made clear that in cases where the defendant might have no recall of the events in question, then the first reasonable opportunity might well be the point in time when his advisers were able to provide proper advice to him. Paragraph 14 of the judgment is in the following terms:

> "There is sometimes confusion in argument between (i) the first reasonable opportunity for the defendant to indicate his guilt and (ii) the opportunity for his lawyers to assess the strength of the case against him and to advise him on it. It is obvious that the second depends on the evidence being assembled and served. The first, however, frequently does not. There will certainly be cases where a defendant genuinely does not know whether he is guilty or not and needs advice and/or sight of the evidence in order to decide. We do not attempt to define them, and they do not arise in the present appeals. They might however include cases where even if the facts are known there is a need for legal advice as to whether an offence is constituted by them, or cases where a defendant genuinely has no recollection of events. There may be other cases in which a defendant cannot reasonably be expected to make any admission until he and his advisers have seen at least some of the evidence. Such cases aside, however, whilst it is perfectly proper for a defendant to require advice from his lawyers on the strength of the evidence (just as he is perfectly entitled to insist on putting the Crown to proof at trial), he does not require it in order to know whether he is guilty or not; he requires it in order to assess the prospects of conviction or acquittal, which is different. Moreover, even though a defendant may need advice

on which charge he ought to plead guilty to, there is often no reason why uncertainty about this should inhibit him from admitting, if it is true, what acts he did. If he does so, normally the public benefits to which we have referred will flow."

(emphasis added)

27. 26. In paragraphs 28 and 29 Hughes LJ emphasised that there was always a residual discretion on the part of the sentencing judge to treat individual cases individually. He said this of course against the backdrop of the important need for consistency in the manner in which discounts should be given. He observed:

> "28. The general approach which we have endeavoured to set out is, we think, essential to an understanding by defendants and their advisers. But it does not altogether remove the scope of the judge to treat an individual case individually. We make no attempt to anticipate the great variety of circumstances which might arise, but give three examples."

27. None of the three examples then set out in paragraph 28, in that case apply here. However, in paragraph 29 the court stated as follows:

> "29. The necessary residual flexibility which must thus remain does not, however, extend to suggesting an investigation in every case of the savings which have or have not actually ensued. The rationale of the reduction for plea of guilty lies in the incentive provided, not in an ex post facto enquiry into what would or might have happened if a different course had been taken. If that kind of enquiry were necessary in every case, the administration of justice would not be made more efficient but rather would unnecessarily be complicated, slowed, and made more expensive."

28. 28. Applying these principles to the facts of the present appeal the judge determined that the first reasonable opportunity for an admission would have been at the hearing, when the trial date was set. However, at that point a not guilty plea had been entered. This was upon the basis that at this hearing the appellant's advisers had in fact had been in receipt of material which, in the judge's view, could have led to advice to the appellant to plead guilty.

29. 29. In the appellant's grounds of appeal this is not denied or challenged. The appellant simply submits, in a generalised way, that the Crown had dropped the charge of dangerous driving given his mental condition and lack of memory and (we quote from the appellant's skeleton):

> "It was necessary for him to wait until the evidence was served before he could be properly advised on plea."

30. This recognises that the central question is the point in time at which advice would be given.

30. 31. In the course of oral submissions counsel for the appellant has explained in greater detail the evidence that was available as of the date of the hearing to fix the date of the trial and the nature of the advice given to the appellant. In this case, applying principles discussed in Caley, we start with the proposition that the appellant was suffering from amnesia at the time of the hearing. This is not challenged. Accordingly his ability to form a considered decision as to whether or not to plead guilty depended upon the ability of his legally advisers to review sufficient evidence to proffer sensible advice. As to this, as at the date of the hearing, when the trial date was set, the appellant's legal advisors did not have the collision report, information about the state of the tyres or the toxicology evidence. The evidence was clearly incomplete.

31. 32. The decision to tender a plea of guilty is one which carries extremely important consequences for a defendant. It follows, in our view, that in a case such as this, legal advisers should ordinarily be entitled to see all the material evidence before advising the client on the course of action to be taken in relation to a plea. What the material evidence will be will vary from case to case.

32. 33. In the present case the judge did not analyse what evidence was available to the legal advisers and whether it was material evidence. He simply said that there was "some evidence". This might be true but it does not address what in our judgment is the relevant question, which is whether the evidence available was sufficiently material to enable proper advice to be given. We would add in this regard that if the view expressed by the legal advisers is that in their professional judgment there was relevant evidence that they had not had sight of, then a court should normally be slow to gainsay that professional judgment.

33. 34. In these circumstances, and with respect to the judge whose sentencing remarks were otherwise careful and considered, we believe that he did in this one respect err. We have formed the judgment that the appellant was entitled to the full one-third discount, upon the basis that his plea was tendered at the first reasonable opportunity. This means that the sentence of 7 years should be set aside and a sentence of 6 years and 10 weeks imposed in substitution.

34. 35. There is one other matter that we need to refer to which is a victim surcharge order was imposed. As to this, the transitional provisions of the Criminal Justice Act Surcharge Order 2012, make clear that the order does not apply where the court deals with an offender for more than one offence where any of the offences were committed before 1st October 2012. In the present case the sentencing court was also sentencing the appellant for an offence committed prior to 1st October 2012, this being in relation to the breach of the suspended sentence. Accordingly there is no power to impose the surcharge and we must therefore set aside that part of the sentence.

H. Conclusion

35. 36. In conclusion, for these reasons, we substitute the sentence of 7 years for one of 6 years and 10 weeks. We also quash the victim surcharge order. To this extent the appeal is allowed.

Neutral Citation Number: [2014] EWCA Crim 104
No: 201304206 A6
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 24 January 2014

B e f o r e:

LORD JUSTICE FULFORD

MR JUSTICE HICKINBOTTOM

MRS JUSTICE SIMLER DBE

R E G I N A

V

JASWINDER ARORA

Computer Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr N Baki appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

1. MRS JUSTICE SIMLER: This is an appeal against sentence for an offence of causing death by dangerous driving. On 29 July, 2013, in the Crown Court at Ipswich, the appellant pleaded guilty to causing death by careless driving, contrary to section 2(b) of the Road Traffic Act 1988. On 1 August 2013, in the same Crown Court, the appellant was convicted by judge and jury of causing death by dangerous driving, contrary to section 1 of the Road Traffic Act 1988. He was sentenced to 3 and a half years' imprisonment with no separate penalty for the death by careless driving offence. He was disqualified from driving for a period of 3 years and was required to pass an extended driving test.

2. The facts can be shortly stated. At around 10.20am on 16 May 2012, on the A14 westbound carriageway at Nacton, a fatal 3-vehicle collision occurred involving a Volvo HGV lorry driven by the appellant, a Corsa driven by Carmen Bucur (the deceased), who had in her car a front seat passenger, a Miss Racu, and a Renault van driven by Mr Martin, who at the time of the collision was towing the Corsa. The appellant was a lorry driver for Ocean Express Logistics. He had set off that morning at 10.09 to pick up an empty cargo trailer to be taken from Felixstowe to Croydon. The Corsa had broken down on the A14 westbound carriageway at Nacton. Mr Martin had come to the aid of Miss Bucur in a Renault. He attached a tow rope between the two vehicles, and was towing the Corsa at a very slow speed along the A14. There was no towing warning sign and the evidence suggests that the hazard warning lights, whilst illuminated on the Renault, were not illuminated on the Corsa.

3. The weather on the day was fine, dry and sunny; visibility was excellent and the traffic flow light. At least three other vehicles driving in the westbound carriageway overtook the towing combination without incident. Having travelled under a mile, Mr Martin became aware of the Volvo lorry driven by the appellant, approximately 50 metres behind, in the slow lane. There were no other vehicles between the Volvo lorry and the back of the Corsa. A fraction of a second later he felt a thud. He saw the Volvo lorry scraping down the driver's side of the Renault, taking the wing mirror with it. Miss Bucur suffered fatal injuries and was pronounced dead at the scene. Miss Racu was taken to hospital having suffered severe bruising and shock.

4. A vehicle examination carried out on the Corsa described it as massively damaged. It was noted that the Corsa driver's seat belt was trapped in its stored position and could not have been used at the time of the collision. The examiner was, however, unable to say whether wearing a seat belt would have prevented the fatal injuries suffered by Carmen Bucur.

5. Data obtained showed that during the Volvo lorry’s journey two voice calls were made, a text message was received and a text message was sent from the appellant's handsfree phone. The voice calls totalled 3 minutes and 23 seconds. When the times of these calls and text messages were compared with the evidence of the tachograph, it was apparent that all these took place whilst he was travelling at the maximum limited speed for his vehicle of 55/56 miles per hour.

6. After slowing to negotiate a roundabout on the A14, his vehicle had obtained its maximum speed. It maintained that speed for 6¼ minutes before the first collision with the Corsa at 10.19 or 10.20, Almost immediately there was a second collision with the Renault recorded at a speed of 53 miles per hour. The accident report concluded that the Corsa and Renault were travelling very slowly and would have presented a hazard to other road users.

7. Research evidence was presented to the jury showing that drivers who use mobile phones, either handheld or hands free, are likely to be distracted. They are four times more likely to be involved in a collision, injuring or killing themselves or others. The appellant had a clear and unobstructed view of the road ahead of him for about 8 seconds prior to the collision, and the Corsa and Renault could be seen. He had failed to react appropriately to their presence, and the only plausible explanation for that failure was the distraction caused by the use of this hands free telephone.

8. The appellant was arrested and interviewed. He said prior to the collision he made a call from his mobile phone wearing a Bluetooth earpiece. The call had lasted for less than a minute. No calls were made to him while he was driving, but he received a text message from his daughter just before he made the call, which he read. He stated that he first saw the vehicles when they were 60 to 70 feet away, not completely off lane one. He thought they had broken down. He could not see hazard lights or indicators on either vehicle. When he was about 10 to 15 feet away from them, both vehicles pulled into lane one. He said he was shocked and tried to apply his brakes. He only had a fraction of a second and steered approximately 10 feet to the right, but they continued to get further into the nearside lane. When he hit them he said both vehicles were still at an angle pulling out from the verge. He drove to the next slip road and stopped and telephoned the police.

9. He was interviewed again and the content of the telephone data was discussed with him. He could not remember making the second phone call. When shown CCTV footage that clearly showed the Renault and Corsa in lane one in continuous movement, not, as he had suggested in his first account, pulling off the verge, he could not account for what he was seeing and maintained that they had pulled off the verge. He offered no explanation for not seeing the Renault and Corsa ahead of him in time to react appropriately.

10. The appellant was born on 27 December 1968. He has one previous conviction for 79 offences of making false records or entries kept for recording in breach of the Tachograph Regulation requirements. He has no reprimands, warnings or cautions.

11. In sentencing him the Judge dealt with the tragic consequences of this accident, so far as concerned the deceased. It had taken the life of Carmen Bacur, a 34-year-old wife and mother of a 7-year-old son. The Judge made clear that that was never the appellant's intention, but that an accident was the overwhelming likely consequence, nevertheless, of his driving. No words and no sentence that the court could pass, the Judge said, would bring Carmen back to those who loved her and they would feel that loss for the remainder of their lives.

12. The Judge identified the guidelines within the Sentencing Council's guidelines and stated that there was no good reason to depart from them. Serious as this case was, this was not an aggravated form of dangerous driving. The Judge referred to the fact that the appellant was driving a 44-ton vehicle at 55 or 56 miles per hour, that the speeding, such as it was on its own, could not have warranted a conviction for dangerous driving, but that what was plain was that for a significant part of the journey the appellant was on his mobile phone. The Judge recognised that the appellant was a fundamentally decent man who had fallen spectacularly from grace and who, to the extent, that a survivor could, had shared in the tragedy that had been brought about by his own actions and who would have to suffer the guilt for the remaining years of his life.

13. The Judge identified in addition to the serious inattention to the road ahead, the fact of the tachograph offences as a serious aggravating factor. Bearing all those matters in mind, the Judge said that the shortest sentence that could be passed was one of 3 and a half years' imprisonment.

14. Mr Baki, who in a measured submission advances three interlinked grounds of appeal. He submits that this was a tragic accident caused by the negligence of the appellant, and fully accepts the seriousness of the appellant's position. However, he urges us that the contributory negligence of the slow driving by the Renault van, the lack of warning lights on the Corsa, and the failure to secure her seat belt by the deceased, greatly mitigated the circumstances of this offence. Secondly, whilst accepting that an immediate custodial sentence was justified, he submits that given the personal mitigating features, coupled with the mitigating factors surrounding the collision, the learned Judge ought not to have passed a custodial term in excess of the 3-year starting point. Thirdly,in all the circumstances he submits a sentence of 3 and a half years was manifestly excessive.

15. Forcefully as those arguments were put by Mr Baki on the appellant's behalf, we are unable to accept them. Of the three matters relied on as actions of the victim, or third party said to have contributed significantly to the likelihood of a collision in this case, we consider that none were of any real consequence for the following reasons: (i) so far as the slow speed of the vehicles were concerned, this was an A road and slow moving vehicles may, and do, lawfully travel on these roads and the towing of vehicles is permissible. The weather and visibility were good and the appellant had an unobstructed view of the towing combination for eight seconds before a collision occurred, but took no action to avoid it. To the extent that the towing combination did constitute a hazard in this case, it was plainly one that was avoided by several other road users who successfully passed the combination without incident.

16. (ii) So far as the absence of hazard warning lights on the towing vehicle at the time of the collision is concerned, other motorists had seen the hazard warning lights of the towing vehicle and there is no basis, in our judgment, for suggesting that if the hazard warning lights on the victim's vehicle had been operating the outcome would have been any different. This factor was accordingly of no real consequence given that the accident was the result of complete inattention of the appellant.

17. (iii) The same, in our judgment, is true of the fact that the deceased was not wearing a seat belt at the time of the collision. There is no support in the evidence for the suggestion that the outcome for the deceased would have been different if she had been wearing her seat belt.

18. The learned Judge identified this as a level 3 case within the Sentencing Council guidelines with a range of 2 to 5 years and a starting point of 3 years custody. As he said in his sentencing remarks, the speeding, such as it was, would not have warranted a charge of dangerous driving on its own. The real determinant of seriousness in this case was the fact that for a significant part of the journey the appellant was avoidably distracted. This was not a momentary lapse of attention. Although not using his phone at the time, the appellant had been doing so immediately beforehand and, in the last six minutes of his journey prior to the collision, he sent a text message, received a text message and made two outgoing calls lasting a total of nearly three and a half minutes. The second of these calls ended at 10.18.55 and the collision occurred between 10.19.30 and 10.20. During this time he was travelling at 55 to 56 miles an hour. The evidence demonstrated that there were no vehicles between his and the towed vehicle for eight seconds prior to the collision, but he took no action because driving did not have his full attention. The potential but avoidable consequences of his reduced attention were so much more serious given the vehicle being driven was a 44-ton lorry driven at maximum speed.

19. The Judge identified, as an aggravating feature that the appellant was, at the time of the offence, on bail for tachograph offences involving driving for longer hours than the law permits. This was plainly a relevant matter for him to take into consideration.

20. Mr Baki realistically and correctly concedes that none of the circumstances of this case made it wrong to impose an immediate custodial sentence. Having regard to the sentencing guidelines and the circumstances of this case, in our judgment, whilst the sentence of 3 and a half years was a severe one, the Judge was entitled to pass it and we cannot conclude that it was either manifestly excessive or wrong in principle. Accordingly this appeal is dismissed.

21. LORD JUSTICE FULFORD: Mr Crimp, we did not call on you but thank you for your attendance and, Mr Baki, thank you for your assistance.

Regina v Pavitra Kancham

No. 2013/04810/A2

Court of Appeal Criminal Division

19 December 2013

[2013] EWCA Crim 2591

2013 WL 6980683

Before: Lord Justice Laws Mr Justice Kenneth Parker and Mr Justice Jeremy Baker

Thursday 19 December 2013

Representation

Mr J Laidlaw QC appeared on behalf of the Applicant.

Mr J O'Connell appeared on behalf of the Crown.

Judgment

Thursday 19 December 2013
Lord Justice Laws:

I shall ask Mr Justice Kenneth Parker to give the judgment of the court.

Mr Justice Kenneth Parker:

1 On 27 August 2013 the applicant, Pavitra Kancham (now aged 31), following her plea of guilty, was sentenced in the Crown Court at Isleworth by His Honour Judge McGregor-Johnson to sixteen months' imprisonment for one count of causing death by dangerous driving, contrary to section 1 of the Road Traffic Act 1988 . She was also disqualified from driving for two years and until an extended driving test was passed. She now renews her application for leave to appeal against sentence following refusal by the single judge.

2 On 5 October 2012 the applicant was driving her motor car, a Honda Civic, along Granville Road, Hillingdon. Her husband was the front seat passenger and her 4 year old daughter and mother-in-law were sitting in the back of the car. The applicant was a newly-qualified driver. She had passed her driving test just over a month earlier.

3 Granville Road is a minor road which at the relevant point comes to a junction with a major road, Long Lane. There is a “Give Way” sign at the junction, as would be expected, directing any vehicle approaching the junction to give way to any vehicle, whether travelling left to right or right to left, on Long Lane. Any driver on a minor road regularly encounters this scenario and knows the danger of moving out from a minor road into oncoming traffic.

4 On Long Lane, to the right, a bus was parked which obscured to some extent a clear view of traffic approaching the junction from right to left. The applicant moved out on to Long Lane to make a turn to the right. She may have been focused at the time on traffic coming from the right, because her view was obscured by the parked bus. Long Lane is a comparatively straight, wide-open road in the vicinity of the junction, and there is good visibility over a substantial distance at the junction of traffic approaching from the left.

5 A Toyota or Ford Galaxy-type people-carrier was travelling from left to right at the junction. This vehicle was travelling at about 30mph. There was plenty of time for the applicant to see it approaching, and plenty of time for her to decide to wait and to allow the oncoming vehicle to pass safely. Given that that vehicle was now within a very close distance of the junction, it was obviously dangerous for the applicant to pull out of the minor road into the path of the oncoming vehicle. She did pull out, at first edging out into the path of the oncoming vehicle. She then accelerated hard, perhaps with an element of panic. By doing so she made the situation more perilous. The driver of the people-carrier was forced to take emergency action to avoid a collision with the applicant's car, which the driver managed to do, although the vehicle ended up on the verge.

6 The applicant continued to accelerate. She turned to the right so that she was now on the wrong side of Long Lane, posing a hazard to oncoming traffic. She then moved back onto the left side of Long Lane, still accelerating. By her actions she had plainly lost control of her vehicle. She managed to avoid the island in the middle of the road, and missed the barrier, lights and bollard. However, her vehicle mounted a pavement near a pedestrian crossing. When it mounted the pavement it struck the victim, Mr Wright. As described by an eyewitness, Mr Wright was sent up into the air and seemed to land on his head. He “just crumpled and lay there”.

7 Mr Wright, who had just retired after a long and productive working life, had been out shopping with his wife, Mrs Wright. The last thing she heard before the fatal impact was her husband saying “That car is going to hit us”. Mr Wright was taken to hospital but died. Mrs Wright suffered very serious injuries. Like the judge, we have read her victim impact statement which sets out the devastating effect which the applicant's criminal conduct has had on her life and on the lives of their two sons. We shall say no more than that it is a restrained but powerful and moving statement.

8 After striking Mr Wright and Mrs Wright, the applicant's vehicle kept moving before it hit a large 4x4, which was parked in the side road outside the shops to the left of the pavement. This collision turned the applicant's vehicle to its right and along the side road where it struck two more cars before it came to a halt. The Honda came to a halt as a result of the activation of the emergency fuel cut-out, not as a result of any action by the applicant. It was fortunate that no other person was struck, injured or even killed.

9 Before the learned judge, prosecution counsel and the advocate then appearing for the applicant agreed that the applicant's dangerous driving fell within level 3 of the Sentencing Guidelines Council's relevant definitive guideline; it was driving that created a significant risk of danger, characterised as it was by a brief but obvious danger arising from a seriously dangerous manoeuvre.

10 In our judgment they were correct in their agreement. The judge was also right to proceed on that basis. The applicant pulled out from a minor road when it was dangerous to do so. She then misjudged the speed of the oncoming vehicle to her left, and she responded inappropriately to its approach towards her by pressing the accelerator. Her view to the left was not restricted but was clear. It was from this direction that the oncoming vehicle approached.

11 Mr Laidlaw QC, who now appears for the applicant, submits that the judge ought to have made reference to the starting point and range for the most serious level of causing death by careless driving in accordance with the note in the guideline attached to level 3. No one at the sentencing hearing had suggested that this note was at all relevant to the applicant's driving. It is, in our judgment, wholly irrelevant. The applicant's driving was plainly not within the realm of careless; it was dangerous — very dangerous in fact — as the risk that she created was substantial. In particular, it put at great risk of death or serious injury vulnerable pedestrians in the area. It would be wholly wrong to describe driving at this level of dangerousness as “markedly less culpable” than the level of dangerousness at which level 3 is directed, and the note therefore is not engaged.

12 The starting point in the guideline for the level of dangerous driving is three years' custody. In terms of the specified aggravating factors, the applicant's dangerous driving not only killed Mr Wright, but seriously injured Mrs Wright. Given the nature of the driving, it was fortuitous that

there were no further victims.

13 In terms of the specified mitigating factors, the applicant had limited driving experience, having just passed her driving test. That lack of experience may have contributed to the commission of the offence. It should be noted in this context that the requirement not to pull out of a minor road into the path of proximate oncoming traffic is a fundamental rule of road safety that is taught to and known by all drivers, whatever their level of experience. Any driver, whatever their level of skill and competence, regularly encounters this scenario. There is nothing unusual or intrinsically difficult about it. It may be that the applicant's inexperience contributed to her inappropriate response to the danger that she had created — a response that then made the situation more perilous, which led to the death of Mr Wright and the injuries to Mrs Wright.

14 In our judgment, given the nature of the dangerous driving and the balance of aggravating and mitigating factors, a starting point of three years for this offence, following the guideline, would not be inappropriate. The judge allowed the applicant a full one-third reduction for her guilty plea and imposed the final sentence of sixteen months' imprisonment, indicating that he took a starting point not of three years, just mentioned, but of two years — a starting point of a full one-third less than that which could appropriately, in our judgment, have been taken. The judge could have come down to this very substantially reduced starting point only by giving great weight to matters of personal mitigation affecting the applicant.

15 Mr Laidlaw, however, submits that the judge ought to have given even greater weight to such matters and to have reduced the final sentence to an even greater extent to reflect such matters. We therefore turn to that question.

16 The applicant has shown remorse, which neither the judge nor we doubt, for the death of Mr Wright, the injuries to Mrs Wright and the devastating effect of her criminal offence on their family. The applicant, understandably, has herself been affected by what she has done. Before the judge there was a report dated 10 July 2013 from Dr Veisi, a Registrar in Forensic Psychiatry, who on examination found that the applicant exhibited classic symptoms of post-traumatic stress disorder, including frequent flashbacks and nightmares, intrusive and disturbing thoughts, and disturbed patterns of sleep. There was a further report dated 5 August 2013 from Mrs Goldman, a psychologist, referring to the applicant's depression and anxiety, and to the psychological effect of these events. There were also a number of references vouching for the applicant's positive good character. The judge was also told that the applicant has a young daughter, now aged five, who suffers from asthma, eczema and multiple food allergies. She needs significant care, including during the night. The applicant was her primary carer.

17 For this hearing the court has been provided with a further report dated 25 November 2013 regarding the applicant's daughter, Dhanya, prepared by Anna Gupta, an experienced independent social worker. Miss Gupta reports that Dhanya now lives with her father, uncle and grandmother. She has regular contact visits with her mother in prison. Miss Gupta states that Dhanya has suffered emotional distress following the abrupt separation from her mother.

18 Dhanya's father remains a stable figure in her life, but the time that he can spend with her is limited by work and other demands. He is concerned about how he will fulfil all the responsibilities of primary carer when his mother returns to India. Miss Gupta concludes that Dhanya's best interests will be served by an early and permanent reunification with her mother. Miss Gupta also speculates on the applicant's possible deportation as a result of these proceedings. However, we must emphasise that any such matter is exclusively for the Secretary of State, subject to the applicable legal procedures. It would be wholly wrong for this court to consider any such matter in determining an application of the present nature.

19 We have carefully considered all the information to which we have referred. In our view a substantial custodial sentence was inevitable in this case, given the nature of the dangerous driving and the balance of aggravating and mitigating factors. It was inevitable notwithstanding the effect of the applicant's imprisonment on her five year old daughter — an effect that was explained to the judge and that has been emphasised before us by Miss Gupta's recent report. In some cases — and this is indubitably one such case — the demands of fair, proportionate and effective penal justice will have a detrimental effect on the welfare of a young child that society

would ordinarily strive to avoid, but simply cannot avoid in the present context.

20 As we have already observed, the judge's final sentence of sixteen months' imprisonment gave very substantial weight indeed in this case to all the matters that we have considered, including the welfare of the applicant's daughter. It was in the circumstances a humane sentence. On no basis could it, however, begin to be considered manifestly excessive.

21 Accordingly, for these reasons the renewed application is refused.

ROAD TRAFFIC OFFENDING AND CIVIL LIABILITY

Scott Horner

Scott Horner

Email address: shorner@devonchambers.co.uk
Core Practice Area: Crime, Civil
Call: 2010
Inn: Lincoln's Inn

Scott joined Chambers in 2011 and accepted tenancy in 2012 after 5 years' practising with Lyons Davidson Solicitors as part of their litigation team, mainly working on the defence of personal injury claims.

Scott enjoys a mixed criminal and civil practice.

In addition to his background in dealing with personal injury cases, including fatality claims, indemnity and credit hire disputes, Scott particularly welcomes instructions in any commercial or contractual disputes and employment tribunal claims.

Scott is also instructed in housing related matters and has a particular interest in possession claims and anti social behaviour actions.

A common sense and practical attitude to all areas of litigation are at the heart of his approach. He is an ADR accredited civil / commercial and workplace mediator and is happy to be instructed to undertake mediations and arbitrations.

Cases

Personal Injury

JW v CC Successful multi track claim for personal injury following a back injury suffered in the workplace. This case was dealt with under the terms of a CFA.

TD v PCC 2 day multi track claim for injury and losses arising from an 'ice slipping' incident. The case involved a complete review of the winter service place adopted by the local authority. This case was also conducted on a CFA.

Employment

FE v THS Acting for the claimant in an employment tribunal claim for unfair dismissal arising from an employment contract at a public school.

Landlord & Tenant

KD v CC Acting for the landlord in a possession claim involving £1m property and subsequent claim for damage caused to the property. The client took prompt possession and was awarded £15k in damages plus his costs. This case also involved a counterclaim under s212 Housing Act 2004 (tenancy deposits) which was successfully defended.

Housing/Anti Social Behaviour

TBC v YW Successful eviction of nuisance tenants on behalf of the local authority based on grounds of anti-social behaviour

CH v SD Defence of nuisance tenants being evicted from her property owned by a registered social landlord.

YH v MG Acting for the defendant in opposing as application for an Anti-Social Behaviour Injunction (ASBI).

ECC v TH Acting for the Local Authority claimant in committal proceedings for breach of ASBI.

Crime

R v X Defence of a 15 year old boy charged with sexual touching upon his 4 year old nephew. This was a 2 day youth court trial involving testimony from several youth witnesses and family members.The case also involved dealing with forensic evidence adduced by the prosecution. The youth defendant was ultimately acquitted.

Other Interests

In his spare time, Scott is a keen cricketer and golfer.

"Road Traffic Offending and Civil Liability"

1. Background

- **Section 11 Civil Evidence Act 1968**
- **A 'Subsisting Conviction'**
- **The rule in Hollington v Hewthorn**
- **Foreign Jurisdiction**

2. Funding potential

- **A Mutual Benefit**
- **Insurance Policies**

3. Levels of funding

- **Experts, Disbursements, etc**
- **Involvement of Counsel**

4. Liability

- **Is Liability Genuinely Disputed?**
- **Contributory Negligence**

5. Pitfalls

- **The Panel Lawyers**

6. Summary

1. Background

Section 11 Civil Evidence Act 1968

The fact that a person has been convicted of a criminal offence before a Court in the UK, or by court martial, is admissible in evidence in civil proceedings for the purpose of proving that he committed that offence where that is relevant to any issue in the civil proceedings.

The burden of proof will always be upon the individual wishing to disprove the facts

> **11.— Convictions as evidence in civil proceedings.**
>
> (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or [of a service offence (anywhere)] [1] shall (subject to, subsection (3) below) be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section.
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or [of a service offence] [2] —
>
> (a) he shall be taken to have committed that offence unless the contrary is proved; and
>
> (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.

(3) Nothing in this section shall prejudice the operation of section 13 of this Act or any other enactment whereby a conviction or a finding of fact in any criminal proceedings is for the purposes of any other proceedings made conclusive evidence of any fact.

(4) Where in any civil proceedings the contents of any document are admissible in evidence by virtue of subsection (2) above, a copy of that document, or of the material part thereof, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document shall be admissible in evidence and shall be taken to be a true copy of that document or part unless the contrary is shown.

(5) Nothing in any of the following enactments, that is to say—

(a) [section 14 of the Powers of Criminal Courts (Sentencing) Act 2000] (under which a conviction leading to [...] [4] discharge is to be disregarded except as therein mentioned);

(aa) section 187 of the Armed Forces Act 2006 (which makes similar provision in respect of service convictions);

(b) [section 191 of the Criminal Procedure (Scotland) Act 1975] [6] (which makes similar provision in respect of convictions on indictment in Scotland); and

(c) section 8 of the Probation Act (Northern Ireland) 1950 (which corresponds to the said section 12) or any corresponding enactment of the Parliament of Northern Ireland for the time being in force,

shall affect the operation of this section; and for the purposes of this section any order made by a court of summary jurisdiction in Scotland under [section 383 or section 384 of the said Act of 1975] shall be treated as a conviction.

(7) In this section–

"*service offence*" has the same meaning as in the Armed Forces Act 2006;

"*conviction*" includes anything that under section 376(1) and (2) of that Act is to be treated as a conviction, and "*convicted*" is to be read accordingly.

A 'Subsisting Conviction'

Section 11 clearly envisaged the potential for appeal by the way in which it has been drafted. If an appeal has been successful and a conviction quashed, then clearly it cannot be used as evidence in civil proceedings, simply to 'darken the character' of an individual who has been involved in the criminal process.

It is likely too that in the event of an appeal notice being filed following a conviction, any civil proceedings that place reliance upon that criminal conviction will be stayed pending the outcome of the criminal appeal.

*NB – it is also noteworthy that section 11 applies equally to non-parties in civil proceedings as well as it does to the litigants themselves. This may be of interest when considering cases of perverting the course of justice and similar.

The rule in Hollington v Hewthorne

The introduction of section 11 reversed the longstanding rule established in the case of ***Hollington v F Hewthorn & Co. Ltd [1943] KB 587***, in which the Court of Appeal held that criminal convictions were inadmissible in civil proceedings as evidence of the facts on which they were based. The principles, however, still apply to other forms of previous judicial findings, including:-

- Findings of malpractice by a Solicitors Disciplinary Tribunal;
- Arbitration awards in rent cases;
- Public enquiries;

The rationale of the rule is not difficult to fathom, given the Court's desire to cut down on 'satellite litigation', by going back into a factual matrix that has already been ruled upon. The person therefore wanting to disprove the existence of a criminal conviction will have the burden of showing, on the balance of probabilities that, he did not commit the offence. (See ***Hunter v Chief Constable of West Midlands Police [1981] UKHL 13***)

Foreign Jurisdiction

The legislation only applies specifically to convictions by, or before, a UK court or court martial. The reasoning being that the facts relied upon in the conviction would have been tested by use of the English law's rules of evidence.

It is of course worth bearing in mind that the Court of Appeal in R ***v Kordansinki [2006] EWCA Crim 2984***, suggests that foreign convictions may be admissible in criminal proceedings as evidence that the defendant committed the offence of which he was convicted, however that principle does not appear to have been extended to civil proceedings.

2. Funding Potential

A Mutual Benefit

Upon a Defendant being charged with of a road traffic offence, or even seeking initial advice, the question of funding is never likely to be too far from either party's thoughts.

Section 143(1) of the Road Traffic Act 1988 requires every person who uses, causes, or permits another person to use a motor vehicle on a road or other public place to have a policy of insurance in respect of third party risks.

The consequence of this is that there is a much greater chance of private funding from the insurers who have an interest in the proceedings by virtue of the likely impending civil action. The benefit to the insurers being that they are able to invest in a defence at an early stage and prevent a scenario occurring in which they are bound to settle a third party clam, simply by the existence of a criminal conviction which may have been avoided by the appropriate investment in the case at the outset.

From a loss adjusters perspective too, keeping an element of control over the early proceedings will allow for adjustments to be made to claim reserves, which is likely to be particularly beneficial in cases of high monetary value, such as care cases or cases that are likely to involve significant future loss of earnings.

Insurance Policies

Many policies of insurance now allow for an element of legal expenses insurance to be incorporated into the contract itself. This may range from the most basic cover, for example a defence in a civil claim, to assistance in the criminal courts should such a situation arise.

It is worth bearing in mind also that many household, buildings and content policies contain legal expenses insurance which will refund an individuals' legal expenses once certain conditions are triggered and often up to a certain amount. With that in mind, a review of the client's respective policies may well pay dividends.

In any event, it is always worthwhile making contact with the client's insurer to ascertain their stance on funding, even if there is no specific provision for this in the contract of insurance. If it can be shown that some initial funding may be of benefit to the company as well as the individual, there is a chance of some cooperation.

3. Levels of Funding

Experts, Disbursements, etc

Depending upon the outcome of the negotiations above, it may be that the insurers are willing to provide assistance which stops short of a full indemnity. This may be particularly appropriate to items of expenditure which have a dual use, for example an incident reconstruction experts report or a detailed incident locus plan. Gaining a full understanding of the potential claim at the earliest opportunity and having the evidence tested prior to civil proceedings are likely to be attractive propositions to the insurers.

Involvement of Counsel

No insurance company is likely to act as a charity when it comes to providing funding for a criminal defence. If there is no benefit to the insurers then unless they are contractually bound, funding is unlikely to be forthcoming.

It is with this in mind that a potential approach may be to suggest to the insurers that in the first instance funding be provided to prepare instructions and ascertain the opinion of counsel as to the prospects of an acquittal, the impact of section 11 above on any future civil claim and any 'wish list' pieces of evidence that would assist the case but would come at cost by way of incurring a disbursement. This way the insurers will have a much greater understanding of the risk involved in the case and dependent on counsel's view, be more inclined to offer funding going forward.

4. Disputed Liability

Is Liability Genuinely Disputed?

From an insurers perspective, unless under contract, it is unlikely that assistance will be provided for cases which have no hope of establishing a defence to a civil action or are immoral/illegal. For this reason, road traffic offences tend to lend themselves to private funding by this method, but only if there is a realistic prospect of establishing that the Defendant is not at fault for the incident or that the 'complainant' carries a significant responsibility for the incident too (more below).

There is no attraction to an insurer to become involved in a criminal case in which even if there were an acquittal, they would stand no chance of defending in a civil court. For example an individual charged with dangerous driving by travelling at excessive speed in a built up area, loses control and collides with another vehicle causing significant damage and serious injury. He accepts the speed he was travelling at was excessive but denies this was dangerous. Whilst speed does not in itself amount to negligence, such an admission in a civil case is very likely to result in a finding against the policyholder, which would not have been helped by the insurers contributing to the criminal defence.

Another scenario may well be where the vehicle which is insured is involved in an illegal act. Section 143 does include cover against intentional criminal acts, as confirmed in ***Hardy v Motor Insurers' Bureau [1964] 2 All E.R. 742*** and ***Gardner v Moore [1984] 1 All E.R. 1100***, however I anticipate an uphill struggle for anyone seeking assistance for an agg TWOC!

Contributory Negligence

A minor grey area arises from cases where there may be a finding of some degree of fault against both, or multiple parties. The circumstances are likely to be entirely fact specific but be aware that even if there is a possibility of establishing a small finding of fault (on the weight of the evidence) against a largely blameless driver, a lack of a seatbelt for example, may, if established, represent a significant reduction in the amount paid out to the injured party, which in these circumstances is likely to have been achieved without the need to fund an entire civil action.

5. Pitfalls

The Panel Lawyer

A word of caution is that even if you are able to gain the interest of an insurer in supporting your client's claim, this does not necessarily mean that they are supporting your firm to conduct the litigation or a barrister of your choosing.

It is becoming increasingly commonplace for the major insurers to refer such cases to pre-approved panel lawyers. Such lawyers generally market themselves as 'specialists' in road traffic law and refer their cases to panel counsel. The advantage to the insurers of such an arrangement is that savings are made in bulk referrals, however this does not always result in quality representation.

Ultimately your client will have a big say in who he wishes to represent him at his criminal trial and beyond. This should go a long way. It may be that the insurers offer funding to the extent they would fund panel lawyers, which may still be an attractive proposition.

6. Summary

Anyone attending the Crown Court regularly in recent years, would not have failed to notice the paralegal, trainee solicitor or junior barrister undertaking the 'noting brief' on behalf of insurers in Court, particularly in road traffic cases. This suggests that there is clearly an interest taken in the early stages of a potential civil claim by the respective insurers.

Given the impact of section 11 of the Civil Evidence Act, insurers are right to take an early interest in proceedings, however rather than simply remain updated on the case at a cost, there is likely to be a benefit in investing those resources into the conduct of the litigation and representation, albeit at perhaps a greater cost but at a potentially greater return in the long run.