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# Road traffic offences

## 32.1 Background to the legislation

The arrival of motor vehicles on the road created problems for the laws then in force. There were some provisions of statutes which applied to motorists, but only, as it were, by chance. For example, under s 72 of the Highway Act 1835 it was an offence to drive any carriage on the pavement and this could be applied to motor carriages. Under s 28 of the Town Police Clauses Act 1847 the furious driving of any horse or carriage was an offence and this was applied to motorists.

A further example is that it was, and remains, an offence, triable only on indictment and punishable with two years' imprisonment, under s 35 of the OAPA 1861 for a person, having charge of a carriage or vehicle, to cause bodily harm by wanton or furious driving.<sup>1</sup> This provision, though rarely used, can be valuable since it applies to drivers of horse-drawn vehicles and motorists or cyclists who cannot be prosecuted for dangerous driving or cycling because their act was not done on a road or (in the case of drivers) a public place, or because they were not warned of intended prosecution.<sup>2</sup> The offence recently attracted considerable

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<sup>1</sup> In *Okosi* [1996] Crim LR 666, it was assumed, without deciding the point, that subjective *Cunningham* recklessness must be proved. *Knight* [2004] All ER (D) 149 (Oct), also supported the subjective mens rea test.

<sup>2</sup> Cf *Cooke* [1971] Crim LR 44, QS, where D could not be charged under the road traffic legislation because the offence was not committed on a road and *Mohan* [1976] QB 1, CA.

media attention in the case of a fixed-wheel cyclist.<sup>3</sup> The North Report recommended the repeal of s 35. That recommendation seems most unlikely ever to be acted upon.

In relation to more serious cases involving a fatality, motorists might have been deterred by the threat of proceedings for manslaughter, but in cases involving some harm less than death the other offences against the person were hardly pertinent. For the main part, the law barely concerned the motorist. There were no tests of driving proficiency, no registration requirements, no compulsory insurance and virtually no driving offences. The common law could not (and rightly did not) fill gaps like these and the result is that for practical purposes the regulation of road traffic is almost entirely statutory.

The pre-existing offences which were capable of being applied to the motorist required, in the main, that the harm should be caused intentionally or recklessly. It is rare for a motorist to intend harm to the person though perhaps not so rare for him to be reckless as to whether or not he causes such harm. Though the motorist who causes harm may often be at fault, the harm he causes is ordinarily both undesired and unforeseen by him: it is usually a matter of negligence. But offences based on intention and recklessness do have a role in the road traffic context. There are many offences (eg speeding, driving whilst unlicensed, driving whilst uninsured) where the offence is as a matter of fact ordinarily committed intentionally or recklessly though it does not follow that such offences will require, as a matter of law, proof of intention or recklessness.

Road traffic legislation is voluminous, technical and complex and it is neither possible nor appropriate in a work of this kind to deal in a comprehensive way with the plethora of offences created. Attention is accordingly concentrated on careless driving, dangerous

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<sup>3</sup> Alliston tried at the CCC, Aug 2017 (see news reports for 23 Aug 2017).

driving, causing death by dangerous driving and some of the related offences, since a discussion of these contributes to an understanding of the general principles of the criminal law.<sup>4</sup> Careless and dangerous driving are rare examples of English law providing endangerment offences.<sup>5</sup> The additions to the legislative scheme in the Road Safety Act 2006 include some controversial new offences in which it was sought to impose liability for a

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<sup>4</sup> Readers are referred to the leading works, in particular, K McCormac (ed), *Wilkinson's Road Traffic Offences* (27th edn, 2015). A major source of reference on the main offences covered in the chapter is the Department of Transport, Home Office, *Road Traffic Law Review Report* (1988), hereinafter referred to as the North Report. See further JR Spencer, 'Road Traffic Law: A Review of the North Report' [1988] Crim LR 707. Offences under the Road Safety Act 2006 were developed from proposals in the Home Office Consultation Paper *Review of Road Traffic Offences Involving Bad Driving* (2005). Further changes were implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. For discussion, see S Cunningham [2012] Crim LR 261.

<sup>5</sup> See generally on the merits of endangerment offences, RA Duff, 'Criminalising Endangerment' in Duff and Green, *Defining Crimes* (2005) esp at 60–62 and the response by M Ferrante, 'Criminalising Endangerment—A Comment' (2005) 65 La LR 967; Duff, *Answering for Crime*, 160–170; P Westen, 'The Ontological Problem of "Risk" and "Endangerment" in Criminal Law' in RA Duff and SP Green (eds), *Philosophical Foundations of Criminal Law* (2011).

death arising while unlawfully on the roads irrespective of whether the death is due to some defect in the manner of the driving.<sup>6</sup>

## 32.2 Dangerous driving

The most serious road traffic offences are dangerous driving, causing death by dangerous driving and causing serious injury by dangerous driving.<sup>7</sup> We can begin by considering dangerous driving which is governed by s 2 of the Road Traffic Act 1988, as substituted by s 1 of the Road Traffic Act 1991:

- 2A**—(1) For the purposes of sections 1, 1A and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—
- (a) the way he drives falls far below what would be expected of a competent and careful driver, and
  - (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

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<sup>6</sup> For criticism, see PW Ferguson, 'Road Traffic Law Reform' 2007 SLT 27; S Cunningham, 'Punishing Drivers Who Kill: Putting Road Safety First' (2007) 27 LS 288; S Cunningham, 'Vehicular Homicide: A Need for a Special Offence' in S Cunningham and C Clarkson (eds), *Criminal Liability for Non-Aggressive Death* (2008); cf M Hirst, 'Causing Death by Driving and Other Offences: A Question of Balance' [2008] Crim LR 339 suggesting that the new offences are not in themselves objectionable.

<sup>7</sup> See generally S Cunningham, 'Dangerous Driving a Decade On' [2002] Crim LR 945, considering reviews of the legislation.

- (2) A person is also to be regarded as driving dangerously for the purposes of sections 1, 1A and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
- (3) In subsections (1) and (2) above 'dangerous' refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
- (4) In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried.

The offence is based on a failure of driving which is, objectively viewed, far below the standard acceptable. In short, a person is to be regarded as driving dangerously if the way he drives falls far below what would be expected of a competent and careful driver and it would be obvious to a competent and careful driver that driving in that way would be dangerous. A person is also to be regarded as driving dangerously if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

### **32.2.1 Background**

Historically, there were offences of dangerous, reckless and careless driving. They were supposed to represent a hierarchy in terms of culpability. Unfortunately, the courts failed to find a satisfactory definition for any of the offences. The James Committee<sup>8</sup> noted the confused state of the law and how the supposed hierarchy failed to work well. In 1977,

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<sup>8</sup> *The Distribution of Criminal Business between the Crown Court and Magistrates' Courts* (1975) Cmnd 6323, paras 123, 124 and Appendix K.

Parliament abolished dangerous driving. However, the offence of reckless driving that remained was still lacking a clear definition. The law was still unsatisfactory and the authors of the North Report felt that it left too many cases of bad driving to be dealt with simply as careless driving:<sup>9</sup>

In terms of behaviour on the road the sort of driving which we believe ought to be treated more seriously would include . . . such activities as driving in an aggressive or intimidatory fashion which might involve, for example, sudden lane changes, cutting into a line of vehicles or persistently driving much too close to a vehicle in front. The present reckless driving offence is too narrowly framed reliably to catch those guilty of this kind of bad driving, *particularly in that it requires investigation of the driver's state of mind at the relevant time, evidence of which may be hard to obtain.*

The italics have been supplied because, to some at least, it is not immediately apparent why in an offence carrying two years' imprisonment on conviction on indictment (14 years' imprisonment should death be caused and five years should serious injury be caused) the driver's state of mind should be irrelevant. It would surely be relevant to the sentencer who would be inclined to award a sentence towards the lower end of the scale if he concluded that the driver was merely thoughtless and towards the higher end of the scale if he concluded that the driver had deliberately put at risk the persons or properties of others.<sup>10</sup> And why should it be more difficult to obtain evidence as to the person's state of mind when he is driving a car

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<sup>9</sup> North Report, para 5.15. This same anxiety has led, bizarrely, to suggestions for an intermediary offence of negligent driving. For cogent criticism, see Cunningham, n 4.

<sup>10</sup> The Sentencing Guidelines Council issued guidance on Causing Death by Driving in 2008. Available at [www.sentencingcouncil.org.uk/wp-content/uploads/web\\_causing\\_death\\_by\\_driving\\_definitive\\_guideline.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/web_causing_death_by_driving_definitive_guideline.pdf).

than when he is wielding other dangerous implements such as a garden fork, hedge-trimmer or chainsaw?

The North Report also recommended that liability ought to attach to the driver who gave thought to the risk but foolishly concluded there was none: the so-called lacuna or loophole in the *Caldwell* test of recklessness.<sup>11</sup> The North Report concluded that there should be a new 'very bad' driving offence which would be objective and would articulate the relevant standard—the offence of dangerous driving was created.

### 32.2.2 The offence

The test of dangerousness is a purely objective one.<sup>12</sup> The CPS<sup>13</sup> provides the following examples of driving which may support an allegation of dangerous driving: racing or competitive driving; speed which is particularly inappropriate for the prevailing road or traffic conditions; aggressive driving, such as sudden lane changes, cutting into a line of vehicles or driving much too close to the vehicle in front; disregard of traffic lights and other road signs which, on an objective analysis, would appear to be deliberate; disregard of warnings from fellow passengers; overtaking which could not have been carried out safely; where the driver is suffering from impaired ability, such as having an arm or leg in plaster, or

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<sup>11</sup> As to which, see Ch 3. Some would argue that the driver in an inadvertent state is really failing to apply latent knowledge from experiences of driving and is blameworthy in that regard. For discussion see RA Duff, *Intention, Agency and Criminal Liability* (1990) 160.

<sup>12</sup> *Loukes* [1996] 1 Cr App R 444.

<sup>13</sup> See [www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents](http://www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents).

impaired eyesight; driving when knowingly deprived of adequate sleep or rest; driving a vehicle knowing it has a dangerous defect or is poorly maintained or dangerously loaded; using a hand-held mobile phone or other hand-held electronic equipment whether as a phone or to compose or read text messages when the driver was avoidably and dangerously distracted by that use;<sup>14</sup> reading a newspaper/map; talking to and looking at a passenger where the driver was avoidably and dangerously distracted by that; selecting and lighting a cigarette or by adjusting the controls of electronic equipment such as a radio, hands-free mobile phone or satellite navigation equipment; a brief but obvious danger arising from a seriously dangerous manoeuvre.

Dangerous driving is triable either way and carries an unlimited fine and/or six months' custody on summary conviction; in the Crown Court, the maximum penalty is two years' custody and/or an unlimited fine. Disqualification from driving for at least a year and an extended driving retest are mandatory in the absence of 'special reasons'.

The offence requires a consideration of the following matters.

### **32.2.2.1 The relevant standard for dangerous driving**

In relation to the *driving* of the vehicle, the relevant standard is entirely objective:<sup>15</sup> D doing his incompetent best might still render himself liable for dangerous driving. The test is focused on the manner of driving and not on D's state of mind.<sup>16</sup>

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<sup>14</sup> See *Arora* [2014] EWCA Crim 104. See *Browning* [2001] EWCA Crim 1831.

<sup>15</sup> *Collins* [1997] Crim LR 578.

<sup>16</sup> But note the public attitude reported in the surveys discussed by Cunningham [2002] Crim LR 945 at 950 and in her 'Vehicular Homicide'. See also, B Mitchell, 'Further Evidence of

It must be proved (a) that the way D drives falls ‘far below’ what would be expected of a competent and careful driver; *and*<sup>17</sup> (b) that it would be obvious to a competent and careful driver that driving in that way would be dangerous. Dangerous driving is a more serious offence than careless driving. Careless driving may well create a risk of injury to the person or of serious damage to property but careless driving which does not fall ‘far below’ what would be expected of a competent driver does not suffice. Conversely, driving might fall far below the standard of the competent driver and yet not create a risk of injury to the person nor of serious damage to property. Moreover, the danger of the relevant harm must be ‘obvious’ to the competent and careful driver and this requires more than that the danger would have been ‘foreseeable’ to the competent and careful driver; the situation must be one where the competent and careful driver would say that the danger was plain for all to see. A single inadvertent act or omission may fall so far below the standard of driving of a competent and careful driver that it constitutes dangerous driving. It is, nevertheless, intended to be a high threshold, and not one applying to every slip;<sup>18</sup> not every breach of the Highway Code will be sufficient to establish the offence of dangerous driving, although it will be a guide as to the standard to be expected of the careful and competent driver.<sup>19</sup>

Clearly, the magistrates or the jury have to make a value judgement as to whether D’s driving falls ‘far below’ the standard of the competent and careful driver. Opinions of

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the Relationship Between Legal and Public Opinion on the Law of Homicide’ [2000] Crim LR 814.

<sup>17</sup> See *Brooks* [2001] EWCA Crim 1944.

<sup>18</sup> *Conteh* [2004] RTR 1; *Few* [2005] EWCA Crim 728.

<sup>19</sup> *Taylor* [2004] EWCA Crim 213.

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magistrates and juries may, and no doubt will, differ on how far below is 'far below' but appellate courts are unlikely to interfere with what are said to be decisions 'of fact and degree' unless the decision is patently unreasonable. There will therefore be an element of chance in whether D is convicted of dangerous driving or the lesser offence of careless driving.<sup>20</sup> This element of the offence has been heavily criticized since members of the public do not have a 'consistent perception of what is required of a competent and careful driver'.<sup>21</sup>

Viewed as a matter of principle, the driving should be considered independently of the harm in fact caused; it is the nature of the driving and its potential to cause the stated harms that is the criterion in a conduct or endangerment crime such as dangerous driving.<sup>22</sup> This is supported in particular by the fact that there are separate specific offences of causing death by dangerous driving and causing serious injury by dangerous driving.

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<sup>20</sup> It is incumbent on the trial judge to direct carefully on the difference between dangerous and careless driving: *Jeshani* [2005] EWCA Crim 146 and see *Lane* [2009] EWCA Crim 1630.

<sup>21</sup> *Cunningham* [2002] Crim LR 945 at 957, reviewing the findings of research surveys into the working of the 1991 Act.

<sup>22</sup> cf *Krawec* (1984) 6 Cr App R (S) 367, CA, holding that in cases of careless driving leading to death, the unforeseen and unexpected consequences are not normally relevant to penalty, the primary consideration being the extent to which the driving falls below the standard of the reasonable driver. The North Report (para 5.22) recommended that the dangerous driving offence 'should look directly and objectively at the quality of the driving . . .—was the driving really bad?—without needing to consider how or what the driver had thought about the possible consequences . . .'

### 32.2.2.2 Driving a vehicle in a dangerous state

Regardless of the manner in which a vehicle is driven, danger may be caused to the public (a) by the condition of the driver or (b) by the condition of the vehicle.<sup>23</sup> Under the old law of reckless driving (now repealed), the courts held, quite inconsistently: (a) that danger arising from the driver's drunken condition could not in itself amount to the offence because the recklessness must be in the manner of the driving; but (b) that the offence was committed merely by driving a vehicle in a dangerous condition and it was immaterial that the manner of the driving was not reckless. The North Report recommended that, as indeed common sense seems to require, these two cases should be treated alike and either should constitute the offence. The offence:

should cover the fact that the vehicle is driven at all, as well as how it is driven. This is necessary so as to include within the offence those who decide to drive when either they themselves or their vehicles are wholly unfit to be on the road as well as those who, despite being fit to drive and having properly maintained vehicles, drive very badly.<sup>24</sup>

Section 2A(2) implemented this recommendation for dangerous driving but only in respect of the state of the vehicle and not in respect of the state of the driver. The absence of any reference to the driver's condition appeared to confirm the illogical pre-Act position.

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<sup>23</sup> There is no need for a jury to be unanimously of the view that it was the manner or the condition of the vehicle provided the jury is sure it was dangerous driving: *Budniak* [2009] EWCA Crim 1611.

<sup>24</sup> At para 5.22(iv).

It was therefore a great surprise when, in *Woodward*,<sup>25</sup> the court held that the fact that D was adversely affected by alcohol was 'a relevant circumstance' in determining whether he was driving dangerously.<sup>26</sup> The court accepted in relation to dangerous driving the arguments which it had persistently rejected or ignored in respect of reckless driving. In a final twist in this tale of statutory construction, the Court of Appeal rightly, it is submitted, accepted in

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<sup>25</sup> [1995] 3 All ER 79, [1995] Crim LR 487. The Criminal Law Review report wrongly treats this as a case of *reckless* driving. *Woodward* was followed in *Marison* [1997] RTR 457 (diabetic driver who was aware that there was a real risk he might have a sudden hypoglycaemic attack guilty of causing death by dangerous driving); see also *Akinyeme* [2007] EWCA Crim 3290 (epileptic failed to take medication). It was persuasively suggested that *Woodward* was a case where the court has improved the law by misreading the statute, EJ Griew [1995] 2 Arch News 4.

<sup>26</sup> In *Marison* [1997] RTR 457, [1996] Crim LR 909, it was held that for the purposes of conviction of this offence there is no relevant distinction between an incapacity induced by alcohol and one which is induced by diabetes or any other cause. The question in every case is whether the incapacity is such that it would be obvious to a competent and careful driver that it would be dangerous to drive while labouring under it. The source of the disability may be relevant to sentence. See also *Webster* [2006] EWCA Crim 415, which emphasizes that *Marison* should properly be regarded as a case on the unavailability of a plea of automatism. Note also *Ashworth* [2012] EWCA Crim 1064 and *Pleydell* [2006] 1 Cr App R 212—admissibility of unquantified consumption of cocaine. Cf the discussion later relating to the ability of the driver.

*Webster*<sup>27</sup> that the condition of the driver, although relevant, is not conclusive proof of dangerousness. *Moses LJ* in the Court of Appeal stated that:

the closely drafted definition of 'dangerous driving' does not permit proof of that offence to be limited to the danger occasioned by the condition of the driver. Firstly, the wording of the statute excludes such a possibility. Section 2A(1) refers only to the manner of driving. The definition is broadened by Section 2A(2) which eschews reference to the state of the driver and is confined to the defective condition of the vehicle. Section 2A(3) permits regard to circumstances which may well include the condition of the driver. But that condition is not dispositive of the question whether the person was driving dangerously. His condition will, by virtue of subsection (3) be relevant to whether there was danger of injury or serious damage but no more.<sup>28</sup>

As regards the state of the vehicle, it has been acknowledged that latent defects in the vehicle will be insufficient to found the charge since they would not be obvious to a competent and careful driver.<sup>29</sup> The 'current state' of the vehicle implies a state altered from the manufactured or designed state.

In determining the state of the vehicle, s 2A(4) provides that regard may be had to anything attached to or carried on or in the vehicle and to the manner in which it is attached or carried. This provision may have been unnecessary but it prevents any possible argument that the 'state' of the vehicle refers only to its mechanical state and does not extend, for example, to an improperly secured trailer or an insecure load.<sup>30</sup>

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<sup>27</sup> [2006] EWCA Crim 415. Evidence of any consumption of alcohol may be admissible even if D is not 'over the limit': *Mari* [2009] EWCA Crim 2677.

<sup>28</sup> At [17].

<sup>29</sup> *Marchant* [2004] 1 All ER 1187, [2003] Crim LR 806.

<sup>30</sup> cf *Crossman* [1986] RTR 49, CA (insecure load).

### 32.2.2.3 The relevant danger

The danger created must be of ‘injury to any person or of *serious* damage to property’. In relation to serious damage to property, given that the essence of the offence is very bad driving, it seems odd that the offence is committed only where the very bad driving creates a danger of ‘serious’ harm to property (assuming that no danger of personal injury is created). Very bad driving remains very bad driving if it creates a danger of *any* damage to property. And when does damage become *serious*? Fifty pounds’ worth? One hundred pounds’ worth? Five hundred pounds’ worth? Of course, the courts can take refuge in the formula that ‘it is all a matter of fact and degree’, but in terms of statutory definition this is unsatisfactory.

### 32.2.2.4 The knowledge of the reasonable person assessing D’s driving

The test of dangerous driving is objective: whether D’s driving falls far below the standard of the competent and careful driver and whether it would have been obvious to a careful and competent driver that driving in that way would be dangerous.

The fact that D pressed the accelerator accidentally in mistake for the brake is no defence. If no competent and careful driver would have done such a thing, that is evidence of dangerous driving.<sup>31</sup> Even in the case where the alleged offence is driving a vehicle in a dangerous state, if it would have been obvious to a careful and competent driver that the vehicle was defective or that the load was insecure D cannot defend himself by showing that

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<sup>31</sup> *A-G’s Reference (No 4 of 2000)* [2001] RTR 415, [2001] Crim LR 578; cf *Cambray* [2006] EWCA Crim 1708.

he was unaware of the defect in the vehicle, or that he thought the load was secure.<sup>32</sup> Where D secured his bales of straw to the trailer in a manner that had been in use for over 25 years without mishap, it was not reasonably open to the jury to convict on the basis that it was an ‘inherently dangerous’ system under s 2.<sup>33</sup>

The danger, it has been held, is ‘obvious’ only if it could be ‘seen or realized at first glance, evident to’ the competent and careful driver: *Strong*<sup>34</sup> where the fatal corrosion of the car, which D had bought only a few days earlier, could have been discovered only by going underneath it. The danger was not ‘obvious’. The court has subsequently suggested that *Strong* was not attempting to lay down a precise formula, and that ‘obvious’ was an ordinary English word that did not require elaboration.<sup>35</sup>

If a driver is aware of facts which would not be obvious in this sense, he may nevertheless be guilty since the Act provides that regard must be had to any circumstances shown to be within his knowledge. If D is unaware quite reasonably, for example, of the tendency of a car to swerve to the right when braked hard, D cannot be held to have driven dangerously or even carelessly, but once D becomes aware of this tendency he may properly be held to have driven dangerously if it would then be obvious to a competent and careful driver that to drive the car with this tendency would be dangerous.<sup>36</sup> Similarly, D’s actual knowledge of an

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<sup>32</sup> See *Marchant* [2004] 1 All ER 1187 on the position where the vehicle has an ‘authorization for use’ on the roads from the Secretary of State.

<sup>33</sup> *Few* [2005] EWCA Crim 728.

<sup>34</sup> [1995] Crim LR 428. See also *Roberts and George* [1997] RTR 462, [1997] Crim LR 209.

<sup>35</sup> *Marsh* [2002] EWCA Crim 137.

<sup>36</sup> cf *Haynes v Swain* [1975] RTR 40, DC, n 75.

uneven road surface may count against him though other drivers would be unaware of the hazard. More may be expected of a professional driver than of the private motorist.<sup>37</sup> An employed driver, however, cannot generally be expected to do more than to comply with the apparently reasonable instructions of his employer.

Several cases have highlighted the difficulty in applying the objective test in situations where a driver has superior driving ability. Ought that ability to be taken into account? With an objective test, account would not be taken of a driver's inexperience, so why should we take account of superior experience?

In *Milton v DPP*,<sup>38</sup> a very experienced and highly advanced police driver was recorded speeding at 140 mph. He claimed to be doing so in order to improve his driving skills for occasions when driving at such speed might be needed in an emergency situation. The District Judge acquitted him. The Crown appealed and in the Divisional Court, Hallett LJ observed that:

*It matters not whether the respondent intended to drive dangerously, or believed that he could drive at grossly excessive speeds without causing danger to others because of his advanced driving skills. I repeat that the test is, what is the standard judged objectively and what would have been obvious to the independent bystander? As to whether the district judge would have been entitled to impute knowledge of the respondent's driving skills to the independent bystander on the basis of the arguments advanced before us, I can form no concluded view.*<sup>39</sup>

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<sup>37</sup> *Roberts and George* [1997] Crim LR 209.

<sup>38</sup> [2006] EWHC 242 (Admin).

<sup>39</sup> Emphasis added.

The case was remitted to the magistrates who duly convicted the driver. On appeal, that conviction was quashed by the Divisional Court.<sup>40</sup> D argued that the fact that he was a highly experienced police driver was a ‘circumstance . . . shown to have been within the knowledge of the accused’ for the purpose of s 2A(3). The Divisional Court in *Milton (No 2)* held that, just as the prosecution can rely on circumstances known to D to help to establish that his driving was dangerous, so D can rely on special circumstances known to him (here, his special skill as a police driver) to help to establish that it was not.<sup>41</sup> In the more recent case of *Bannister*<sup>42</sup> (also involving a speeding police officer), the Court of Appeal rejected the reasoning in *Milton (No 2)* and endorsed that in *Milton (No 1)*.

The current state of the law is, therefore, that the superior driving *ability* of the driver is irrelevant when a driver is charged with dangerous driving. To have regard to those *abilities* is inconsistent with the objective test of the competent and careful driver set out in the Act. However, the intoxicated state of the driver is relevant to determining whether the driving was dangerous because the *condition* of the driver (heavily intoxicated by alcohol) is in itself a ‘circumstance’ known to the accused and therefore regard had to be had to it.<sup>43</sup> This is relevant to the dangerousness test because it does not go to the *standard* of the competent and

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<sup>40</sup> At [27].

<sup>41</sup> A jury once held that a motorist driving at 145 mph, more than twice the speed limit, was not driving dangerously, apparently having regard to the high quality of the vehicle, the ability of the driver and, presumably, the prevailing road conditions: (1999) *The Times*, 25 Mar.

<sup>42</sup> [2009] EWCA Crim 1571. See J Goudkamp (2010) 69 CLJ 8.

<sup>43</sup> *Woodward* [1995] 2 Cr App R 388.

careful driver but amounts to facts relating to the condition of the driver which were as relevant as the driver's knowledge of the unroadworthiness of a car or the conditions of the weather or the road. That distinction is a fine one. Moreover, it might be argued that the test would remain an objective one if the reasonable person were to be asked whether, judged objectively, the standard of driving is dangerous taking into account the level of expertise of the driver. It takes a strained reading to include *any* such factors within the evaluation of the *dangerousness* of the driving since it is odd to describe the drunkenness of the driver as a 'circumstance within the knowledge of the accused' which is what s 2A(3) requires in order for it to be considered.<sup>44</sup>

The relevant principles of causation appear to be the same as in homicide generally and these are discussed elsewhere.<sup>45</sup> It is, however, worthy of note here that where the dangerous condition of the vehicle results in its being stationary on the road, creating an obstruction which is a contributory cause of a fatal accident, the driver who ought to have known of the

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<sup>44</sup> *Bannister* poses other difficulties: the court's statement that 'no emergency or police duty permits a police officer to drive dangerously' overstates the position. If a defence of necessity can legitimate killing, surely it can provide a defence to an act of objectively dangerous driving if the circumstances warrant it (eg driving the wrong way down a road to reach and defuse a terrorist bomb).

<sup>45</sup> See Ch 2. In this context, however, it needs to be noted that it is not enough that D brings about a death *while* driving dangerously; the dangerous driving must *cause* the death. Cf *O'Neale* [1988] Crim LR 122, CA; *Hand v DPP* [1991] Crim LR 473, DC.

vehicle's condition is guilty of causing death.<sup>46</sup> D may be convicted of causing death by dangerous driving even though it would not have been obvious to a careful and competent driver that there was any danger of personal injury as long as there was an obvious risk of serious damage to property; this seems a particularly unwarrantable extension of liability for an unforeseen death.<sup>47</sup>

### 32.3 Careless and inconsiderate driving

Section 3 of the Road Traffic Act 1988, as substituted by s 2 of the Road Traffic Act 1991, provides:

If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence.

The offences are summary only and punishable by an unlimited fine.<sup>48</sup>

The substituted section extended the offences in two respects, first by substituting 'mechanically propelled vehicle' for 'motor vehicle' and, secondly, by the addition of 'or

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<sup>46</sup> *Skelton* [1995] Crim LR 635, rejecting an argument that, by the time of the crash, the act of dangerous driving was spent. See also *Jenkins* [2012] EWCA Crim 2909.

<sup>47</sup> See also *Jeshani* [2005] EWCA Crim 146.

<sup>48</sup> Road Traffic Offenders Act 1988, Sch 2, Part 1, as amended by the Road Safety Act 2006, s 23. The court must also endorse the driver's licence with between three and nine penalty points, unless there are 'special reasons' not to do so. Disqualification (for a fixed period and/or until a driving test has been passed) is discretionary.

other public place' to 'road'.<sup>49</sup> The meaning of 'mechanically propelled vehicle' was examined in *Coates v CPS*.<sup>50</sup> C appealed by way of case stated against a decision of a District Judge that he wilfully rode a motor vehicle, namely a Segway, upon a footpath contrary to s 72 of the Highway Act 1835. The Administrative Court held that the relevant issue for determination was whether a Segway is a 'carriage' within s 72 of the 1835 Act. C was riding the device. As Munby LJ explained, 'to be carried along on a wheeled contraption or machine, whether powered or not, can be, within the meaning of section 72, to ride'.<sup>51</sup> In a characteristically scholarly analysis of the problem, Munby LJ explained the concepts of 'riding' and of 'driving', as well as examining the meaning of 'carriage'. The court declined to rule on whether a 'bath-chair or wheelchair, a child's perambulator, pushchair or buggy, a

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<sup>49</sup> The North Report recommended these extensions for the offence of dangerous driving (paras 8.10, 8.12) but not for careless driving. On defining 'public place', see *May v DPP* [2005] EWHC 1280 (Admin). See also *Barrett v DPP* [2009] EWHC 423 (Admin) for a useful review of the case law. On the interpretation of 'road', see *Avery v CPS* [2011] EWHC 2388 (Admin); *Hallett v DPP* [2011] EWHC 488 (Admin).

<sup>50</sup> [2011] EWHC 2032 (Admin).

<sup>51</sup> At [23]. A Segway is a form of personal transportation consisting of 'a small gyroscopically stabilised platform mounted on two wheels, on which the traveller stood, powered by a battery-driven electric motor'.

child's scooter or horse on wheels, a skateboard, roller skates, or a wheelbarrow or handcart' constituted carriages within the meaning in s 72.<sup>52</sup>

For the purposes of s 3, and no doubt for the purposes of ss 1 and 2, 'other persons using the road' includes the passengers in a vehicle driven by D.<sup>53</sup>

Section 3 creates two distinct offences, careless driving and inconsiderate driving. In many cases, the facts would constitute either offence but they are not identical since inconsiderate driving may be committed only where other persons are using the road.

### 32.3.1 Background to the careless driving offence

As discussed in Ch 4, at common law, negligence is only rarely a sufficient basis for criminal liability. It is now established that manslaughter may be committed by gross negligence<sup>54</sup> but this is exceptional. Negligence, however gross, is not usually sufficient to ground liability for a non-fatal offence against the person or even of damage to property. A number of road traffic offences are founded on negligence, in particular the offence discussed in detail later of driving a mechanically propelled vehicle carelessly. That offence does not require harm to person or property. Why, if it is not an offence negligently to cause injury with 'a garden fork, hedge-trimmer or even a chainsaw'<sup>55</sup> should it be an offence to cause harm (or even not

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<sup>52</sup> The court did note that the Department for Transport has published guidance that to ride a self-balancing scooter on the public footway (pavement) is an offence under s 72, although that is mere guidance and not determinative of anything.

<sup>53</sup> *Pawley v Wharldall* [1966] 1 QB 373.

<sup>54</sup> *Adomako* [1995] AC 171. See Ch 14.

<sup>55</sup> <ib>North Report</ib>, para 5.29.

to cause harm) by the negligent use of a motor vehicle? The North Report conceded that there is not a great logical difference between the careless use of a chainsaw or a vehicle but defended the offence of careless driving on the grounds that:

the careless use of chainsaws does not contribute to over 5,000 deaths every year. It is because the danger associated with the widespread use of motor vehicles is so great that society has decided to attempt to restrain the use of vehicles so as to reduce this danger. And there are parallels between road traffic law and other bodies of regulatory law covering areas of activity such as health and safety at work, and building standards. Some of these areas of law contain offences which could be the result of mere carelessness such as, for example, polluting a river or leaving a machine unguarded.

The common element between such offences is the degree of danger that may be caused to innocent parties.<sup>56</sup>

Some may find this reassurance convincing, others less so. The assumption appears to be that without such an offence, road deaths attributable to careless driving would have been significantly more than 5,000, but the assumption remains unproven.<sup>57</sup>

One argument against such an offence is that it is unnecessary because drivers are already constrained to drive as best they can so as to protect their own safety, and to avoid a collision and its consequences (not least the loss of an insurance no claims bonus, the cost of which may exceed any fine the court imposes). The North Report rejected this argument, suggesting that if the offence of careless driving were to be abolished then:

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<sup>56</sup> *ibid*, para 5.30. Cf Health and Safety Act 1974 offences.

<sup>57</sup> The Consultation Paper preceding the 2006 Act reforms—*Review of Road Traffic Offences Involving Bad Driving* (2005)—referred to the 35,000 deaths or injuries per year on British roads.

at least part of it would have to be replaced or there would be some serious instances of bad driving which would go unpunished. In our view it is likely that the issues here are confused by the amount of attention which is focused on the common shorthand term for this offence—careless driving. But what is required to establish the section 3 offence is more than this. The course of driving must be found to be lacking in *due care* or *reasonable* consideration. Cases where no accident is caused, involving momentary inattention for example, by a driver with an unblemished driving career should not, in our opinion, lead to an appearance in court. But a series of bad overtaking decisions might, if such driving came to police attention, warrant prosecution, even if no accident resulted.<sup>58</sup>

This passage is puzzling. It suggests that the offence of careless driving should be retained because it will deal with cases of ‘bad’ driving which are not bad enough to qualify as ‘very bad’ driving within the offence of dangerous driving. It also suggests that carelessness per se does not suffice for the offence; the emphasis on ‘*due care*’ and ‘*reasonable consideration*’ suggesting that more than mere carelessness is required to constitute the offence. This is a novel suggestion and does not appear to be one articulated in the case law to date.

### 32.3.2 Careless driving defined

The Road Safety Act 2006 introduced a provision into the 1988 Act, seeking to clarify the definition of the offence. Section 30 of the 2006 Act inserts s 3ZA which provides that:<sup>59</sup>

- (2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver.
- (3) In determining for the purposes of subsection (2) above what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which

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<sup>58</sup> North Report, para 5.31.

<sup>59</sup> From 24 Sept 2007.

he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

This codifies earlier case law and has echoes of the test in dangerous driving noted earlier. In that respect, it is welcome since it makes clear that there is a hierarchy, with careless driving requiring conduct falling below the standard of the competent driver while the dangerous driving offence requires a falling *far* below that standard.

The earlier cases defined the test of liability for careless driving as whether D was exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances.<sup>60</sup> The relevant standard, according to Lord Hewart CJ:

is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver.<sup>61</sup>

The aim of the courts was to impose a purely objective standard, paying no heed to the inadequacies of the learner or inexperienced driver.<sup>62</sup> Nor was any special standard applicable

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<sup>60</sup> Per Lord Goddard CJ in *Simpson v Peat* [1952] 2 QB 24, [1952] 1 All ER 447 at 449, DC.

<sup>61</sup> *McCrone v Riding* [1938] 1 All ER 157 at 158, DC. References in a criminal case to rules of civil law affecting the onus of proof (such as *res ipsa loquitur*) are probably best avoided though it is open to justices to infer negligence from facts affording no other reasonable explanation.

<sup>62</sup> *McCrone v Riding* [1938] 1 All ER 157; *Preston Justices, ex p Lyons* [1982] RTR 173, [1982] Crim LR 451, DC. See M Wasik, 'A Learner's Careless Driving' [1982] Crim LR 411. Inexperience may be relevant to sentence: *Kancham* [2013] EWCA Crim 2591. Given the nature of the test, expert evidence is rarely needed since jurors are more than capable of

to experienced drivers, such as police drivers who may be trained to meet exacting standards of proficiency,<sup>63</sup> even though they may have to cope with emergencies which ordinary drivers do not.<sup>64</sup> Faced by an emergency, the issue is not whether by taking some other course of action harm may have been avoided, but whether D's reaction to the emergency was a reasonable one.<sup>65</sup> Even if D suffers an unexplained initial loss of control (eg resulting in the vehicle skidding), it is not improper for justices to convict him of careless driving on the basis of his reaction in braking too heavily.<sup>66</sup>

Lord Diplock in *Lawrence*<sup>67</sup> described the offence as an 'absolute offence':

in the sense in which that term is commonly used to denote an offence for which the only *mens rea* needed is simply that the prohibited physical act (*actus reus*) done by the accused was directed by a mind that was conscious of what his body was doing, it being unnecessary to show that his mind was also conscious of the possible consequences of his doing it.

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evaluating whether D's driving fell below the standard to be expected. See *Stubbs* [2011] EWCA Crim 1293.

<sup>63</sup> *Woods v Richards* (1977) 65 Cr App R 300, DC.

<sup>64</sup> In coping with such emergencies, the police driver owes the ordinary duty of care to other persons lawfully (*Gaynor v Allen* [1959] 2 QB 403, DC) or unlawfully (*Marshall v Osmond* [1983] QB 1034, DC) on the highway. The test is whether D is driving with due care *in all the circumstances*, including the emergency with which he is faced (*Woods v Richards* (1977) 65 Cr App R 300, DC) and the nature of the unlawful conduct with which he has to deal (*Marshall v Osmond*).

<sup>65</sup> *R v Bristol Crown Court, ex p Jones* (1986) 83 Cr App R 109, DC.

<sup>66</sup> *R (on the application of Bingham) v DPP* (2003) 167 JP 422.

<sup>67</sup> [1982] AC 510, HL.

Care is needed in using the term ‘absolute offence’.<sup>68</sup> If D’s driving falls short of the standard expected from the competent and careful driver, not only is it no defence for D to show that he was doing his level best but also it is no defence for him to show that it was in fact impossible for him to do any better. In truth, the ‘competent and careful driver’ is not the average driver but a mean standard. In this limited sense only, careless driving might be said to be an absolute offence but it is not clear that it is in any sense helpful to so classify it. The general basis on which persons are punished for offences of negligence is that they could have done better, whereas people may be punished for offences of absolute liability even though they have taken all reasonable care.

Lord Diplock does, however, recognize that no liability can be incurred unless what was done by D was directed by a mind conscious of what he was doing. This is merely a particular instance of a general principle governing criminal liability. If D is unforeseeably afflicted by an epileptic seizure when driving he cannot be convicted of careless driving. D may thereby create considerable dangers for other road users, which perhaps explains why some cases seem to show a marked lack of sympathy to drivers raising automatism,<sup>69</sup> but without a real ability to control his actions and where the seizure was truly unforeseeable D

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<sup>68</sup> See the discussion of the mislabelling of offences in Ch 5. Cf his lordship’s view as expressed in *Tesco Supermarkets Ltd v Natrass* [1971] AC 153, HL: ‘negligence connotes a reprehensible state of mind—a lack of care for the consequences of his physical acts on the part of the person doing them’.

<sup>69</sup> *Watmore v Jenkins* [1962] 2 QB 572, DC; *Broome v Perkins* [1987] Crim LR 271, DC. See also the discussion in the Law Commission Discussion Paper, *Criminal Liability: Insanity and Automatism* (2013) paras 5.22 et seq.

cannot be convicted of careless driving.<sup>70</sup> He may, however, find himself not guilty by reason of insanity if his disability arose from an ‘internal factor’ such as multiple sclerosis or epilepsy.<sup>71</sup>

Care is also needed with Lord Diplock’s *dictum* since it might be taken to imply that the offence of careless driving requires proof of inconvenience or annoyance to other road users. That is not the case. Careless driving is a conduct crime and not a result crime;<sup>72</sup> it may be committed though no one is affected by the careless driving.

It has always been accepted that all the circumstances (which cannot be exhaustively stated but include such factors as the state of the road, the volume of traffic, weather conditions and so on) need to be considered by the magistrates in determining whether D’s driving falls short of the relevant standard and the question is essentially one of fact for them. Since the test is objective, and what is relevant is the driver’s conduct, it cannot matter that the failure to exercise due care arose from a deliberate act of bad driving on D’s part.<sup>73</sup> This is not to say that subjective factors must always be ruled out of account. Though no account

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<sup>70</sup> But note *Moses* [2004] All ER 128 (Sept): D convicted of causing death by *dangerous* driving when he served the bus he was driving because he was swatting a wasp in the cab.

<sup>71</sup> See JC Smith, ‘Individual Incapacities and Criminal Liability’ (1998) 6 Med L Rev 138 at 144–145.

<sup>72</sup> See Ch 2.

<sup>73</sup> *Taylor v Rogers* (1960) 124 JP 217, [1960] Crim LR 271, DC.

is to be taken of such subjective factors as experience and skill,<sup>74</sup> knowledge of circumstances is a relevant factor.

The new s 3ZA, cited earlier, makes explicit the opportunity for the magistrates to consider the circumstances of the knowledge of the individual driver. A typical example would be where the driver knew that a particular road was liable to black ice or where he knew that the brakes on the car were defective. It is clear that D could be convicted of careless driving where, for example because of his familiarity with the vehicle, he realizes that it has a tendency to pull to the right when the brakes are applied at high speed,<sup>75</sup> while someone who was unfamiliar with the vehicle, and who was reasonably unaware of this tendency, could not. Professor Ferguson argues that the new provision inserted by the 2006 Act creates a logical difficulty because the court must take account of the circumstances proved to have been known to D only where that operates against him (eg knowledge of defective brakes) and not when it amounts merely to a claim of his awareness of his own presumed superior ability (being a police driver, etc).<sup>76</sup>

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<sup>74</sup> Presumably no account is to be taken of age although D may lawfully drive a motor car at 17 years and a motorcycle at 16. No doubt the same 'impersonal and universal' standard would be applied. But what of careless cycling under s 29 where D may be only ten years old? In civil cases, generally a child must exercise the care to be expected of a child of his age but where a child is engaged in an activity such as cycling on a road there is much to be said for holding him to the standard of the reasonably experienced cyclist. Cf *Bannister*, n 42.

<sup>75</sup> *Haynes v Swain* [1975] RTR 40, [1974] Crim LR 483, DC.

<sup>76</sup> 2007 SLT 28.

Evidence of the amount of alcohol consumed by the driver is admissible. Where, as in *Millington*,<sup>77</sup> the manner of driving is in dispute, it is relevant as circumstantial evidence of that matter. An intoxicated person is more likely to have driven in the manner alleged by the prosecution than a sober person. It may also be an element in the alleged carelessness—it might not be ‘careless’ for a mildly intoxicated person to drive in the particular conditions at 30 mph, nor for a sober person to drive at 45 mph, but careless for that intoxicated person to drive at 45 mph.<sup>78</sup>

Only where the magistrates reach a decision which no reasonable bench could reach on those facts will the High Court interfere.<sup>79</sup> Consequently, the High Court may uphold a decision to convict (or acquit) if it is one which may reasonably be reached on the facts and even though, had the decision been the reverse, that decision would equally have been upheld.<sup>80</sup> In criminal cases, as in civil actions for negligence, the courts resist any attempt to elevate ‘to the status of propositions of law what really are particular applications to special

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<sup>77</sup> [1995] Crim LR 824.

<sup>78</sup> A new drug driving offence—s 5A—was inserted by the Crime and Courts Act 2013, s 56. See the Home Office guidance (from the Bill stage). Recommended limits for 16 different drugs have now been approved with eight generally prescription and eight illicit drugs added into new regulations in force from 2 Mar 2015.

<sup>79</sup> *Bracegirdle v Oxley* [1947] KB 349, DC.

<sup>80</sup> *Jarvis v Fuller* [1974] RTR 160, DC. The same principles apply to a charge of inconsiderate driving: *Dilks v Bowman-Shaw* [1981] RTR 4.

facts of propositions of ordinary good sense'.<sup>81</sup> The point may be illustrated by reference to cases involving the Highway Code.<sup>82</sup> While the Code contains many principles of good driving, and while the Act itself provides<sup>83</sup> that a failure to observe its provisions may be relied on in both criminal and civil proceedings as tending to establish or negative liability, it does not lay down for drivers a regime of inflexible rules. Since each case turns on its own particular facts, it does not *always* (though it may usually) follow that a driver is necessarily careless in driving at such a speed that he cannot stop in the distance he sees to be clear;<sup>84</sup> nor in leaving insufficient braking distance between his vehicle and another;<sup>85</sup> nor in failing to look behind before reversing;<sup>86</sup> nor in crossing a road's dividing line.<sup>87</sup> This is so notwithstanding the fact that these are all instances of poor driving practice set out in the Code.

D's driving is not necessarily careless merely because it constitutes some other driving offence. While the speed at which a vehicle is driven is often a relevant factor, it does not

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<sup>81</sup> *Easson v London and North Eastern Rly Co* [1944] 2 All ER 425 at 426, CA, per du Parcq LJ.

<sup>82</sup> See [www.gov.uk/guidance/the-highway-code](http://www.gov.uk/guidance/the-highway-code).

<sup>83</sup> Section 38(7).

<sup>84</sup> *Jarvis v Fuller* [1974] RTR 160.

<sup>85</sup> *Scott v Warren* [1974] RTR 104, DC. Cf *Preston Justices, ex p Lyons* [1982] RTR 173, DC.

<sup>86</sup> *Hume v Ingleby* [1975] RTR 502, DC. *Hume* was doubted by the High Court of Justiciary in *McCrone v Normand* 1989 SLT 332.

<sup>87</sup> *Mundi v Warwickshire Police* [2001] EWHC 447 (Admin).

necessarily follow that D is guilty of careless driving merely because he is exceeding a speed limit.<sup>88</sup> Nor does it follow that a driver who is guilty of the offence of failing to accord precedence to a pedestrian on a crossing is guilty of careless driving.<sup>89</sup>

The following are provided by the CPS as examples of driving which *may* amount to careless driving: overtaking on the inside; driving inappropriately close to another vehicle; inadvertently driving through a red light; emerging from a side road into the path of another vehicle; tuning a car radio when the driver was avoidably distracted by this action; using a hand-held mobile phone or other hand-held electronic equipment when the driver was avoidably distracted by that use; and selecting and lighting a cigarette or similar when the driver was avoidably distracted by that use.<sup>90</sup>

### 32.3.3 Inconsiderate driving

Whereas in cases of careless driving the prosecution need not show that any other person was inconvenienced, in cases of inconsiderate driving there must be evidence that some other user of the road or public place was actually inconvenienced: Road Safety Act 2006 (s 3ZA(4)).

Inconsiderate driving is the more appropriate offence where, for instance, D drives his car through a puddle which he might have avoided and drenches pedestrians. It must be the

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<sup>88</sup> *Quinn v Scott* [1965] 1 WLR 1004, DC. Support for this proposition is also derived from the decision of the Administrative Court in *Milton v DPP* [2007] EWHC 532 (Admin).

<sup>89</sup> *Gibbons v Kahl* [1956] 1 QB 59, DC.

<sup>90</sup> See the CPS guidance on charging offences arising from driving incidents:

[www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents](http://www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents).

driving which is inconsiderate; other inconsiderate conduct, such as shouting abuse at a cyclist,<sup>91</sup> will not do. The CPS provides examples of conduct appropriate for a charge of driving without reasonable consideration, including: flashing of lights to *force* other drivers in front to give way; misuse of any lane to avoid queuing or gain some other advantage over other drivers; unnecessarily remaining in an overtaking lane; unnecessarily slow driving or braking without good cause; driving with undipped headlights which dazzle oncoming drivers; or driving a bus in such a way as to scare the passengers.<sup>92</sup>

## 32.4 Causing death by driving

There are at least six ways that a person might be held liable for causing a death by driving.<sup>93</sup> At the most extreme, it is possible for D to be liable for murder, as where he drives at V with

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<sup>91</sup> *Downes v Fell* [1969] Crim LR 376, DC.

<sup>92</sup> See [www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents](http://www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents). See eg *Curtis* [2007] EWCA Crim 2034: HGV driver attempted to overtake another HGV on a single carriageway road, causing oncoming traffic to brake, swerve off the road and collide with each other.

<sup>93</sup> On the application of the offences, see S Cunningham, 'Has Law Reform Policy been Driven in the Right Direction? How the New Causing Death by Driving Offences are Operating in Practice' [2013] Crim LR 711; S Cunningham, 'The Reality of Vehicular Homicides: Convictions for Murder, Manslaughter and Causing Death by Dangerous Driving' [2001] Crim LR 679. The Administrative Court held that causing death by driving is incapable of justifying a verdict of 'unlawful killing' at an inquest. See *R (Wilkinson) v HM Coroner for the Greater Manchester South District* [2012] EWHC 2755 (Admin).

intent to kill or do GBH.<sup>94</sup> Secondly, there is the possibility of manslaughter.<sup>95</sup> There are then four statutory offences involving death by driving: causing death by dangerous driving, causing death by careless driving, causing death by careless driving while intoxicated,

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<sup>94</sup> See J Spencer, 'Motor Vehicles as Weapons of Offence' [1985] Crim LR 29. In *Williams* [2017] EWCA Crim 305, D was acquitted of murder but found guilty of manslaughter after he swerved to avoid a tyre-deflation device that had been placed in the road and struck a police officer. See also *Brown* [2005] EWCA Crim 2868 (D deliberately drove his car into a head-on collision with another vehicle whilst intent on committing suicide). See also *Whitnall* [2006] EWCA Crim 2292 (car ramming); *Bissell* [2007] EWCA Crim 2123 (manslaughter by HGV driver leaving scene); *Yaqoob* [2005] EWCA Crim 1269 (inadequate maintenance). Cf the Scottish case of *HM Advocate v Purcell* 2008 SLT 44.

<sup>95</sup> In *Meeking* [2012] EWCA Crim 641, D was a passenger in the car that her husband, V, was driving. D and V quarrelled and D pulled the handbrake. This caused the car to spin across the road into a head-on collision with another vehicle, killing the husband. The unlawful act upon which the manslaughter charge was based was s 22A(1)(b) of the Road Traffic Act 1988, namely that D had intentionally and without lawful excuse interfered with a motor vehicle. D was convicted and appealed on the basis that the provision was limited to acts of interference done before the vehicle was driven. In rejecting this contention, the Court of Appeal interpreted the offence in s 22A(1)(b) as being a crime of negligence but one that required a deliberate act. For discussion of whether a manslaughter conviction can be based upon an offence of negligence, see Ch 14 and Ashworth's criticisms at [2013] Crim LR 333.

causing death while driving unlawfully—being disqualified, or having no licence or insurance.<sup>96</sup>

At common law, a motorist who by his driving causes death could always be charged with manslaughter.<sup>97</sup> However, in practice juries may be reluctant to convict motorists of manslaughter save in the most exceptional circumstances<sup>98</sup> because the label is so striking. Since 1956, we have had statutory offences of causing death by driving a motor vehicle on a road.<sup>99</sup>

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<sup>96</sup> For a review of the greater significance of the selection of charge by the CPS, see S Cunningham, 'The Unique Nature of Prosecutions in Cases of Fatal Road Traffic Collisions' [2005] Crim LR 834 at 837. Technically an offence under the Aggravated Vehicle-Taking Act 1992 which causes death is a separate offence as it attracts a higher penalty: Theft Act 1968, s 12A(4).

<sup>97</sup> *US Government v Jennings* [1983] 1 AC 624 HL.

<sup>98</sup> See Hansard, 15 Feb 1955, vol 191, col 86 (Lord Goddard); *Seymour* [1983] 2 AC 493, HL. See also I Brownlee and M Seneveratine, 'Killing with Cars After *Adomako*: Time for Some Alternatives' [1995] Crim LR 389. On the illogicality of the offence, see B McKenna, 'Causing Death by Reckless or Dangerous Driving' [1970] Crim LR 67.

<sup>99</sup> For consideration of whether manslaughter would suffice without additional statutory offences, see S Cunningham, 'Vehicular Homicide: The Need for a Special Offence' in S Cunningham and C Clarkson (eds), *Criminal Liability for Non-Aggressive Death* (2008). See also *Brown v R* [2006] UKPC 18. For some solutions that it is argued might have addressed this issue directly without the creation of a specific offence, see J Horder, 'The Rise of

Clearly, following *Adomako*, a charge of manslaughter will only be appropriate where there is an obvious and serious risk of death from the manner of the driving; a risk of serious injury will not do. Furthermore, manslaughter will very rarely be appropriate and should be reserved for ‘very grave’ cases.<sup>100</sup> In particular, it might be appropriate where a vehicle has been used as an instrument of attack (but where D lacks the necessary intent for murder), ‘or to cause fright and death results’. In addition, it may be appropriate in hit-and-run cases where the death did not arise from the manner of the defendant’s driving but the subsequent failure to comply with the duty to stop under s 170 of the Road Traffic Act 1988 following an accident. Manslaughter should also be considered where the driving is otherwise than on a road or other public place, or when the vehicle driven was not mechanically propelled since in these cases the statutory offences may not apply.

Interestingly, it may be that public attitude to the use of manslaughter for driving fatalities is changing.<sup>101</sup> Responses to a CPS public consultation revealed support for more frequent use of gross negligence manslaughter.<sup>102</sup> Nevertheless, the CPS advice is still that gross

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Regulation and the Fate of the Common Law’ in J Horder, *Homicide and the Politics of Law Reform* (2012) 80–83.

<sup>100</sup> See also [www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents](http://www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents).

<sup>101</sup> See J Roberts et al, ‘Public Attitudes to Sentencing Involving Death by Driving’ [2008] Crim LR 525.

<sup>102</sup> See

[http://webarchive.nationalarchives.gov.uk/20140304111642/http://www.cps.gov.uk/consultations/charging\\_offences\\_driving\\_incidents\\_responses.pdf](http://webarchive.nationalarchives.gov.uk/20140304111642/http://www.cps.gov.uk/consultations/charging_offences_driving_incidents_responses.pdf).

negligence manslaughter should only be charged in exceptional cases, normally where there is evidence to show a very high risk of death.<sup>103</sup> Further, s 33 of the Road Safety Act 2006 now allows a jury to return an alternative verdict to a charge of manslaughter for one of four offences, including causing death by dangerous driving, if they do not find that there is sufficient evidence to convict of manslaughter but think the evidence was sufficient to prove any of those four offences.

We can now turn to consider the *statutory* offences which involve causing death by driving. The necessary elements of causation which are important for these offences have been considered previously in relation to murder (see Ch 12). The courts have struggled to apply a consistent approach to causation in relation to driving offences and attention is drawn in particular to the discussion of *Jenkins*,<sup>104</sup> *L*,<sup>105</sup> *Barnes*,<sup>106</sup> *Girdler*<sup>107</sup> and *Williams*<sup>108</sup> in Ch 2. Difficult problems of causation arise where D causes a minor crash with X and V then fails to avoid X's vehicle.

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<sup>103</sup> In *Meeking* [2012] EWCA Crim 641, n 95, the Court of Appeal observed *obiter* that gross negligence manslaughter would have been a more appropriate charge than unlawful act manslaughter.

<sup>104</sup> [2012] EWCA Crim 2909.

<sup>105</sup> [2010] EWCA Crim 1249; and see *Jenkins* [2012] EWCA Crim 2909 confirming that in an offence of causing death by driving there is no requirement that the driving occurs at the same time as the death. In that case the car was parked dangerously.

<sup>106</sup> [2008] EWCA Crim 2726.

<sup>107</sup> [2009] EWCA Crim 2666.

<sup>108</sup> [2010] EWCA Crim 2552, [2011] Crim LR 468 and commentary.

### 32.4.1 Causing death by dangerous driving

By s 1 of the Road Traffic Act 1988, as substituted by s 1 of the Road Traffic Act 1991:

A person who causes the death of another person by driving a mechanically propelled vehicle dangerously<sup>[109]</sup> on a road or other public place is guilty of an offence.

The offence is triable only on indictment and is punishable by imprisonment for 14 years<sup>110</sup> and/or a fine.

The problems with offences which depend on the chance of whether a particularly evil consequence occurs (death), as opposed to whether D had some mental fault in relation to that particular consequence, have been considered earlier. This is a particularly conspicuous example of the importance attached to harm done. The North Report<sup>111</sup> considered the arguments for and against such an offence but concluded that it should be retained:

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<sup>109</sup> It has been argued that it is worth emphasizing that the broad definition of ‘dangerous’ has not been narrowed despite the fact that the maximum sentence is three times what it was originally. See Horder, n 113, at 77.

<sup>110</sup> Criminal Justice Act 2003, s 285. Higher sentences will be imposed: *Afzal* [2005] EWCA Crim 384; *Richardson* [2007] 2 All ER 601. See generally on the sentencing difficulties in road traffic fatalities, the Sentencing Advisory Panel paper: <http://webarchive.nationalarchives.gov.uk/20100611032102/http://www.sentencing-guidelines.gov.uk/docs/death-by-driving-advice.pdf> and the Council’s guidelines published in 2008: [www.sentencingcouncil.org.uk/wp-content/uploads/web\\_causing\\_death\\_by\\_driving\\_definitive\\_guideline.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/web_causing_death_by_driving_definitive_guideline.pdf).

<sup>111</sup> At paras 6.1–6.9.

Two main factors have influenced our thinking. To abolish the offence in the absence of compelling reasons for doing so would mean that some cases of very bad driving were not dealt with appropriate seriousness. Repeal of section 1 would be seen as a down-grading of bad driving as a criminal activity. This is not a message which we wish to convey. Secondly, though logic might pull us towards arguments in favour of abolition neither English nor Scots law in fact relies entirely on intent as the basis for offences. There seems to be a strong public acceptance that, if the consequence of a culpable act is death, then this consequence should lead to a more serious charge being brought than if death had not been the result. We concur with this view.<sup>112</sup>

Developments since the Report have emphasized this attitude. The penalty for causing death by dangerous driving has been increased from five to ten years, and now to 14 years' imprisonment.<sup>113</sup>

### 32.4.2 Causing death by careless driving

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<sup>112</sup> At para 6.9.

<sup>113</sup> Horder argues that road traffic offences such as this one are typically conceptualized as ones that exist predominately to ensure future compliance with a regulatory scheme, rather than to reflect public condemnation of the offender's act. He bases that argument on the fact that the offence is contained in a statute that is primarily concerned with road *safety* issues rather than in a homicide statute. He argues, however, that this offence has outgrown its origins given the fact that the maximum sentence has increased threefold and so it now resembles a common law crime the purpose of which is to secure retribution. See Horder, n 113, at 73–74. As has already been mentioned, the MOJ has consulted on whether the maximum sentence should be increased to life imprisonment. Presumably Horder would argue that this bolsters his argument.

In February 2005, the government announced proposals for reform in the Consultation Paper *Review of Road Traffic Offences Involving Bad Driving*.<sup>114</sup> The proposals included introducing a new offence and s 20 of the Road Safety Act does so.<sup>115</sup> A new s 2B is inserted which provides:<sup>116</sup>

A person who causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention,<sup>[117]</sup> or without reasonable consideration for other persons using the road or place, is guilty of an offence.

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<sup>114</sup> (2005). This is part of the wider government initiative: Road Safety Strategy, *Tomorrow's Roads—Safer for Everyone* (2000). On the consultation in 2009 on making Britain's roads the safest in the world, see

<http://webarchive.nationalarchives.gov.uk/20100202151921/http://www.dft.gov.uk/pgr/roadsafety/strategytargetsperformance/tomorrowsroadssaferforeveryone>.

<sup>115</sup> For critical analysis of the provisions, see Cunningham, n 4 (2007) 27 LS 288; P Ferguson, 'Road Traffic Law Reform' 2007 SLT 27. Section 20(1) creates an offence (s 2B of the 1988 Act) of causing death by careless or inconsiderate driving.

<sup>116</sup> For an empirical study of how the new offence is operating in practice, see S Cunningham, 'Has Law Reform Policy been Driven in the Right Direction? How the New Causing Death by Driving Offences are Operating in Practice' [2013] Crim LR 711. Cunningham's study demonstrates that prosecutors seem to be giving greater consideration to whether driving is careless as opposed to dangerous, but that there is uncertainty on where the line between the two ought to be drawn.

<sup>117</sup> The revised definitions of careless and inconsiderate driving, as introduced by the Road Safety Act 2006 and set out earlier, apply to these offences.

The aim is to fill the perceived gap created when a defendant was found not guilty of causing death by dangerous driving because his driving had not fallen far enough below the standard of the competent driver.<sup>118</sup> The maximum penalty on conviction on indictment is five years' imprisonment or a fine, or both. This offence brings sharply into focus the question of whether punishment ought to be based on the fault of the actor or the consequences resulting.<sup>119</sup> Note that the distinction between this offence and that in s 2A is that there is no need to prove that it was obvious to a competent and careful driver that driving would create a risk of harm to person or property.

### **32.4.3 Causing death by careless or inconsiderate driving when under the influence of drink or drugs**

The Road Traffic Act 1991, inserting a new s 3A into the Road Traffic Act 1988, created new offences, triable only on indictment and punishable with ten years' imprisonment:

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<sup>118</sup> See *McCallum v Hamilton* 1986 SLT 156.

<sup>119</sup> In *Rigby* [2013] EWCA Crim 34, D was diabetic and suffered an episode of hypoglycaemia which caused him to lose control of his vehicle and kill V. Allowing D's appeal against sentence, the Court of Appeal held that his culpability lay in a failure to take precautions before driving rather than in the driving itself. As such, the guidelines of the Sentencing Council were inapplicable and only a short custodial sentence was appropriate.

If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention,<sup>[120]</sup> or without reasonable consideration for other persons using the road or place, and—

- (a) he is, at the time when he is driving, unfit to drive through drink or drugs, or
- (b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or
- (c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it, [it is not necessary that D is ‘over the limit’: *Coe*<sup>121</sup>] or
- (d) he is required by a constable to give his permission for a laboratory test of a specimen of blood taken from him under section 7A of this Act, but without reasonable excuse fails to do so, [it is not necessary that D is ‘over the limit’: *Coe*.]

he is guilty of an offence.<sup>122</sup>

This section appears to create eight forms of the offence. It is well established that simple careless and inconsiderate driving are separate offences and each is a further separate offence according to whether it is combined with (a), (b), (c) or (d). Where these offences are charged in the alternative to causing death by dangerous driving, the jury will need careful direction. In some instances, it will not be appropriate to leave the alternative charge of causing death by careless driving, as where the only issue is whether D was asleep.<sup>123</sup>

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<sup>120</sup> The revised definitions of careless and inconsiderate driving, as introduced by the Road Safety Act 2006 and set out earlier, apply to these offences.

<sup>121</sup> [2009] EWCA Crim 1452.

<sup>122</sup> Added by s 3 of the Road Traffic Act 1991, amended by s 31 of the Road Safety Act 2006.

<sup>123</sup> *Hart* [2003] EWCA Crim 1268.

### 32.4.4 Causing death while driving unlawfully

The Road Safety Act 2006 introduced in s 21 these controversial new offences of causing death while driving when unlicensed, disqualified or uninsured. The offences<sup>124</sup> are triable either way with a maximum penalty on conviction on indictment of two years' imprisonment, or a fine or both.<sup>125</sup> These are stark examples of constructive liability offences where on a literal interpretation of the section, the punishment is for a consequence (death) unrelated to the manner of the driving or any fault involved in driving. All that needs to be proved is that the defendant was driving when he did not have a valid licence or insurance or had been disqualified from driving, and was involved in a fatal collision. It seemed that even if D's driving was flawless and the collision was solely the fault of another, or even if V was solely at fault in running out in front of D, D would be convicted of the statutory homicide offence. For example, in *Williams*,<sup>126</sup> W was convicted when he drove his car without a driving licence or insurance. V crossed a dual-carriageway and stepped out 3 feet in front of W's car. W argued that he could not avoid the accident. Two other drivers testified that W was not speeding and that V stepped out when W was 3 feet away. The Court of Appeal held that for an offence under s 3ZB fault was not required. Moreover, 'cause' in s 3ZB was the same as in

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<sup>124</sup> It is submitted that s 3ZB creates three separate offences. This is echoed in the CPS legal guidance, which states that a single charge may be deemed bad for duplicity. Available at [www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents](http://www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents).

<sup>125</sup> Both offences are triable either way, and disqualification upon conviction of either offence is obligatory, as is endorsement by three to 11 penalty points.

<sup>126</sup> [2010] EWCA Crim 2552. The case was heavily criticized: [2011] Crim LR 471.

‘cause’ in death by dangerous driving.<sup>127</sup> W’s driving was ‘a cause’ if it was ‘more than negligible or *de minimis*’. It was questioned whether even if no mens rea as to the death was needed, there must still be proof that W caused the death by his ‘driving a motor vehicle on a road’.<sup>128</sup> It was suggested that there had to be proof of a causal link between the *driving* and the death, and not just of the fact that the car was on the road at the time. The offence is not one of death being caused by the presence of a motor vehicle on the road; it is an offence of causing death by driving. Extreme examples were postulated to demonstrate the illogicality of the decision: for example, if a suicidal person jumped from a high motorway bridge and landed on D’s uninsured car why has D’s *driving* caused V’s death? V’s death would have arisen if he had hit V’s stationary car or the road. The case of *Dalloway*,<sup>129</sup> which the court dismissed, is it is submitted relevant in reminding us that in an inquiry into causation the focus must be on the relevant act—which act is it that the Crown alleges is a cause of the death? Here, it is the driving not the existence of the car. In *Dalloway*, it was the negligent driving not the fact of the car on the road.

The Supreme Court considered the breadth of s 3ZB in *Hughes*.<sup>130</sup> D was driving without a full licence and while uninsured. V was driving in a vehicle coming in the opposite direction and veered across the road before colliding into D’s vehicle. It transpired that V had

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<sup>127</sup> *Hennigan* (1971) 55 Cr App R 262.

<sup>128</sup> For further discussion, see GR Sullivan and AP Simester, ‘Causation Without Limits: Causing Death While Driving Without a Licence, While Disqualified, or Without Insurance’ [2012] Crim LR 753.

<sup>129</sup> (1847) 2 Cox CC 273.

<sup>130</sup> [2013] UKSC 56, [2014] Crim LR 234.

been driving under the influence of heroin, was overtired and had driven a long distance on the day of the collision. In addition, evidence from other road users confirmed that V had been driving erratically long before his vehicle collided with D's. V died as a result of injuries suffered in the collision and D was charged with two counts under s 3ZB, the Crown accepting that there was nothing D could have done to prevent the accident from occurring. The recorder accepted the argument advanced on behalf of D that he had not caused V's death. The Crown, however, appealed and the Court of Appeal considered itself bound by the decision in *Williams*.<sup>131</sup> When the proceedings were resumed, D was convicted. The Court of Appeal certified the following question:

Is an offence contrary to section 3ZB of the Road Traffic Act 1988, as amended by section 21(1) of the Road Safety Act 2006, committed by an unlicensed, disqualified or uninsured driver when the circumstances are that the manner of his or her driving is faultless and the deceased was (in terms of civil law) 100% responsible for causing the fatal accident or collision?

In a unanimous judgment written by Lords Hughes and Toulson, the Supreme Court pointed out that D had been punished not for what he had done wrong, namely driving without insurance and a valid licence, but for a homicide for which V himself would be considered wholly responsible in civil law. Their lordships also pointed out that the offences of driving uninsured and without a full licence are offences of strict liability and so could be committed in circumstances where D was not responsible for the lapse in his insurance/driving licence. In construing the ambit of the offence, emphasis was placed on the fact that s 3ZB is a homicide offence and therefore one that is extremely serious. The Supreme Court accepted

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<sup>131</sup> [2011] EWCA Crim 1508, (2012) 70 CLJ 29. The Court of Appeal took cognizance of the criticisms of *Williams* made at [2011] Crim LR 471.

that Parliament could have created an offence that left it beyond doubt that a driver was guilty of the offence simply by being present on the road. The court emphasized that Parliament had drafted the offence so as to make D guilty when he ‘causes death by driving’. The court rejected D’s reliance upon the principle enunciated in *Kennedy (No 2)*, namely that V’s voluntary act broke the chain of causation between his death and D’s driving, because V was not trying to kill himself.<sup>132</sup>

The case was instead conceptualized as one involving concurrent causes.<sup>133</sup> The court accepted that D was a ‘but for’ cause of V’s death, but the issue was whether he was also a legally effective cause. In answering this question in the negative, the Supreme Court placed considerable emphasis on the presumption of mens rea.<sup>134</sup> Invoking Lord Hoffmann’s oft-

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<sup>132</sup> The court also rejected the attempt made by Simester and Sullivan, n 128, to identify a category of cases involving deaths caused without fault. Their argument is predicated upon distinguishing between culpability and responsibility in the sense that there may be cases in which the latter is present but where it would be unjust to impose the former. Their lordships held that such a distinction would make the law ‘confusing and incoherent.’ For Simester and Sullivan’s defence of this approach, see (2014) 73 CLJ 14.

<sup>133</sup> This rejection of *Kennedy* might at first glance seem confusing, since it was not the victim’s intention in that case to kill himself either. Simester and Sullivan state that this is explicable due to the peculiarity of unlawful act manslaughter. They argue that in *Kennedy* V’s taking of the drug was freely chosen and it was not caused by D’s unlawful act of supplying heroin. See (2014) 73 CLJ 14.

<sup>134</sup> See Ch 5 for discussion.

recited *dicta* in *R v Secretary of State for the Home Department, ex p Simms*<sup>135</sup> that ‘[i]n the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual’, their lordships stated that if Parliament had wished to displace the normal approach to causation it was free to do so, but that this would not be inferred by the courts in the absence of unambiguous language. In the absence of such language and applying the normal rules of statutory interpretation, s 3ZB had to be construed so as to require an element of fault. In order for D to be guilty of an offence under s 3ZB, therefore, the Supreme Court held that it must be proved that D has done something other than simply putting his vehicle on the road so that it is there to be struck. In the words of their lordships, ‘It must be proved that there was something which [D] did or omitted to do by way of driving it which contributed in a more than minimal way to the death.’ This still, however, left open the question of what is sufficient in law to constitute such an act or omission in the manner of driving. Wary of being overly proscriptive, the court declined to set a rigid standard against which D’s driving ought to be evaluated. Their lordships stated as follows:

Juries should thus be directed that it is not necessary for the Crown to prove careless or inconsiderate driving, but that there must be something open to proper criticism in the driving of the defendant, beyond the mere presence of the vehicle on the road, and which contributed in some more than minimal way to the death.<sup>136</sup>

Given that the Crown had conceded that D’s driving was faultless, the recorder had been correct to rule as he did and his ruling was restored.

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<sup>135</sup> [2000] 2 AC 115.

<sup>136</sup> At [33].

The Supreme Court's judgment is welcome as it curtails the otherwise expansive scope of the offence in s 3ZB and ensures that it conforms to long-standing principles of the criminal law. The judgment is also important for the way in which their lordships emphasize the fundamentality of the presumption of mens rea and confirms that courts will not be quick to infer that Parliament has intended to displace it.<sup>137</sup> In the subsequent case of *Taylor*,<sup>138</sup> Lord Sumption, speaking for a unanimous seven-member Supreme Court, reaffirmed the principle enunciated in *Hughes*. Parliament does not seem to have taken much notice of the court's admonition to use less ambiguous language in drafting offences that are intended to deviate from this principle of the criminal law.<sup>139</sup> What remains to be seen is when, in future, s 3ZB will be considered an appropriate charge in circumstances in which a death has been caused by D who is driving whilst uninsured or without a licence.<sup>140</sup>

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<sup>137</sup> For a case in which the Supreme Court was willing to find that the presumption had been displaced by the relevant statutory language, see *Brown* [2013] UKSC 43. Simester and Sullivan argue that it is unfortunate the Supreme Court did not address directly the issue of whether an individual can be convicted of a serious criminal offence in the absence of culpability: (2014) 73 CLJ 14. See also K Laird, 'The Decline of Criminal Law Causation Without Limits' (2016) 132 LQR 566.

<sup>138</sup> [2016] UKSC 5, [2016] Crim LR 366.

<sup>139</sup> The Criminal Justice and Courts Act 2015, s 29 and Sch 6, replaces in s 3ZB the offence of causing death by driving while disqualified with an identical offence 's 3ZC', with the maximum sentence increased from two to ten years.

<sup>140</sup> The CPS guidance cites the notional examples given by the Supreme Court of the driver driving safely at 34 mph in a 30 mph limit, 68 mph in a 60 mph limit or one who is driving

*Uthayakumar*<sup>141</sup> is instructive as it illuminates the circumstances in which s 3ZB ought not to be charged, as the conduct will be deemed to fall outside the scope of the provision, as redefined by the Supreme Court. The Court of Appeal quashed pleas made before the Supreme Court decision and refused to order retrials. D was driving on a provisional licence, although she had a full licence in Sri Lanka. As the licence was provisional, she should have had a qualified driver with her. D was driving at a proper speed when V, a pedestrian in dark clothes who had scaled an 8-foot fence to get onto the road, wandered erratically across the three-lane road. He was struck by D's car. V had taken large quantities of Class A drugs and alcohol and was described by one witness as 'suicidal'. In the conjoined appeal, C had been driving at 25 mph through a green light at temporary traffic lights. V was riding his motorcycle in the opposite direction and, in overtaking stationary traffic, V was on the wrong side of the road. In a glancing blow, C knocked V off his motorcycle when they collided on a slight bend where V may have been obscured from C's view. V suffered leg injuries and was making a good recovery but died days later from a blood clot. C's insurance lapsed five days before the event as he had not received his renewal notice because it had been sent to the address of his partner from whom he had recently separated.

Little guidance exists to assist prosecutors in deciding whether charging D with an offence contrary to s 3ZB is an appropriate course of action. It may become the case that s

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with an underinflated tyre or one which had fallen below the prescribed tread limit as situations where s 3ZB might be charged. Available at [www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents](http://www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents).

<sup>141</sup> [2014] EWCA Crim 123. See also *McGuffog* [2015] EWCA Crim 1116, [2015] Crim LR 818.

3ZB is considered an appropriate charge only in circumstances where D's driving is particularly egregious. If, however, the manner of D's driving is so bad then he may be charged with one of the more serious offences that were considered earlier and so s 3ZB may have been rendered somewhat obsolete by the Supreme Court's redefinition of it. Although the decision in *Hughes* calls into question the future utility of s 3ZB, D can still be charged with driving without a licence contrary to s 87 of the Road Traffic Act 1988 and/or driving without insurance, contrary to s 143.

Under the Criminal Justice and Courts Act 2015, s 29 and Sch 6 make the offence of causing death by driving while disqualified a separate, indictable only offence (Road Traffic Act 1988, s 3ZC) and increases the maximum penalty for it to ten years' imprisonment.

## 32.5 Causing serious injury by dangerous driving

The penalty for dangerous driving where no death results is two years. The gulf between that and the 14-year maximum for causing death by dangerous driving was striking.<sup>142</sup> The impetus for the creation of a new offence was the perception that judges did not have adequate sentencing powers to deal appropriately with those whose dangerous driving causes serious injury.

In response, Parliament introduced the offence of causing serious injury by dangerous driving. Section 143(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 inserted a new s 1A into the Road Traffic Act 1988, which provides:

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<sup>142</sup> There is, it seems, nothing to prevent charges of dangerous driving and offences against the person such as grievous bodily harm being charged together: *Bain* [2005] EWCA Crim 7; *Stranney* [2007] EWCA Crim 2847.

- (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, . . .

The definition of ‘dangerous’ is that contained in s 2A of the Road Traffic Act 1988. On conviction on indictment, the maximum sentence is five years’ imprisonment; on summary conviction, six months or a fine.<sup>143</sup>

The offence is a constructive one, in the sense that it does not require D to have mens rea as to the causing of serious injury. Parliamentary counsel seems to have made a conscious attempt to abandon the use of anachronistic terminology by employing the term ‘serious injury’ over its more commonplace variants. For this reason, it is somewhat ironic that ‘serious injury’ is defined with reference to grievous bodily harm in ss 18 and 20 of the OAPA 1861. Given the lack of precision in the definition of that term, concerns were expressed in Parliament as to what ‘serious injury’ actually means. What is clear is that not every instance in which D will have caused GBH for the purposes of the 1861 Act will fall within the scope of s 1A. The most obvious example is where D has caused V to develop a recognized psychiatric condition. Since the House of Lords decision in *Ireland*, this potentially would make D liable under either s 18 or 20, depending on whether he intended to

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<sup>143</sup> Until the Criminal Justice Act 2003, s 154(1) comes into force, at which point it becomes 12 months. The offence also attracts the mandatory consequences of disqualification for a minimum period of two years and endorsement, as well as between three and 11 penalty points.

cause GBH. Section 1A(2)(a) states that ‘serious injury’ means any *physical harm* which amounts to grievous bodily harm for the purposes of the OAPA 1861 and this would seem to preclude psychiatric harm from falling within the scope of that provision. The practical effect of this is that if D’s dangerous driving causes V to suffer a fractured skull he will potentially be liable under s 1A, but he will not be liable if a bystander develops debilitating post-traumatic stress disorder as a result of witnessing D’s car collide with her child.

It is important to point out that the new offence does not expand the scope of the criminal law since an individual who causes GBH in the context of a road traffic accident would already potentially be guilty of dangerous driving. The purpose of the offence is to expand the range of sentencing options available to the judge when sentencing an individual whose dangerous driving causes harm falling short of death. In the absence of guidelines from the Sentencing Council, the Court of Appeal in *Vinner*<sup>144</sup> and *Dewdney*<sup>145</sup> laid down the factors that ought to be taken into consideration when sentencing those who have been convicted of the offence in s 1A.

Section 29 of the Criminal Justice and Courts Act 2015 creates an offence of causing serious injury by driving a motor vehicle on a road, while disqualified. This is an either way offence with a maximum penalty of four years’ imprisonment.

## 32.6 Reform

The Ministry of Justice conducted a consultation on the adequacy of the offences that concern motorists who cause death or serious injury on the road. Specifically, the MOJ asked

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<sup>144</sup> [2014] EWCA Crim 2743.

<sup>145</sup> [2014] EWCA Crim 1722.

whether the maximum sentence for the existing offences of causing death by dangerous driving and death by careless driving under the influence of drink or drugs should be increased from 14 years' imprisonment to life. The consultation document also asked whether there is a gap in the law relating to careless driving that results in serious injury. See *Driving offences and penalties relating to causing death or serious injury* (2016) and the response to the consultation (2017).<sup>146</sup>

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<sup>146</sup> [https://consult.justice.gov.uk/digital-communications/driving-offences-causing-death-or-serious-injury/supporting\\_documents/drivingoffencesconsultationdocument.pdf](https://consult.justice.gov.uk/digital-communications/driving-offences-causing-death-or-serious-injury/supporting_documents/drivingoffencesconsultationdocument.pdf) and the response at [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/651879/consultation-response-on-driving-offences.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/651879/consultation-response-on-driving-offences.pdf).